

**Defending Liberty
Pursuing Justice**

**EVALUATING FAIRNESS AND ACCURACY IN
STATE DEATH PENALTY SYSTEMS:**

The Indiana Death Penalty Assessment Report

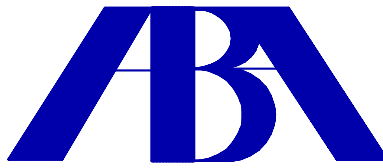
An Analysis of Indiana's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

February 2007

AMERICAN BAR ASSOCIATION



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The materials contained herein represent the assessment solely of the ABA Death Penalty Moratorium Implementation Project and the Indiana Death Penalty Assessment Team and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

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The American Bar Association Death Penalty Moratorium Implementation Project (the Project) is pleased to present this publication, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Indiana Death Penalty Assessment Report*.

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

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EXECUTIVE SUMMARY

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

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

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

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Indiana assessment, the Project has released state assessments of Alabama, Arizona, Florida and Georgia. In the future, it plans to release reports in, at a minimum, Ohio, Pennsylvania, and Tennessee. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

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

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

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

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Indiana Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Indiana Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Indiana death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

II. HIGHLIGHTS OF THE REPORT

A. *Overview of the Indiana Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Indiana's death penalty system, the Indiana Death Penalty Assessment Team¹ researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.² The Indiana Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Indiana death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Indiana complies with the ABA Recommendations.

While taking no view of the morality of the death penalty, the members of the Assessment team are of the unanimous view that so long as Indiana imposes the death penalty, it should be reserved for the very worst offenders and offenses and be imposed only after full and fair proceedings. Many aspects of Indiana's criminal justice system do a good job in this regard, such as the provision of two adequately compensated lawyers with funding for expert and other assistance throughout most proceedings. In addition, Governors of both political parties should be commended for considering a wide array of factors in a thoughtful and deliberative clemency process. Clemency, however, like federal *habeas corpus*, comes near the end of the litigation of a capital case. Where errors or irregularities exist, it is in the best interest of all involved parties that the error is addressed at the earliest opportunity.

The Indiana Death Penalty Assessment Team notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. Additionally, the cost of a capital case far exceeds the cost of a case seeking a life sentence. The Indiana Death Penalty Assessment Team is concerned that the necessary expenditure of resources on capital cases affects the system's ability to render justice in non-capital cases.

The Team has concluded that the State of Indiana fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in Indiana's death penalty system. The next section highlights

¹ The membership of the Indiana Death Penalty Assessment Team is included *infra* on pp. 3-5 of the Indiana Death Penalty Assessment Report.

² This report is not intended to cover all aspects of Indiana's capital punishment system and, as a result, it does not address a number of important issues.

the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. Areas for Reform

The Indiana Death Penalty Assessment Team has identified a number of areas in which Indiana's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems within Indiana's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can undermine sound procedures in others. With that in mind, the Indiana Death Penalty Assessment Team views the following problem areas as most in need of reform:

- ***Inadequate Qualification Standards for Defense Counsel*** (see Chapter 6 and 8) – Although the State of Indiana provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls far short of the requirements set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* for trial and appellate attorneys.
- ***Lack of an Independent Appointing Authority*** (see Chapter 6) – The State of Indiana does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony, thereby increasing the possibility that attorneys will be appointed or retained for reasons other than their qualifications. The lack of any type of performance review is especially troubling in light of the stakes of a death penalty trial or appeal.
- ***Lack of Meaningful Proportionality Review of Death Sentences*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and offenders; however, the Indiana Supreme Court does not engage in a meaningful review of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.
- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Indiana capital jurors do not understand their roles and responsibilities when deciding whether to impose a death sentence. In one study, over 52 percent of interviewed Indiana capital jurors did not understand that they could consider any evidence in mitigation, 58.2 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt, and over 71 percent did not understand that they did not need to be unanimous in finding the existence of mitigation circumstances. The same study also found that 36.6 percent of interviewed Indiana capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Indiana law.

- ***Racial Disparities in Indiana’s Capital Sentencing*** (see Chapter 12) – The Indiana Criminal Law Study Commission’s 2002 report found that those convicted of killing white victims are sentenced more severely than those convicted of killing non-white victims. The ABA’s racial disparity study backs up these findings.
- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Indiana has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.

C. Indiana Death Penalty Assessment Team Recommendations

Although a perfect system is unfortunately not possible, the following recommendations would improve Indiana’s death penalty proceedings significantly. Our recommendations seek to ensure fairness at all stages, while emphasizing the importance of resolving important issues during the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Indiana Death Penalty Assessment Team makes the following recommendations:

- (1) The State of Indiana should require that all biological evidence be preserved for as long as the defendant remains incarcerated.
- (2) The State of Indiana should require all law enforcement agencies to videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of the custodial interrogation.
- (3) The State of Indiana should develop minimum education and training requirements for all county coroners.
- (4) The State of Indiana should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). Furthermore, workload requirements should be amended to state that no attorney may have more than two capital cases at any given time.
- (5) The State of Indiana should create an independent appointing authority made up solely of defense counsel that is responsible for appointing defense attorneys. The independent appointing authority should be required to appoint at least two attorneys at every stage of a capital case. In making these appointments, there should be a presumption that trial counsel will not represent the death row inmate on appeal, regardless of the attorney’s qualifications.
- (6) The State of Indiana should offer training for all defense counsel and prosecutors involved in capital cases. The training for defense attorneys

should be consistent with the requirements set forth in the *ABA Guidelines*; training for prosecutors should be incorporated into the Indiana Prosecuting Attorneys Council's training for all new prosecutors, in addition to training for experienced prosecutors who are involved in a capital case or are considering filing a notice of intent to seek the death penalty.

- (7) The State of Indiana should collect data on potentially death-eligible murder cases. At a minimum, data should be collected regarding each county's sentencing information. Relevant information on all death-eligible cases should be made available to prosecutors to assist them in making informed charging decisions and the Indiana Court of Appeals and Indiana Supreme Court for use in ensuring proportionality.
- (8) To ensure that death is imposed against the very worst offenses and offenders, the Indiana Supreme Court should employ at least the same searching and thoughtful sentencing review it applies in non-capital cases to capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.
- (9) Despite the seemingly broad language of the Post-Conviction Relief Rules, the Indiana Supreme Court does not allow petitioners to raise free-standing claims of error or even fundamental errors in a post-conviction proceeding. Significant claims of error in death penalty cases should be allowed to be raised during a post-conviction proceeding unless they have been knowingly and voluntarily waived by the defendant.
- (10) The State of Indiana should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature.
- (11) The State of Indiana should complete and release its ongoing study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system.
- (12) Although the State of Indiana excludes individuals with mental retardation from the death penalty, it does not explicitly exclude individuals with other types of serious mental disorders from being sentenced to death and/or executed. The State of Indiana should adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not "competent" for

execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Indiana, our research establishes that at this point in time, the state cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. Unfortunately, hundreds of Hoosiers are murdered under a variety of heinous circumstances every year. Despite this, only a few of these cases result in a prosecutor seeking a death sentences, fewer still result in the imposition by a death sentence by a jury or judges, and only a handful over the past three decades have resulted in the execution of a defendant.

By way of illustration, we offer five examples of murder cases and their various outcomes:

- (1) Gary Burris was left in a trash can as a baby and raised in a house of prostitution before being declared a ward of the county at age twelve due to neglect. At age twenty three, Burris was convicted of killing a taxicab driver in the course of a robbery along with two accomplices. One of the accomplices testified at trial against him in exchange for a sentence of fifteen years.³ Burris was sentenced to death and executed.
- (2) Zachariah Melcher strangled his wife, who was eight months pregnant, and their eleven-month old son. He then stuffed their bodies in a plastic storage container.⁴ Fifteen months after being charged with capital murder, Melcher was offered a plea agreement to life imprisonment.
- (3) Arthur Baird strangled his wife, who was six months pregnant, and later stabbed both of his parents to death with a butcher knife. Mental health experts testified that Baird, who had no criminal history, suffered from delusions and believed that someone else was controlling his actions, but because he was able to appreciate the wrongfulness of the murders, a jury

³ See Clark County Prosecuting Attorney, The Death Penalty, Clark County Death Penalty Cases, at <http://www.clarkprosecutor.org/html/death/dpclark.htm> (last visited Jan. 29, 2007).

⁴ See *id.*

rejected his insanity defense at trial.⁵ Baird was sentenced to death, a decision that was affirmed by judges in several different cases and courts over the course of two decades. His sentence was commuted to life imprisonment without parole by Governor Daniels in 2005.

- (4) Darryl Jeter, who was on probation and driving a stolen car, killed a state trooper who came to his aid when his vehicle was stopped alongside the highway. The trooper's wife was pregnant with their first child.⁶ Upon the recommendation of a Lake County jury, Jeter was sentenced to life imprisonment without parole.
- (5) Three men, Roger Long, Jerry Russell and John Redmond, kidnapped a 44-year-old mentally disabled woman walking to the grocery store, confined her in an attic for two weeks, repeatedly forced her to perform oral, anal and vaginal intercourse, then beat her to death with a baseball bat and left her body in a wooded area.⁷ Long, Russell and Redmond were never charged with capital murder. Each is currently serving a sentence of life without parole, plus additional sentences for criminal deviate conduct, criminal confinement, and conspiracy to commit murder.

Of these eight men, only Gary Burris, who had been abandoned in a trash can as a baby and become a ward of the county after being raised in a house of prostitution, was executed. Although his offense of murder in the course of robbery is certainly a very serious one, it is difficult to conclude that either Gary Burris or his offense is the worst of the eight defendants or offenses presented here. The seemingly random process of charging decisions, plea agreements, and jury recommendations is just part of a death penalty system that has aptly been called Indiana's "other lottery." Although escaping the death penalty may be a prize bestowed upon some defendants, we are deeply troubled that it is not imposed in a fair or consistent manner upon only the very worst offenders who have committed the very worst of offenses.

Because of these sorts of inconsistencies in Indiana's application of the death penalty, and because the State of Indiana is in full compliance with just ten out of seventy-nine recommendations included in this Assessment Report, the members of the Indiana Death Penalty Assessment Team conclude that the State of Indiana should impose a temporary moratorium on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular in the Executive Summary. During this moratorium, trials would continue, and people still could be sentenced to death and move through the appeals process, but the temporary halt in executions would allow the state to examine its death penalty system and implement necessary reforms.

⁵ *See id.*

⁶ *See Man Sentenced to Life for Killing Indiana Trooper: Jury Rejects*, CHICAGO SUN TIMES, Jul. 15, 2006, available at http://findarticles.com/p/articles/mi_qn4155/is_20060715/ai_n16543426 (last visited Jan. 29, 2007).

⁷ *Long v. State*, 743 N.E.2d 253 (Ind. 2001); Associated Press, *Judge Sentences Third Foddrill Suspect to Life in Prison*, Nov. 12, 1999.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of Indiana’s Death Penalty System

In this chapter, we examined the demographics of Indiana’s death row, the statutory evolution of Indiana’s death penalty scheme, and the progression of an ordinary death penalty case through Indiana’s death penalty system from arrest to execution.

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

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

A summary of Indiana’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.⁸

⁸ Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance⁹</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance¹⁰</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.			X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.		X			
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

The State of Indiana does not statutorily require the preservation of evidence, except for evidence in the state’s possession or control that could be subjected to DNA testing after a post-conviction petition for DNA testing has been filed.

Indiana courts have held that police and prosecutors have a duty to preserve exculpatory evidence pre-trial, so long as it could be expected to play a “significant role in the suspect’s defense.”¹¹ Indiana courts have made it difficult to prove a violation of this duty, however, and in order to meet this standard, the evidence must have had “exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other

⁹ Given that a majority of the ABA’s recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which the State of Indiana meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

¹⁰ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Indiana death penalty. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

¹¹ *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000).

reasonably available means.”¹² Indiana courts also have held that the destruction of “potentially useful evidence” is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.¹³

While the State of Indiana does not require the preservation of all physical evidence for the entire period of incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery; and (2) seek post-conviction DNA testing. However, certain procedural requirements and restrictions have the potential to preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, judges are not required to hold a hearing on an inmate’s motion requesting post-conviction DNA testing. Rather, after the petitioner provides notice of the petition to the prosecuting attorney and the prosecuting attorney is given the opportunity to respond, the court may, but is not required to, order a hearing on the petition.

Based on this information, the State of Indiana should at a minimum adopt the Indiana Death Penalty Assessment Team’s recommendation, previously discussed on page v of the Executive Summary, that a law be passed requiring all biological evidence to be preserved for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

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

A summary of Indiana’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations is illustrated in the following chart.

¹² *Id.* at 675-76.

¹³ *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004).

Law Enforcement Identifications and Interrogations					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.				X	
Recommendation #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial		X			
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	X				
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.			X		

We commend the State of Indiana for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Indiana are required to complete a basic training course of 480 hours; and
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

In addition to these statewide measures, at least twenty-two law enforcement agencies in Indiana regularly record some or all custodial interrogations in an effort to protect against false or coerced confessions.

Despite these measures, the State of Indiana does not require law enforcement agencies to adopt procedures governing identifications and interrogations. Although modern technology makes recording these important events easy and inexpensive, many police agencies do not record them. Moreover, Indiana courts do not require a jury instruction that specifically provides the factors to be considered by the jury in gauging lineup accuracy.

Based on this information, the State of Indiana should at a minimum adopt the Indiana Death Penalty Assessment Team’s recommendation, previously discussed on page v of the Executive Summary, that all law enforcement agencies be required to videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of the custodial interrogation.

Chapter Four: Crime Laboratories and Medical Examiner Offices

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

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

Crime Laboratories and Medical Examiner Offices					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Indiana law does not require crime laboratories to be accredited, but all four of the Indiana State Police crime labs and the Indianapolis-Marion County Forensic Services Agency voluntarily have obtained accreditation. As a prerequisite for accreditation, the accreditation program requires laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence. Further, Indiana law requires that any laboratory which conducts DNA analysis (1) must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB); and (2) must adhere to the quality assurance guidelines issued by the Technical Working Group on DNA Analysis Methods.

Despite these measures, however, problems have been discovered in at least two crime laboratories. For example, the Marion County Prosecutor's Office appointed a special prosecutor in 2004 to investigate problems at the Indianapolis-Marion County Forensic Services Agency and mold was found on five evidence samples at the Indiana State Police crime laboratory in Fort Wayne in 2005.

Like crime laboratories, the State of Indiana does not require county coroners to be accredited, but as of February 2006, 380 county and deputy coroners had voluntarily obtained accreditation. Even though the State of Indiana does not require such accreditation, it has established the Coroners Training Board to create standards for continuing education and training for county coroners; enact mandatory training and continuing education requirements for deputy coroners; and set minimum requirements for continuing education instructors. The Indiana Constitution currently makes it difficult, if not impossible, for the Coroners Training Board to set mandatory education and training standards for county coroners.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, previously discussed on page v of the Executive Summary, that the state develop minimum education and training requirements for all county coroners.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion deciding whether or not to seek the death penalty.

In this chapter, we examined Indiana's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Indiana's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

Prosecutorial Professionalism					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				X	
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.				X	
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.		X			
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.		X			

The State of Indiana does not require prosecuting attorneys' offices to establish policies on the exercise of prosecutorial discretion. We recognize, however, the State of Indiana has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Indiana Supreme Court has adopted the Indiana Rules of Professional Conduct, which requires prosecutors to, among other things, disclose to the

defense 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 information known to the prosecutor;

- The Indiana Supreme Court holds prosecutors responsible for disclosing not only evidence of which s/he is aware, but also favorable evidence known to others acting on the government's behalf;
- The State of Indiana has created the Indiana Prosecuting Attorneys' Council to serve the needs of prosecutors by offering training and technical support.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, previously discussed on page v-vi of the Executive Summary, that training for prosecutors on capital cases should be incorporated into the Indiana Prosecuting Attorneys Council's training for all new prosecutors, in addition to capital training for experienced prosecutors who are involved in a capital case or are considering filing a notice of intent to seek the death penalty.

Chapter Six: Defense Services

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

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

Defense Services						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	Recommendation #1: Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> (ABA Guidelines)—The Defense Team and Supporting Services			X		
Recommendation #2: Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel			X			
Recommendation #3: Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency			X			
Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation			X			
Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training			X			

Indiana’s indigent trial and appellate legal representation system is provided on a county-by-county basis. In all counties, judges have sole or primary authority to appoint counsel. State post-conviction counsel is provided by the statewide Indiana Public Defender’s Office. While the State of Indiana does not provide for counsel to be appointed in clemency proceedings, the federal courts have held that federal *habeas* counsel may represent the defendant in clemency proceedings. Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls far short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) for a number of reasons:

- The State of Indiana does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony. Rather, this responsibility is divided among several entities: (1) the county public defender boards; (2) the county public defender offices; (3) the State Public Defender; (4) the Indiana Public Defender Council; (5) the Indiana Public Defender Commission; and (6) the judiciary. Most of these entities are not independent of the judiciary, thereby failing to protect against the possibility of appointment or retention of attorneys for reasons other than their qualifications;
- Indiana law does not contain any qualification or training requirements for attorneys representing death row inmates in state post-conviction proceedings;
- The State of Indiana requires only twelve hours of training, professional development, and continuing legal education within two years of appointment for defense attorneys and no training for other members of the defense team involved in capital cases; and

- Indiana law imposes no limitation on the number of capital cases that any lawyer may be assigned at any time and includes a presumption that trial counsel will also litigate the appeal.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendations, previously discussed on page v-vi of the Executive Summary, to:

- (1) Adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction proceedings so that they are consistent with the *ABA Guidelines*. Furthermore, workload requirements should be amended to state that no attorney may have more than two capital cases at any given time.
- (2) Create an independent appointing authority made up solely of defense counsel that is responsible for appointing defense attorneys. The independent appointing authority should be required to appoint at least two attorneys at every stage of a capital case. In making these appointments, there should be a presumption that trial counsel will not represent the death row inmate on appeal, regardless of the attorney's qualifications.
- (3) Offer training for all defense counsel involved in capital cases. The training for defense attorneys should be consistent with the requirements set forth in the *ABA Guidelines*.

Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and penalty phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Indiana's laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA's policies on the direct appeal process.

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

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

The Indiana Supreme Court has aptly acknowledged that “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹⁴ Based on the state constitutional power to review and revise sentences and the appellate rule that provides for revision of “inappropriate” sentences when “certain broad conditions are satisfied,”¹⁵ the Court reduces many sentences each year in non-capital cases.

Although the Court long explained that it “automatically reviews every death sentence and applies a level of scrutiny more intensive than for other criminal penalties,”¹⁶ the Court’s review of capital cases seems less searching and has resulted in very few reductions of death sentences. The Court encourages appellate counsel to make comparative proportionality arguments, but has expressly declined to hold that it must engage in proportionality review. To ensure that death is imposed against the very worst offenses and offenders, we urge the Indiana Supreme Court to employ at least the same searching and thoughtful review it applies in non-capital cases to capital cases. Ideally, this review would consider not only other death penalty cases but also those cases in which the death penalty could have been sought or was sought and not imposed.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team’s recommendations, previously discussed on page vi of the Executive Summary, to:

- (1) Collect data on potentially death-eligible murder cases to be made available to the Indiana Court of Appeals and Indiana Supreme Court for use in ensuring proportionality; and

¹⁴ *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003).

¹⁵ *See generally* *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005).

¹⁶ *Bivins v. State*, 642 N.E.2d 928, 948 (Ind. 1994).

- (2) Employ at least the same searching and thoughtful sentencing review the Tennessee Supreme Court and Court of Appeals applies in non-capital cases to capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Indiana’s laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA’s policies on state post-conviction.

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

State Post-Conviction Proceedings						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.			X			
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.		X				

State Post-Conviction Proceedings (Con't.)						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.					X
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.		X				
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.				X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.				X		
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.			X			
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.			X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.			X			

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.			X			
Recommendation #12: During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.						X

The State of Indiana has adopted some laws and procedures that facilitate the adequate development and judicial consideration of all post-conviction claims—for example, Indiana law requires an automatic stay of execution upon a request by the petitioner that is attached to the post-conviction petition and Indiana law provides a right to counsel for all post-conviction petitioners to assist in the presentation and litigation of post-conviction claims. But some laws and procedures have the opposite effect. The State of Indiana:

- Does not specify a finite amount of time to file a post-conviction petition after one’s conviction and sentence become final and leaves the decision for setting a time for filing up to the post-conviction judge within an expedited period that can only be extended with approval of the Indiana Supreme Court;
- Permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own, which might undermine the judge’s duty to exercise independent judgment in deciding cases.
- Despite the seemingly broad language of the Post-Conviction Relief Rules, does not allow petitioners to raise free-standing claims of error or even fundamental errors in a post-conviction proceeding.

The effect of these laws and procedures on the adequate development and judicial consideration of motions and/or claims is even more acute in post-conviction proceedings where the petitioner does not have a constitutional right to effective counsel.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team’s recommendations, previously discussed on page v-vi of the Executive Summary, to (1) establishing qualification standards consistent with the *ABA Guidelines*; and (2) allow petitioners to raise free-standing claims of error and especially fundamental errors in post-conviction proceedings.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court’s or jury’s decision-making. In this chapter, we reviewed Indiana’s laws, procedures, and practices concerning the clemency process, including, but not limited to, the Indiana Board of Executive Clemency’s criteria for considering and deciding petitions and inmates’ access to counsel, and assessed whether they comply with the ABA’s policies on clemency.

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

Clemency						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation #1: 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.			X			
Recommendation #2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.			X			
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.			X			
Recommendation #4: Clemency decision-makers should consider the inmate’s mental retardation, mental illness, or mental competency, if applicable, the inmate’s age at the time of the offense, and any evidence of lingering doubt about the inmate’s guilt.			X			
Recommendation #5: Clemency decision-makers should consider an inmate’s possible rehabilitation or performance of positive acts while on death row.			X			
Recommendation #6: Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .				X		

Clemency (Con't.)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<i>Recommendation</i>							
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.					X		
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.				X			
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.				X			
Recommendation #10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.				X			
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.		X					

The Indiana Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for all offenses, including capital crimes, except treason and impeachment. Additionally, the General Assembly has created the Indiana Parole Board (Board), which assists the Governor by making pardon, clemency, reprieve, and remission recommendations.

The clemency process in Indiana seems to have worked quite well in recent years, as Governors of both political parties have seemingly engaged in a thorough investigation and deliberative review before making clemency decisions. There is no guarantee these practices will continue, as the process the Governor and the other Board members follow in considering a clemency application is largely undefined. For example:

- The Indiana Parole Board is responsible for conducting an investigation into all factors relevant to the issue of clemency and for submitting a recommendation to the Governor, but many of the issues that should be considered as a matter of course when considering a clemency application are listed as factors that the Board “may,” but is not required to consider; and
- While recent Governors have demonstrated a commitment to a thorough investigation of many facets of death penalty cases, nothing requires the Governor

to consider the findings of the Board’s investigation or any specific factors when assessing a death-sentenced inmate’s clemency petition.

Not only is the clemency process largely undefined, but parts of the clemency application process also are problematic. For example,

- The State of Indiana does not provide for the appointment of counsel to indigent inmates petitioning for clemency; and
- It does not appear that sufficient time is provided to prepare and litigate a petition for clemency. The entire process must be completed in less than a month. Thus, upon being provided the forms necessary to petition for clemency, the inmate is given approximately one week to file the petition or to sign a waiver.

Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the “awesome responsibility” of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Indiana’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

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

Capital Jury Instructions					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.			X		
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	X				
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.				X	
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.		X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.		X			

Jurors in Indiana, as in many states, appear to be having difficulty understanding their roles and responsibilities, as described by trial judges in their instructions to juries. In particular, studies have shown that Indiana capital jurors have difficulty understanding two crucial concepts: (1) mitigation evidence, and (2) the effect of future dangerousness.

Indiana's pattern jury instructions define the term "mitigating circumstance," but Indiana courts have declined, on occasion, to offer this pattern jury instruction. Indiana appellate decisions have upheld the trial court's failure to define words used in the jury instructions if the "terms are in general use and can be understood by a person of ordinary intelligence."¹⁷ The pattern jury instructions also state clearly that unlike aggravating circumstances, mitigating circumstance need not be proven beyond a reasonable doubt, nor does the jury have to be unanimous in finding that a mitigating circumstance exists. Despite this information, a recent study found that:

- Approximately fifty-two percent of interviewed capital jurors in Indiana did not know that they could consider any evidence in mitigation
- Approximately seventy-one percent of interviewed capital jurors in Indiana did not understand that they did not need to be unanimous in finding the existence of mitigating circumstances; and
- Approximately fifty-eight percent of interviewed Indiana capital jurors believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.

Accordingly, Indiana capital jurors are confused not only about the scope of mitigation evidence that they may consider but also about the applicable burden of proof. Further, contrary to the ABA's recommendations, the pattern jury instructions do not inform jurors that residual doubt about guilt can be a mitigating factor and nor do they state that the jury may recommend a life sentence even if they find that no mitigating circumstances exist.

Similarly, capital jurors in Indiana have difficulty understanding the requirements associated with finding the existence of certain statutory and non-statutory aggravating circumstances. Specifically, capital jurors fail to understand the effect of finding that the defendant would be dangerous in the future. For example, the same study found that approximately thirty-six percent of interviewed Indiana capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

In an effort to prevent these common juror misconceptions, the State of Indiana should adopt the Indiana Death Penalty Assessment Team's recommendations previously discussed on page vi of the Executive Summary and redraft its capital jury instructions.

¹⁷ McNary v. State, 428 N.E.2d 1248, 1252 (Ind. 1981).

Chapter Eleven: Judicial Independence

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

A summary of Indiana’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

Judicial Independence						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.			X			
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.			X			
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.					X	

Judicial Independence (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.					X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.					X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.			X			

Indiana's partisan judicial election format for superior and circuit court judges, combined with the retention election format for all judges, raise concerns about the fairness of the judicial election process in Indiana. The nature of the judicial election and retention process has the potential to influence judges' decisions in death penalty cases. The regular use of candidate questionnaires can undermine the impartiality or the appearance of impartiality of judicial candidates who may eventually sit on the bench. Furthermore, one survey of Indiana judges who were subject to periodic retention elections revealed that three-fifths believe that judicial retention elections have "a pronounced effect on judicial behavior."¹⁸

Despite these concerns, we commend Chief Justice Shepard for his vocal support of judicial independence and hope that these sorts of efforts continue.

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Indiana's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

¹⁸ Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 37 (1995). The survey included judge respondents from ten states who were subject to retention elections. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 n.3 (1994). Six judges in Indiana were included, or 85 percent of the judges in the State that are subject to retention elections. *Id.*

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

Racial and Ethnic Minorities						
Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.			X			
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.					X	
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.					X	
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.				X		
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the state should have the burden of rebutting it by substantial evidence.				X		

Racial and Ethnic Minorities (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.			X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during <i>voir dire</i> .				X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.			X			
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.					X	
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.				X		

The State of Indiana has taken some steps to explore the impact of race on Indiana's criminal justice system, but has not yet done so in a comprehensive manner.

The Supreme Court created its Race and Gender Fairness Commission in 1999 to "study the status of race and gender fairness in Indiana's justice system and investigate ways to improve race and gender fairness in the courts, legal system, and state and local government, as well as among legal service providers and public organizations."¹⁹ In 2002, the Commission issued a report presenting its findings regarding race and gender issues, including recommendations for strategies to eliminate racial discrimination in the

¹⁹ See Indiana Courts, Commission on Race and Gender Fairness, About, at <http://www.in.gov/judiciary/fairness/about.html> (last visited Jan. 9, 2007).

judicial system. The report presented recommendations for addressing the problems raised in the report, including that:

- (1) The Prosecuting Attorneys Council and the Public Defender Council be encouraged to include one session of programming a year promoting awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness;
- (2) A Blue Ribbon Panel be convened with representation from all branches and levels of government, ethnic and racial communities, including academics, law enforcement and medical and mental health professionals to review the sentencing structure and offense classifications that appear to have a disparate impact on ethnic minorities and females; and
- (3) Trial courts throughout Indiana presiding over criminal proceedings be ordered to keep (a) statistics of the race, gender, and ethnicity of criminal defendants, the offense(s) charged, and the amount of bail, if any, and (2) statistics of the race, gender, and ethnicity of persons convicted of crimes, the offense(s) on which they were found guilty, the results of any plea bargain and sentence or probation, if any. These statistics should be submitted quarterly to the Office of State Court Administration beginning in July 2003.

The number of recommendations in the Commission's report that have been or will be implemented is unclear.

In 2001, the Indiana Criminal Law Study Commission (ICLSC), a commission comprised of individuals appointed by the Governor to review Indiana's criminal procedure, monitor its penal codes, and draft recommendations to ensure the just and efficient operation of the criminal justice system, began studying the application of Indiana's capital sentencing law. During the first phase of the study, the Indiana Criminal Justice Institute (Institute) staffed the ICLSC and studied six key issues in relation to the capital sentencing law, including race neutrality. The ICLSC's final report was issued in January 2002, and specifically examined the issue of whether Indiana imposes capital sentencing in a race neutral manner by studying the cases of 224 individuals who received varying sentences for murder.

The findings of the study's first phase broadly describe general sentencing outcomes and do not specifically spotlight death sentences. Nevertheless, the findings reveal that white offenders received harsher sentences for murder than offenders belonging to racial or ethnic minority groups. The report concluded that this disparity may be related to the combination of two factors: (1) the majority of murders in Indiana are intra-racial; and (2) the victim's race, more than the offender's race, influences the severity of sentencing. "When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders."²⁰ African-Americans remain,

²⁰ Mary Ziemba-Davis et al., *Sentencing Outcomes for Murder in Indiana: Initial Findings*, in THE APPLICATION OF INDIANA'S CRIMINAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW

however, greatly over-represented in the class of offenders receiving the death penalty when compared to their representation in the population at-large.

The Institute subsequently launched, but has not released, a second phase of the study, *Indiana's Murder Sentencing Study*, to continue the work begun in "Sentencing Outcomes for Murder in Indiana." The study is to examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim. The results of the study are supposed to be distributed in a series of publications that will be shared with the Governor, the ICLSC, Indiana's Sentencing Policy Study Committee, other policymakers, and criminal justice practitioners.

Because the State of Indiana has not released the more comprehensive study designed to determine whether racial bias exists in Indiana's capital punishment system, the full extent of the issue cannot be known nor can steps to develop new strategies to eliminate the role of race in capital sentencing be fully implemented. Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, found on page vi of the Executive Summary, to complete and release *Indiana's Murder Sentencing Study* to determine the existence or non-existence of unacceptable disparities, racial, socio-economic, geographic, or otherwise in its death penalty system.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. In this chapter, we reviewed Indiana's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

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

STUDY COMMISSION 123I (2002), available at http://www.in.gov/cji/special-initiatives/law_book.pdf (last visited Dec. 27, 2006). Although focused on post-conviction sentencing, the study refers to a separate unpublished report on the relationship between the race of the victim and the State's decision to charge the death penalty in Marion County, Indiana between 1979 and 1989. *Id.* at 123B n.3. This report apparently found that the State was 3.7 times more likely to seek the death penalty in cases involving white victims than in cases involving black victims. *Id.*

Mental Retardation					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.	X				
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.		X			
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	
Recommendation #4: For cases commencing after <i>Atkins v. Virginia</i> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	X				
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				

Mental Retardation (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X		
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.		X				

The State of Indiana statutorily prohibited the execution of the mentally retarded in 1994, eight years before the United States Supreme Court’s decision in *Atkins v. Virginia*, but the statute only applied to mentally retarded defendants sentenced after the statute’s effective date. To deal with this, the Indiana Supreme Court has held that the law applies retroactively. Indiana comports with many of the ABA recommendations in this area, including that:

- Indiana courts adhere to the American Association on Intellectual and Developmental Disabilities (AAIDD) definition of mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18;
- Indiana law allows for a determination of mental retardation as a bar to execution in the pretrial stages; and
- While the burden of proof is on the defense to prove mental retardation, s/he is only required to prove mental retardation by a preponderance of the evidence.

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

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

Mental Illness					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.		X			
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	
Recommendation #4: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.				X	
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.	X				

Mental Illness (Con't.)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #6: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
Recommendation #7: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
Recommendation #9: Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.				X	
Recommendation #10: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.		X			

Mental Illness (Con't.)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #11: The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.				X		
Recommendation #12: The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.			X			
Recommendation #13: Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.				X		

The State of Indiana has taken some minimal steps to protect the rights of individuals with mental disorders or disabilities by requiring or providing the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, all law enforcement officers receive—as part of their basic training course—four hours of training on mental illness, although this does not include information about how to identify mentally ill suspects. Despite this, the State of Indiana does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Indiana does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner’s input;
- The State of Indiana prohibits the execution of individuals found to be “insane” to be executed, yet the standard used to assess an individual’s insanity is unclear and somewhat ad hoc. Those defendants with severe, longstanding mental illness are not exempted. Rather, “Indiana has no specific statutory provision addressing either the standard of insanity or any procedural requirements to guard against the execution of the insane”²¹; and
- The State of Indiana does not have a pattern jury instruction on the administration of medication for a mental disorder or disability.

Based on this information, the State of Indiana should adopt the Indiana Death Penalty Assessment Team’s recommendation, previously discussed on page vi-vii of the Executive Summary, to adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

²¹ Baird v. State, 833 N.E.2d 28, 33 (Ind. 2005) (Boehm, J., dissenting).

INTRODUCTION

GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

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

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

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Florida assessment, the Project has released state assessments of Alabama, Arizona, and Georgia. In the future, it plans to release reports in, at a minimum, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

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

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

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

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Indiana Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Indiana Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Indiana death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

MEMBERS OF THE INDIANA DEATH PENALTY ASSESSMENT TEAM

Professor Joel Schumm, Chair, is the Clinical Associate Professor of Law at the Indiana University School of Law at Indianapolis. Professor Schumm teaches criminal procedure, juvenile justice, legal analysis, and directs the judicial internship program. He served as a law clerk to Judge Theodore Boehm of the Indiana Supreme Court and Judge Paul Mathias of the Indiana Court of Appeals. Professor Schumm serves as the co-chair of the Indiana State Bar Association's Written Publications Committee. He received his B.A. from Ohio Wesleyan University, M.A. from University of Cincinnati, and graduated magna cum laude from the Indiana University School of Law at Indianapolis.

James J. Bell is a member of the White Collar Practice Group at the Indianapolis law firm of Bingham McHale. James was a two-term Chairman of the Criminal Justice Section of the Indiana State Bar Association. In 2006, he was named a Distinguished Fellow of the Indianapolis Bar Foundation and was one of the individuals awarded the Indianapolis Bar Association's President's Award for Service to the Association. James is a former deputy public defender for the Marion County Public Defender Agency and currently practices in the area of criminal defense at both the trial and appellate levels and defends attorneys in disciplinary matters. James teaches Criminal Procedure for the Indianapolis Bar Association's Bar Exam Review. He received his undergraduate degree from DePauw University in 1996 and graduated from Indiana University School of Law at Indianapolis in 1999.

Senator John Broden serves the 10th District of Indiana, which includes South Bend and Mishawaka. Senator Broden joined the State Senate in 2000. He is a member of the Indiana State Senate committees on Corrections and Criminal and Civil Procedures. Senator Broden continues to serve as of counsel to Leone, Halpin & Konopinski. He previously served as City Attorney to the City of South Bend, Indiana and was a law clerk to Indiana Supreme Court Justice Roger O. DeBruler. He received his B.A. from University of Notre Dame and his J.D. the University of Indiana School of Law at Bloomington.

Robert Gevers, II is a private practice attorney at the Law Offices of Robert W. Gevers, III, P.C. His areas of concentration include state and federal criminal law, personal injury, and trial practice. Mr. Gevers was previously the Prosecuting Attorney in Allen County, Indiana from 1995-2002, and Assistant U.S. Attorney in the Northern District of Indiana from 1990-1993. He also was an adjunct professor in the Criminal Justice Program at the School of Public and Environmental Affairs at Indiana-Purdue University from 1991-1994. He is a member of the Allen County Bar Association, the National College for DUI Defense, and the National Association of Criminal Defense Lawyers. Mr. Gevers received his B.A. cum laude from Northwestern University and his J.D. cum laude from Indiana University.

Marce Gonzales is a sole practitioner in Merrillville, Indiana, concentrating in criminal defense, appeals, and defense of lawyer discipline cases. He also has served as a part-

time appellate felony public defender for over 20 years and served as a member of the Indiana Supreme Court Disciplinary Commission from 1994-1999. Mr. Gonzales received his B.A. and J.D. from Indiana University at Bloomington.

Governor Joe Kernan was Indiana's Lt. Governor from 1997 until he was sworn in as Governor in September 2003 upon the death of Governor Frank O'Bannon, and served until 2005. Previously, Governor Kernan. was elected three times as Mayor of South Bend, Indiana, after serving four years as the City Controller. Previously, Governor Kernan worked in the private sector at the MacWilliams Corporation, Schwarz Paper Company, and Proctor and Gamble. He served in the United States Navy during Vietnam, where he was captured and held as a prisoner of war for eleven months. Governor Kernan received his B.A. from the University of Notre Dame.

Paula Sites serves as Assistant Executive Director of the Indiana Public Defender Council. Since 1990, she has provided training, consultation, and research assistance to attorneys representing capitally charged or sentenced clients throughout the state, and monitors the status of all capital cases filed in the state. Previously, she served as a law clerk for the Hon. Robert H. Staton, of the Indiana Court of Appeals. She is a past winner of the Indiana State Bar Association Women in the Law Award. She received her B.A. with honors and her J.D. magna cum laude from Southern Illinois University.

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CHAPTER ONE

AN OVERVIEW OF INDIANA'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF INDIANA'S DEATH ROW

A. *Historical Data*

In 1976, the State of Indiana reinstated the death penalty.¹ Since its reinstatement, Indiana has sentenced ninety-three individuals to death.² Ten of these death sentences resulted from a judge sentencing defendants to death despite the jury's recommendation of life.³

Of the ninety-three individuals sentenced to death, the State has executed seventeen.⁴ All seventeen executed were male;⁵ fourteen were white and three were black.⁶ Two individuals have been exonerated from Indiana's death row.⁷

1. Rates of Death Sentences and Executions

During the 1980's, Indiana sentenced fifty-seven individuals to death.⁸ The State imposed its greatest number of death sentences—ten—in 1985, followed by 1983 and 1998, with both years yielding eight death sentences.⁹ In the 1990s, the State imposed twenty-eight death sentences, peaking in 1992 with six.¹⁰ Since 2000, Indiana has sentenced thirteen defendants to death.¹¹ Lake and Marion Counties impose the death penalty at the highest rates, with twenty-three and twenty-two death sentences respectively.¹²

¹ Clark County Prosecuting Attorney, The Death Penalty, Current Indiana Death Row (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rownew.htm> (last visited Jan. 31, 2007).

² *Id.*

³ Clark County Prosecuting Attorney, The Death Penalty, Indiana Executions Since 1900 (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rowstats.htm> (last visited Jan. 31, 2007).

⁴ Clark County Prosecuting Attorney, The Death Penalty, Current Indiana Death Row (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rownew.htm> (last visited Jan. 31, 2007).

⁵ *Id.*

⁶ *Id.*

⁷ See Death Penalty Information Center, Cases of Innocence 1973 - Present, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last updated on Jan. 31, 2007). The names of the 2 exonerated individuals are Larry Hicks (acquitted at re-trial in 1980) and Charles Smith (acquitted at retrial in 1991). The definition of innocence used by the Death Penalty Information Center (DPIC) in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id.*

⁸ Clark County Prosecuting Attorney, The Death Penalty, Indiana Executions Since 1900 (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rowstats.htm> (last visited Jan. 31, 2007).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Since reinstating the death penalty, Indiana executed two people during the 1980s,¹³ five in the 1990s, and ten since 2000.¹⁴

2. Race, Sex, and Age of Death-Row Inmates and Their Victims

Of the ninety-three individuals sentenced to death since 1977, sixty-two (66.7%) have been white, twenty-nine (31.2%) black, and two (2.2%) have been Hispanic.¹⁵ One hundred twenty-five (83.1%) of the victims have been white, twenty-one (14.2%) black, three (2.0%) Hispanic, and one (0.07%) has been Indian.¹⁶ Only four (4.3%) of the defendants sentenced to death have been female, while nearly half (46.0%) of all victims have been female.¹⁷

During this same period, the ages of death-row inmates ranged from sixteen to seventy-four years old.¹⁸ On average, death-row inmates were twenty-seventy years of age at the time of their capital offense.¹⁹ The average age of victims was 35.9 years old.²⁰

B. A Current Profile of Indiana's Death Row

Seventeen individuals are currently awaiting execution on Indiana's death row.²¹ Thirteen (76.5%) of these individuals are white and four (23.5%) are black.²² Only one of the seventeen is female,²³ and the average age is thirty-nine years old.²⁴ Five of the seventeen death-row inmates had their cases originate in Marion County.²⁵

¹³ Clark County Prosecuting Attorney, The Death Penalty, Indiana Executions Since 1900 (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/executions.htm> (last visited Jan. 31, 2007).

¹⁴ *Id.*

¹⁵ Clark County Prosecuting Attorney, The Death Penalty, Indiana Executions Since 1900 (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rowstats.htm> (last visited Sept. 20, 2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Clark County Prosecuting Attorney, The Death Penalty, Current Indiana Death Row (As of July 1, 2006), at <http://www.clarkprosecutor.org/html/death/rownew.htm> (last visited Jan. 31, 2007).

II. THE STATUTORY EVOLUTION OF INDIANA’S DEATH PENALTY SCHEME

A. *Indiana’s Post-Furman Death Penalty Scheme (1973)*

In the wake of the United States Supreme Court’s decision finding the death penalty unconstitutional in *Furman v. Georgia*,²⁶ the Indiana legislature passed a new death penalty law in 1973.

Under this new law, the following acts, which constituted murder in the first-degree, mandated the imposition of a death sentence:²⁷

- (1) Killing purposely and with premeditated malice a police officer, corrections employee, or fireman acting in the line of duty;
- (2) Killing a human being by the unlawful and malicious detonation of an explosive;
- (3) Killing a human being while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary by a person who has had a prior unrelated conviction of any of these offenses;
- (4) Killing a human being while perpetrating or attempting to perpetrate a kidnapping;
- (5) Killing a human being while perpetrating or attempting to perpetrate any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft, train, bus, ship or other commercial vehicle; and
- (6) Killing a human being purposely and with premeditated malice:
 - (a) By a person lying in wait;
 - (b) By a person hired to kill;
 - (c) By a person who has previously been convicted of murder; or
 - (d) By a person who is serving a life sentence.²⁸

The law also provided that when sufficient evidence was not presented to convict the defendant of murder in the first-degree, the defendant still could be found guilty of second-degree murder or voluntary or involuntary manslaughter.²⁹

B. *Repeal of 1973 Death Penalty Statute and Passage of New Law*

Indiana’s 1973 death penalty statute was repealed in 1974³⁰ and the Indiana legislature passed a new death penalty statute in 1977.³¹ The new law allowed the State to seek a

²⁶ 408 U.S. 238 (1972).

²⁷ The new death penalty law also defined murder in the first degree as the “kill[ing] [of] a human being either purposely and with premeditated malice or while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary.” For this offense, however, the defendant’s punishment was limited to life imprisonment. *See* 1973 IN Laws 328, § 1(a).

²⁸ 1973 Ind. Acts 328, § 1(b)(1)-(6).

²⁹ 1973 Ind. Acts 328, § 1.

³⁰ 1976 Ind. Acts 148, § 24.

³¹ 1977 Ind. Acts 340, § 122.

death sentence for murder when it alleged the existence of at least one of the following aggravating circumstances:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;
- (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property;
- (3) The defendant committed the murder by lying in wait;
- (4) The defendant who committed the murder was hired to kill;
- (5) The defendant committed the murder by hiring another person to kill;
- (6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty;
- (7) The defendant has been convicted of another murder;
- (8) The defendant has committed another murder, at any time, regardless of whether s/he has been convicted of that other murder; and
- (9) The defendant was under a sentence of life imprisonment at the time of the murder.³²

During the sentencing hearing, the State had to prove the existence of the statutory aggravating circumstance(s) beyond a reasonable doubt.³³

Under the new statute, the fact-finder also was allowed to consider at the sentencing hearing the following mitigating circumstances that could weigh against the imposition of a death sentence:

- (1) The defendant has no significant history of prior criminal conduct;
- (2) The defendant was under the influence of extreme mental or emotional disturbance when s/he committed the murder;
- (3) The victim was a participant in, or consented to, the defendant's conduct.
- (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor;
- (5) The defendant acted under the substantial domination of another person;
- (6) The defendant's capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication; and
- (7) Any other circumstances appropriate for consideration.³⁴

In reaching a decision, the judge³⁵ or jury³⁶ was allowed to consider all of the evidence introduced during the penalty phase of the trial as well as any new evidence presented at

³² 1977 Ind. Acts 340, § 122(a), (b)(1)-(9).

³³ 1977 Ind. Acts 340, § 122(a).

³⁴ 1977 Ind. Acts 340, § 122 (c).

the sentencing hearing.³⁷ The statute specifically authorized the defendant to present at the sentencing hearing additional evidence relevant to the aggravating circumstances alleged or any of the mitigating circumstance enumerated by law.³⁸

If the sentencing hearing was before a jury, the jury could recommend to the court whether death should be imposed.³⁹ The jury could recommend death only if it found (1) that the State had proven beyond a reasonable doubt the existence of at least one aggravating circumstance; and (2) that the aggravating circumstance(s) outweighed the mitigating circumstance(s).⁴⁰ If a jury was unable to agree on a sentence recommendation, the court was obligated to dismiss the jury and proceed as if the sentencing hearing had been conducted only before a judge.⁴¹

The judge held the authority to make the final determination as to the defendant's sentence, after having considered the jury's recommendation (if one was made).⁴² Although the judge was not bound by the jury's recommendation,⁴³ s/he was mandated to base his/her decision on the same standards utilized by the jury.⁴⁴

A death sentence was subject to automatic review by the Indiana Supreme Court and the death-row inmate could not be executed until the Court had completed its review.⁴⁵

C. Constitutionality of Indiana's 1973 Death Penalty Scheme

In 1977, the Indiana Supreme Court assessed the constitutionality of the 1973 death penalty scheme in *French v. Indiana*.⁴⁶ The Court found that the imposition of a mandatory, automatic death penalty did not provide objective standards to guide, regularize, and make rationally reviewable the process for imposing a death sentence,⁴⁷ and that it failed to allow particularized consideration of relevant aspects of character and record of each convicted defendant before imposition of a sentence of death.⁴⁸ Consequently, the 1973 statute was held to be unconstitutional as cruel and unusual punishment.⁴⁹

³⁵ Alternatively, if the trial was before a judge or the defendant pleaded guilty, the judge would conduct the sentencing hearing. 1977 Ind. Acts 340, § 122 (d).

³⁶ If the defendant was convicted of murder by a jury, the jury would reconvene for the sentencing hearing. 1977 Ind. Acts 340, § 122 (d).

³⁷ *Id.*

³⁸ 1977 Ind. Acts 340, § 122(d)(1)-(2).

³⁹ 1977 Ind. Acts 340, § 122(e).

⁴⁰ 1977 Ind. Acts 340, § 122(e).

⁴¹ 1977 Ind. Acts 340, § 122(f).

⁴² 1977 Ind. Acts 340, § 122(e).

⁴³ *Id.*

⁴⁴ 1977 Ind. Acts 340, § 122(e)-(g).

⁴⁵ 1977 Ind. Acts 340, § 122(h).

⁴⁶ *French v. Indiana*, 362 N.E. 2d 834 (Ind. 1977). While the 1973 capital sentencing statute was repealed in 1974, Mr. French was convicted and sentenced to death under the old statute, thus requiring the Indiana Supreme Court to consider its constitutionality, despite the fact that it had been repealed. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

D. Indiana's 1976 Murder Statute and Death Eligibility

The Indiana legislature passed a new murder statute in 1976 that defined murder as:

- (1) Knowingly or intentionally killing another human being; or
- (2) Killing another human being while committing or attempting to commit kidnapping, arson, burglary, rape, robbery, or unlawful deviate conduct.⁵⁰

A person committed a capital felony if s/he:

- (1) Intentionally kills a judge, law enforcement officer, corrections employee, or firefighter acting in the line of duty;
- (2) Kills another human being by the unlawful detonation of an explosive with intent to injure person or damage property;
- (3) Kills another human being while committing or attempting to commit kidnapping;⁵¹
- (4) Intentionally kills another human being while lying in wait or having been hired to kill;⁵² or
- (5) Kills another human being while having a prior unrelated conviction of murder or serving a term of life imprisonment.⁵³

To obtain the death penalty, the charge against the accused person had to specifically state that s/he is charged with murder as a capital felony.⁵⁴ A charge of murder as a capital felony generally includes no lesser offenses.⁵⁵

E. Amendments to the Indiana Death Penalty Scheme

In 1983, the Indiana Legislature amended the death penalty scheme to include an additional aggravating circumstance: the defendant was serving a term of imprisonment and, on the date of the murder, had twenty or more years remaining to be served before his/her earliest possible release date.⁵⁶

The Indiana Legislature amended the death penalty scheme in 1986 to include dismembering the victim as an aggravating circumstance.⁵⁷

In 1987, in addition to non-substantive changes making the law gender-neutral,⁵⁸ the Indiana Legislature added as a mitigating circumstance that the defendant was less than

⁵⁰ 1976 Ind. Acts 148, § 2(a).

⁵¹ 1976 Ind. Acts 148, § 2(b).

⁵² 1976 Ind. Acts 148, § 2(c).

⁵³ 1976 Ind. Acts 148, § 2(d).

⁵⁴ 1976 Ind. Acts 148, § 2(e).

⁵⁵ *Id.*

⁵⁶ 1983 Ind. Acts 336, § 1(b)(10).

⁵⁷ 1986 Ind. Acts 212, § 1(b)(11).

⁵⁸ 1987 Ind. Acts 332, § 2(b)(8), (c) (2), (c) (6).

eighteen years of age when the murder was committed.⁵⁹ The amendment did not apply to cases in which a death sentence was imposed before September 1, 1987.⁶⁰ Also in 1987, the Indiana Legislature amended the death penalty scheme to include as an aggravating circumstance that the victim of the murder was less than twelve years of age.⁶¹

In 1989, the Indiana Legislature removed the following aggravating circumstances:

- (1) The defendant was under a sentence of life imprisonment at the time of the murder; and
- (2) The defendant was serving a term of imprisonment and on the date of murder the defendant had twenty or more years remaining to be served before the earliest possible release date.⁶²

In addition, the Legislature added the following aggravating circumstances:

- (1) The defendant was either under the custody of the department of correction, under the custody of a county sheriff, on probation after receiving a sentence for the commission of a felony, or on parole at the time the murder was committed;⁶³
- (2) The victim was a victim of battery as a Class C or D felony, kidnapping, criminal confinement, or a sex crime and the defendant was convicted of the crime;⁶⁴ and
- (3) The defendant committed the murder by intentionally killing the victim while dealing or attempting to deal in cocaine or a narcotic drug.⁶⁵

The amendments did not apply to offenses that were committed before July 1, 1989.⁶⁶

The Indiana Legislature added the following additional aggravating circumstances in 1993:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit carjacking;⁶⁷
- (2) The victim of the murder was a probation officer, parole officer, community corrections worker, or home detention officer;⁶⁸
- (3) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant

⁵⁹ 1987 Ind. Acts 332, § 2(c)(7).

⁶⁰ 1987 Ind. Acts 332, § 3.

⁶¹ 1987 Ind. Acts 320, § 2(b)(12).

⁶² 1989 Ind. Acts 296, § 2(b).

⁶³ 1989 Ind. Acts 296, § 2(b)(9).

⁶⁴ 1989 Ind. Acts 296, § 2(b)(12).

⁶⁵ 1989 Ind. Acts 296, § 2(b)(1)(h).

⁶⁶ 1989 Ind. Acts 296, § 3.

⁶⁷ 1993 Ind. Acts 230, § 5(b)(1)(h).

⁶⁸ 1993 Ind. Acts 250, § 2(b)(6).

committed the murder with the intent to prevent the person from testifying.⁶⁹

The Legislature also added that if the defendant was convicted of murder in a jury trial, the court must instruct the jury regarding the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good-time credit and clemency.⁷⁰ Additionally, life imprisonment without parole was added as a sentencing option.⁷¹

In 1994, in addition to making non-substantive changes,⁷² the Legislature exempted mentally retarded defendants from being sentenced to death and mandated that a determination as to mental retardation be made pre-trial.⁷³ Additionally, two aggravating circumstances were added:

- (1) Committing the murder by intentionally killing the victim while committing or attempting to commit criminal gang activity;⁷⁴ and
- (2) Committing the murder by intentionally discharging a firearm into an inhabited dwelling or from a vehicle.⁷⁵

Finally, the role of the court during the sentencing hearing was clarified to state that even if the sentencing hearing is conducted before a jury, the court is responsible for making the final sentencing determination.⁷⁶ In making this decision, it must consider the jury's sentencing recommendation⁷⁷ and use the same standards that the jury was required to consider.⁷⁸

In 1995, the Indiana Legislature added language requiring the court that sentences the defendant to order that the execution be carried out no later than one year and one day after the defendant's conviction.⁷⁹ The Indiana Supreme Court has exclusive jurisdiction to stay the execution of a death sentence⁸⁰ and, if it does so, it must set a new date of execution.⁸¹

Additionally, if a person sentenced to death files a petition for post-conviction relief, the court must set a hearing date within ninety days of the date the petition is filed.⁸² The failure to set the hearing date within the ninety-day period, however, is not a basis for

⁶⁹ 1993 Ind. Acts 250, § 2(b)(13).

⁷⁰ 1993 Ind. Acts 250, § 2(d).

⁷¹ 1993 Ind. Acts 250, § 2(e), (g).

⁷² 1994 Ind. Acts 158, § 7(e), (i).

⁷³ 1994 Ind. Acts 158, § 7(a).

⁷⁴ 1994 Ind. Acts 158, § 7(b)(1)(j).

⁷⁵ 1994 Ind. Acts 158, § 7(b)(14).

⁷⁶ 1994 Ind. Acts 158, § 7(e).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 1995 Ind. Acts 306, § 1(h).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 1995 Ind. Acts 306, § 1(i).

additional post-conviction relief.⁸³ The attorney general will answer the petition for post-conviction relief on behalf of the state⁸⁴ and a prosecuting attorney will assist the attorney general at the attorney general's request.⁸⁵ The court is required to enter written findings of fact and conclusions of law concerning the petition within ninety days of the date the hearing concludes.⁸⁶ However, if the court determines that the petition is without merit, it may dismiss the petition within ninety days without conducting a hearing.⁸⁷

Finally, the legislature delineated specific requirements for the automatic, direct review of a death sentence by the Indiana Supreme Court. The Supreme Court's review must take into consideration all claims that the:

- (1) Conviction or sentence was in violation of the Constitution of the State of Indiana or the Constitution of the United States;
- (2) The sentencing court was without jurisdiction to impose a sentence; and
- (3) The sentence exceeds the maximum sentence authorized by law or is otherwise erroneous.⁸⁸

If the Supreme Court cannot complete its review by the scheduled execution date, the Supreme Court will stay the execution of the death sentence and set a new date to carry out the defendant's execution.⁸⁹

In 1996, the Indiana Legislature amended the death penalty scheme to include an aggravating circumstance that the defendant burned, mutilated, or tortured the victim while the victim was alive⁹⁰ and stated that the law did not apply to crimes committed before June 30, 1996.⁹¹ Also in 1996, the Indiana Legislature amended the death penalty scheme to allow the court, in making the final sentencing determination, to receive evidence of the crime's impact on members of the victim's family.⁹²

In 1997, the Indiana Legislature amended the death penalty scheme to include an aggravating circumstance that the victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that had attained viability.⁹³

In 2002, the Indiana Legislature exempted people from the death penalty who were between sixteen and eighteen years old at the time the murder was committed.⁹⁴

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 1995 Ind. Acts 306, § 1(j).

⁸⁹ 1995 Ind. Acts 306, § 1(j).

⁹⁰ 1996 Ind. Acts 228, § 1(b)(11).

⁹¹ 1996 Ind. Acts 228, § 2.

⁹² 1996 Ind. Acts 216, § 25(e).

⁹³ 1997 Ind. Acts 261, § 7(b)(16).

⁹⁴ 2002 Ind. Acts 117, § 1(b).

The Indiana Legislature also amended the death penalty scheme to clarify the role of the victim's family in the sentencing hearing. Only after a court pronounces a sentence may a representative of the victim's family and friends present a statement regarding the impact of the crime.⁹⁵ The statement may be submitted in writing or given orally by the representative, which is to be given in the presence of the defendant.⁹⁶

Also in 2002, the Indiana Legislature amended the sentencing component of the death penalty scheme to include that the court will instruct the jury that in order for it to recommend the imposition of a sentence of death or life imprisonment without parole, the jury must find at least one aggravating circumstance beyond a reasonable doubt and must provide a special verdict form for each aggravating circumstance alleged.⁹⁷ The death penalty scheme also was modified so that the court must follow the jury's sentencing recommendation⁹⁸ for defendants sentenced after June 30, 2002.⁹⁹

In 2003, the Indiana Legislature added that the Indiana Supreme Court must consider whether the sentence "is otherwise erroneous" in its direct appellate review.¹⁰⁰ Furthermore, the law was amended to allow a person who has been sentenced to death and who has completed state post-conviction proceedings to file a written petition with the Indiana Supreme Court to present new evidence challenging the person's guilt or the appropriateness of the death sentence.¹⁰¹ The Supreme Court is responsible for determining, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the Supreme Court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The Supreme Court may not make a determination in the person's favor or make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general an opportunity to be heard.¹⁰²

F. Amendments to the Indiana Murder Statute

In 1977, the Indiana Legislature amended the murder definition to include knowingly or intentionally killing another human being, or killing another human being while committing or attempting to commit child molesting and kidnapping.¹⁰³ Additionally, the classifications and definitions of a Class A felony and a capital felony were removed from the murder statute.¹⁰⁴

⁹⁵ 2002 Ind. Acts 80, § 1(e).

⁹⁶ *Id.*

⁹⁷ 2002 Ind. Acts 117, § 1(d).

⁹⁸ 2002 Ind. Acts 117, § 1(e). The court was not previously bound by the jury's recommendation

⁹⁹ *Id.*

¹⁰⁰ 2002 Ind. Acts 1 § 9 (j)(3)(B).

¹⁰¹ 2003 Ind. Acts 147, § 1(k).

¹⁰² *Id.*

¹⁰³ 1977 Ind. Acts 340, § 25.

¹⁰⁴ *Id.*

In 1987, the Indiana Legislature further amended the murder statute to include killing another human being while consumer product tampering¹⁰⁵ in the definition of murder.¹⁰⁶

In 1989, the Indiana Legislature amended the murder statute to include someone who kills another human being while:

- (1) Attempting to deal or dealing in cocaine or a narcotic drug;
- (2) Attempting to deal or dealing in a schedule I, II or III controlled substance;
- (3) Attempting to deal or dealing in a schedule IV controlled substance, or
- (4) Attempting to deal or dealing in a schedule V controlled substance.¹⁰⁷

The Indiana Legislature amended the murder statute in 1993 to include killing another human being while committing or attempting to commit carjacking.¹⁰⁸

In 1997, the Indiana Legislature amended the murder statute to include knowingly or intentionally killing a fetus that has attained viability.¹⁰⁹

In 2001, the Indiana Legislature amended the murder statute to include someone who kills another human being while manufacturing or attempting to manufacture cocaine or a narcotic drug, or dealing in or manufacturing or attempting to deal in or manufacture methamphetamine.¹¹⁰

In 2006, the Indiana Legislature made non-substantive changes to the statute.¹¹¹

G. Method of Execution

In 1983, the Indiana Legislature mandated that an execution was to be conducted by electrocution.¹¹² It was to be inflicted before sunrise on a date set by the sentencing court, but it must be at least one hundred days after conviction.¹¹³ Either the warden of the state prison or persons designated by the warden were to serve as the executioner.¹¹⁴

In 1995, the Indiana Legislature changed the method of execution to lethal injection.¹¹⁵

¹⁰⁵ “Consumer product tampering” was defined as a person who “recklessly, knowingly, or intentionally introduces a poison, a harmful substance, or a harmful foreign object into a consumer product” or “with intent to mislead a consumer of a consumer product, tampers with the labeling of a consumer product that has been introduced into commerce...” 1987 Ind. Acts 326, § 4.

¹⁰⁶ 1987 Ind. Acts 327, § 2.

¹⁰⁷ 1989 Ind. Acts 296, § 1.

¹⁰⁸ 1993 Ind. Acts 133, § 1.

¹⁰⁹ 1997 Ind. Acts 261, § 3.

¹¹⁰ 2001 Ind. Acts 17, § 15.

¹¹¹ 2006 Ind. Acts 151, § 15(a)(3).

¹¹² 1983 Ind. Acts 311, § 3(a).

¹¹³ 1983 Ind. Acts 311, § 3(b).

¹¹⁴ 1983 Ind. Acts 311, § 3(c).

¹¹⁵ 1995 Ind. Acts 294, § 1(a).

In 2002, the Indiana Legislature made additional, non-substantive changes to the statute.¹¹⁶

H. Mentally Retarded Individuals

In 1994, the Indiana Legislature defined “mentally retarded individual” as an individual who, before turning twenty-two years of age, manifests significantly subaverage intellectual functioning, and substantial impairment of adaptive behavior that is documented in a court ordered evaluative report.¹¹⁷

The defendant may file a petition alleging that s/he is a mentally retarded individual.¹¹⁸ The petition must be filed not later than twenty days before the omnibus date.¹¹⁹ If a defendant files such a petition, the court shall order an evaluation of the defendant for the purpose of providing evidence of whether the defendant has a significantly subaverage level of intellectual functioning, whether the defendant’s adaptive behavior is substantially impaired, and whether these conditions existed before the defendant turned twenty-two years old.¹²⁰

A hearing will take place regarding the petition, where the defendant must prove by clear and convincing evidence that the defendant is a mentally retarded individual.¹²¹ The court will determine no later than ten days before the initial trial date whether the defendant is a mentally retarded individual.¹²²

The court must dismiss the portion of the charging instrument which seeks the death penalty against an individual who the court determines is mentally retarded during this pretrial procedure.

¹¹⁶ 2002 Ind. Acts 20, § 1(c).

¹¹⁷ 1994 Ind. Acts 158, § 2.

¹¹⁸ 1994 Ind. Acts 158, § 3(a).

¹¹⁹ 1994 Ind. Acts 158, § 3(b).

¹²⁰ 1994 Ind. Acts 158, § 3(c).

¹²¹ 1994 Ind. Acts 158, § 4.

¹²² 1994 Ind. Acts 158, § 5.

III. THE PROGRESSION OF AN INDIANA DEATH PENALTY CASE

A. *Pretrial Process*

1. Arrest and Initial Hearing

An individual arrested for the commission of a crime must be taken “promptly” for an initial hearing.¹²³ If the individual has been released in accordance with warrant provisions or makes bail, the initial hearing must occur within twenty days of the arrest.¹²⁴

At the initial hearing, the judicial officer must inform the arrestee orally or in writing:

- (1) That s/he has a right to retain counsel and if s/he intends to retain counsel s/he must do so within twenty days;
- (2) That s/he has a right to assigned counsel at no expense if s/he is indigent;
- (3) That s/he has the right to a speedy trial;
- (4) Of the amount and conditions of bail;
- (5) Of his/her privilege against self-incrimination;
- (6) Of the nature of the charge against him/her; and
- (7) That a preliminary plea of not guilty is being entered from him/her and, unless the defendant enters a different plea, the preliminary plea of not guilty will become a formal plea of not guilty twenty days after the initial hearing is completed.¹²⁵

In addition, the judge must direct the prosecuting attorney to give the defendant or his/her attorney a copy of any formal felony charges that has been or is ready to be filed.¹²⁶

Before the initial hearing has ended, the judicial officer must determine whether a person who has requested counsel is indigent.¹²⁷ If the person is found to be indigent, the judicial officer must assign counsel.¹²⁸ If the court finds that the person is able to pay part of the cost of the assigned counsel’s representation, the court will order the person to pay a fee of \$100.¹²⁹

2. Grand Jury Indictment or Information and Notice of Intent to Seek the Death Penalty

In order to prosecute an individual accused of a capital felony, the prosecuting attorney must charge the defendant with a crime by indictment or information in a court with

¹²³ IND. CODE §§ 35-33-7-1, 35-33-7-5 (2006).

¹²⁴ IND. CODE § 35-33-7-4 (2006).

¹²⁵ IND. CODE § 35-33-7-5 (2006).

¹²⁶ *Id.*

¹²⁷ IND. CODE § 35-33-7-6(a) (2006).

¹²⁸ *Id.*

¹²⁹ IND. CODE § 35-33-7-6(c) (2006).

jurisdiction over the crime charged.¹³⁰ The information or indictment must be filed or prepared to be filed at or before the initial hearing.¹³¹ The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged, but does not need to include a formal commencement, a formal conclusion, or any other matter not necessary to the statement.¹³² Presumptions of law and matters of which judicial notice is taken do not need to be stated.¹³³ The indictment or information must:

- (1) State the title of the action and the name of the court in which the indictment or information is filed;
- (2) State the name of the offense in the words of the statute or any other words conveying the same meaning;
- (3) Cite the statutory provision alleged to have been violated;
- (4) Set forth the nature and elements of the offense charged;
- (5) State the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense;
- (6) State the time of the offense as definitely as can be done if time is of the essence of the offense;
- (7) State the place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed;
- (8) State the place of the offense as definitely as can be done if the place is of the essence of the offense; and
- (9) State the name of every defendant, if known, and if not known, by designating the defendant by any name or description by which he can be identified with reasonable certainty.¹³⁴

An indictment must be signed by five members of the grand jury,¹³⁵ along with the prosecuting attorney or his/her deputy.¹³⁶ An information must be signed by the prosecuting attorney or his/her deputy and sworn to or affirmed by him/her or another person.¹³⁷ The indictment or information must state the names of all of the material witnesses.¹³⁸

¹³⁰ IND. CODE § 35-34-1-1(a), (b) (2006).

¹³¹ IND. CODE § 35-33-7-3(a) (2006). If the prosecuting attorney needs additional time to evaluate the case and determine whether a charge should be filed, or if it is necessary to transfer the person to another court, the court will recess or continue the initial hearing for up to seventy-two hours, excluding intervening Saturdays, Sundays, and legal holidays. IND. CODE § 35-33-7-3(b) (2006).

¹³² IND. CODE § 35-34-1-2(d) (2006).

¹³³ *Id.*

¹³⁴ IND. CODE § 35-34-1-2(a) (2006).

¹³⁵ A grand jury consists of six grand jurors and one alternate. IND. CODE § 35-34-2-2(a) (2006). In order to return an indictment, at least five grand jurors must vote to do so. IND. CODE § 35-34-2-12(b) (2006).

¹³⁶ IND. CODE § 35-34-1-2(b) (2006).

¹³⁷ *Id.*

¹³⁸ IND. CODE § 35-34-1-2(c) (2006).

The state may seek a death sentence by alleging, on a page separate from the rest of the charging instrument, the existence of at least one statutory aggravating factor.¹³⁹ In Indiana, a person is eligible for the death penalty only if s/he is found guilty of murder and at least one statutory aggravating factor exists. Under the Indiana Code, murder is defined as:

- (1) Knowingly or intentionally killing another human being;
- (2) Killing another human being while committing or attempting to commit arson, burglary, child molesting, consumer product tampering, criminal deviate conduct, kidnapping, rape, robbery, human trafficking, promotion of human trafficking, sexual trafficking of a minor, or carjacking;
- (3) Killing another human being while committing or attempting to commit dealing in or manufacturing cocaine or a narcotic drug, dealing in or manufacturing methamphetamine, dealing in the opiates, opiate derivatives, hallucinogenic substances, depressants, and stimulants designated as Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V controlled substances; or
- (4) Knowingly or intentionally killing a fetus that has attained viability.¹⁴⁰

No later than twenty days before the omnibus date, the court may dismiss the indictment or information for the following reasons:

- (1) The indictment or information is defective;
- (2) Misjoinder of offenses or parties defendant, or duplicity of allegation in counts;
- (3) The grand jury proceeding was defective;
- (4) The indictment or information does not state the offense with sufficient certainty;
- (5) The facts stated do not constitute an offense;
- (6) The defendant has immunity with respect to the offense charged;
- (7) The prosecution is barred by reason of a previous prosecution;
- (8) The prosecution is untimely brought;
- (9) The defendant has been denied the right to a speedy trial;
- (10) There is a jurisdictional impediment to conviction of the defendant for the offense charged; or
- (11) Any other ground that is a basis for dismissal as a matter of law.¹⁴¹

The court then may overrule the motion to dismiss, grant the motion to dismiss and discharge the defendant, or grant the motion to dismiss and decline to discharge the

¹³⁹ IND. CODE § 35-50-2-9(a) (2006).

¹⁴⁰ IND. CODE § 35-42-1-1 (2006).

¹⁴¹ IND. CODE § 35-34-1-4(a), (b) (2006).

defendant.¹⁴² The prosecuting attorney also may move to dismiss the indictment or information.¹⁴³

3. Notice of the Defendant's Intention to Raise the Issue of Insanity

When the defendant intends to utilize an insanity defense, s/he must file a notice of intent with the trial court within twenty days of being charged.¹⁴⁴ “[I]n the interest of justice and upon a showing of good cause,” however, the court may permit such a filing at any time before the trial begins.¹⁴⁵

When notice of an insanity defense is filed, the court will appoint two or three “competent” and “disinterested” psychiatrists, psychologists endorsed by the state psychology board as health service providers in psychology, or physicians, at least one of whom must be a psychiatrist, to examine the defendant and to testify at the trial.¹⁴⁶

4. Notice of the Defendant's Intention to Offer an Alibi Defense

When the defendant intends to offer evidence of an alibi in his/her defense, the defendant must file with the court and serve on the prosecuting attorney a written statement of his/her intention to offer the defense within twenty days prior to the “omnibus date.”¹⁴⁷

¹⁴² IND. CODE § 35-34-1-4(d) (2006). The court may grant the motion to dismiss, but refuse to discharge the defendant if the court determines that the indictment or information may be cured by an amendment and the prosecuting attorney has moved for leave to amend. *Id.*

¹⁴³ IND. CODE § 35-34-1-13 (2006). Such a motion may be made at any time before sentencing. *Id.*

¹⁴⁴ IND. CODE § 35-36-2-1 (2006).

¹⁴⁵ *Id.*

¹⁴⁶ IND. CODE § 35-36-2-2(b) (2006).

¹⁴⁷ IND. CODE § 35-36-4-1 (2006). The purpose of the omnibus date is to establish a point in time from which various deadlines are established. IND. CODE § 35-36-8-1(b) (2006). The omnibus date:

- (1) Must be set by the judicial officer at the initial hearing; and
- (2) Must be no earlier than forty-five (45) days and no later than seventy-five (75) days after the completion of the initial hearing, unless the prosecuting attorney and the defendant agree to a different date.

IND. CODE § 35-36-8-1(a) (2006). Once the omnibus date is set, it remains the omnibus date for the case until final disposition, unless:

- (1) The defendant requests a trial within time limits established by the Indiana Rules of Criminal Procedure for early trial motions;
- (2) Subsequent counsel enters an appearance after the omnibus date and previous counsel withdrew or was removed due to:
 - (A) A conflict of interest; or
 - (B) A manifest necessity required that counsel withdraw from the case;
- (3) The state has not complied with an order to compel discovery; or
- (4) The prosecuting attorney and the defendant agree to continue the omnibus date.

IND. CODE § 35-36-8-1(d) (2006).

The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information.¹⁴⁸

If the defendant files a notice of alibi, the prosecuting attorney then must file a specific statement containing the date and the exact place the defendant was alleged to have committed the crime.¹⁴⁹ If the prosecuting attorney's statement contains a date or place other than the date or place stated in the defendant's original statement, the defendant must file a second statement of alibi if the defendant intends to produce at trial evidence of an alibi for the date or place contained in the prosecutor's statement.¹⁵⁰

5. Petition Alleging Mental Retardation

If the defendant intends to allege that s/he is mentally retarded and therefore ineligible for the death penalty, s/he must file a petition within twenty days of the omnibus date.¹⁵¹ Once the defendant files a petition, the court must order an evaluation of the defendant in order to provide evidence of whether (1) the defendant has a significantly subaverage level of intellectual functioning; (2) the defendant's adaptive behavior is substantially impaired; and (3) these conditions existed before the defendant became twenty-two years of age.¹⁵²

The court must determine whether the defendant has proven by clear and convincing evidence that s/he is mentally retarded no later than ten days before the initial trial date.¹⁵³ If the court determines that the defendant is mentally retarded, the part of the state's charging instrument that seeks a death sentence against the defendant will be dismissed.¹⁵⁴

6. Pre-trial Hearing and Conference

A pre-trial hearing and, if necessary, a pre-trial conference, may be held on the omnibus date or any other date that the court designates prior to the start of the trial.¹⁵⁵ The pre-trial hearing is intended to (1) consolidate hearings on pre-trial motions and other requests to the maximum extent possible; (2) rule on the motions and requests and ascertain whether the case will be disposed of by guilty plea, jury trial, or bench trial; and (3) make any other orders appropriate under the circumstances to expedite the proceedings.¹⁵⁶

¹⁴⁸ IND. CODE § 35-36-4-1 (2006).

¹⁴⁹ IND. CODE § 35-36-4-2(a) (2006). The prosecuting attorney does not need to comply with this requirement if s/he intends to present at trial the date and place listed in the indictment or information as the date and place of the crime. *Id.*

¹⁵⁰ IND. CODE § 35-36-4-2(c) (2006).

¹⁵¹ IND. CODE § 35-36-9-3(a), (b) (2006).

¹⁵² IND. CODE § 35-36-9-3(c) (2006).

¹⁵³ IND. CODE § 35-36-9-5 (2006).

¹⁵⁴ IND. CODE § 35-36-9-6 (2006).

¹⁵⁵ IND. CODE § 35-36-8-3(a) (2006).

¹⁵⁶ *Id.*

7. Plea Agreements

The court may not accept a plea of guilty or guilty but mentally ill at the time of the crime entered by an unrepresented defendant without first determining that the defendant has freely and knowingly waived his/her right to counsel.¹⁵⁷ Further, the court may not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

- (1) Understands the nature of the charge against him/her;
- (2) Has been informed that by pleading, s/he waives his/her rights to a public and speedy trial by jury, confront and cross-examine the witnesses against him/her, have compulsory process for obtaining witnesses in his/her favor, and require the state to prove his/her guilt beyond a reasonable doubt at a trial which the defendant may not be compelled to testify against himself/herself;
- (3) Has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences;
- (4) Has been informed that the person will lose the right to possess a firearm if the person is convicted of a crime of domestic violence; and
- (5) Has been informed that if there is a court-accepted plea agreement, the court is bound by the terms of the plea agreement.¹⁵⁸

The court may not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the plea is voluntary.¹⁵⁹ To do this, the court must determine whether any promises, force, or threats were used to obtain the plea.¹⁶⁰ A plea of guilty or guilty but mentally ill at the time of the crime is not to be deemed involuntary solely because it is the product of an agreement between the prosecution and the defense.¹⁶¹

The parties may reach a plea agreement, so long as the agreement is in writing and it is made before the defendant enters a guilty plea.¹⁶² If the contents of the plea agreement indicate that the defendant is to enter a plea of guilty, the court must order a pre-sentence report and may hear evidence on the plea agreement.¹⁶³ Neither the contents of the plea agreement, the pre-sentence report, nor the hearing will be part of the official record of the case unless the court approves the plea agreement.¹⁶⁴ If the plea agreement is not accepted, the court must reject it before the case may be disposed of by trial or by a guilty

¹⁵⁷ IND. CODE § 35-35-1-1 (2006).

¹⁵⁸ IND. CODE § 35-35-1-2(a) (2006).

¹⁵⁹ IND. CODE § 35-35-1-3(a) (2006).

¹⁶⁰ *Id.*

¹⁶¹ IND. CODE § 35-35-1-3(c) (2006).

¹⁶² IND. CODE § 35-35-3-3(a) (2006).

¹⁶³ *Id.*

¹⁶⁴ IND. CODE § 35-35-3-3(b) (2006).

plea.¹⁶⁵ If the plea agreement is not accepted, neither the agreement nor verbal or written communication concerning the plea agreement may be admitted as evidence at the trial.¹⁶⁶ The parties may file subsequent plea agreements, subject to the same requirements as the initial plea agreement.¹⁶⁷ If the court accepts a plea agreement, it is bound by the terms of the agreement.¹⁶⁸

As part of a plea agreement, the prosecuting attorney must certify that s/he offered to show the proposed recommendation to the victim's family and that they have been offered an opportunity to present their opinion of the recommendation to the prosecuting attorney and the court.¹⁶⁹

If the defendant pleaded guilty to a capital offense but did not enter into a plea bargain as to sentence, the case proceeds to the sentencing phase of the capital trial.¹⁷⁰ If the defendant pleaded guilty to a capital offense and entered into a plea bargain as to sentence, the defendant will begin serving the agreed upon sentence.¹⁷¹

B. The Capital Trial

Capital trials are conducted in two phases: the guilt/innocence proceeding and, if the defendant is found guilty, the sentencing proceeding.¹⁷²

1. Guilt/Innocence Phase

All individuals charged with a capital felony possess the right to a jury trial,¹⁷³ although the defendant may waive this right.¹⁷⁴ A capital jury is comprised of twelve individuals, unless the parties and the court agree to a lesser number.¹⁷⁵ The parties may dismiss a potential juror from the jury pool for a variety of reasons, including if s/he is "not qualified to serve in a death penalty case under law."¹⁷⁶

During the guilt/innocence phase of the trial, the jury must decide whether the prosecution has proved that the defendant is guilty of murder beyond a reasonable doubt.¹⁷⁷ Both the State and defense may present opening and closing arguments, as well

¹⁶⁵ *Id.*

¹⁶⁶ IND. CODE § 35-35-3-4 (2006).

¹⁶⁷ IND. CODE § 35-35-3-3(b) (2006).

¹⁶⁸ IND. CODE § 35-35-3-3(e) (2006).

¹⁶⁹ IND. CODE § 35-35-3-5(a) (2006). If the prosecuting attorney is, after a reasonable effort, unable to locate the victim or his/her next of kin, s/he will certify this fact to the court. S/he may then submit the recommendation and the court may act on it. IND. CODE § 35-35-3-7 (2006).

¹⁷⁰ *See, e.g.,* Trueblood v. State, 587 N.E.2d 105 (Ind. 1992) (guilty plea with no sentencing agreement).

¹⁷¹ *See, e.g.,* Smith v. State, 686 N.E.2d 1264 (Ind. 1997) (guilty plea with agreed recommendation for death sentence; death sentence appealed by appointed lawyers as *amicus* and upheld).

¹⁷² IND. CODE § 35-50-2-9(a) (2006).

¹⁷³ IND. CONST. art. 1, §§ 13, 19; IND. R. TRIAL P. 38.

¹⁷⁴ IND. R. TRIAL P. 38(A), 39(A).

¹⁷⁵ IND. JURY R. 16(a).

¹⁷⁶ IND. JURY R. 17(b)(3).

¹⁷⁷ IND. CODE § 35-41-4-1(a) (2006).

as evidence in support of its position.¹⁷⁸ After both sides have presented their closing arguments, the court will instruct the jury as to “all matters of law which are necessary for [the jury’s] information in giving their verdict.”¹⁷⁹

To render a verdict, the jury must be unanimous.¹⁸⁰ If the defendant is found not guilty of any charge, s/he will be released from state custody. If the defendant is found not guilty of the capital crime, but is found guilty of a lesser-included offense, s/he will proceed to a non-capital sentencing proceeding. If the defendant is found not guilty by reason of insanity at the time of the crime, the court will hold a commitment hearing.¹⁸¹ If the defendant is found guilty of the capital offense, or guilty but mentally ill, s/he will proceed to the sentencing phase of the capital trial.¹⁸²

2. Sentencing Phase

If the defendant was convicted of murder in a jury trial, the jury will reconvene for the sentencing hearing.¹⁸³ If the trial was before the court, or the judgment was entered on a guilty plea, the court will conduct the sentencing hearing without a jury.¹⁸⁴ The decision-maker may consider all of the evidence that was introduced during the guilt/innocence phase, together with new evidence that is presented at the sentencing hearing.¹⁸⁵

Both the State and defense may present opening and closing arguments, as well as evidence in support of its position.¹⁸⁶ To impose a death sentence, the State must prove the existence of at least one statutory aggravating factor beyond a reasonable doubt and that the aggravating factor(s) outweighs any mitigating factors.¹⁸⁷ Under current law, the statutory aggravating factors are defined as:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson; burglary; child molesting; criminal deviate conduct; kidnapping; rape; robbery; carjacking; criminal gang activity; or dealing cocaine or a narcotic drug;
- (2) The defendant committed murder by the unlawful detonation of an explosive with intent to injure a person or damage property;
- (3) The defendant committed the murder by lying in wait;
- (4) The defendant who committed the murder was hired to kill;
- (5) The defendant committed the murder by hiring another person to kill;
- (6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer,

¹⁷⁸ IND. CODE § 35-37-2-2 (2006).

¹⁷⁹ *Id.*

¹⁸⁰ IND. JURY R. 16(a).

¹⁸¹ IND. CODE § 35-36-2-4 (2006).

¹⁸² IND. CODE §§ 35-50-2-9(d), 35-36-2-5(a) (2006).

¹⁸³ IND. CODE § 35-50-2-9(d) (2006).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ IND. CODE § 35-37-2-2 (2006).

¹⁸⁷ IND. CODE § 35-50-2-9(a), (l) (2006).

- fireman, judge, or law enforcement officer, and either (a) the victim was acting in the course of duty or (b) the murder was motivated by an act the victim performed while acting in the course of duty;
- (7) The defendant has been convicted of another murder;
 - (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder;
 - (9) The defendant was (a) under the custody of the department of corrections, (b) under the custody of a county sheriff, (c) on probation after receiving a sentence for the commission of a felony, or (d) on parole at the time the murder was committed;
 - (10) The defendant dismembered the victim;
 - (11) The defendant burned, mutilated, or tortured the victim while the victim was alive;
 - (12) The victim of the murder was less than twelve years of age;
 - (13) The victim was a victim of any of the following offenses for which the defendant was convicted: battery as a Class C or Class D felony, kidnapping, criminal confinement, or certain sex crimes;
 - (14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying;
 - (15) The defendant committed the murder by intentionally discharging a firearm into an inhabited dwelling or from a vehicle; and
 - (16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability.¹⁸⁸

The statutory mitigating factors are defined as:

- (1) The defendant has no significant history of prior criminal conduct;
- (2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed;
- (3) The victim was a participant in or consented to the defendant's conduct;
- (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor;
- (5) The defendant acted under the substantial domination of another person;
- (6) The defendant's capacity to appreciate the criminality of the his/her conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication;
- (7) The defendant was less than eighteen years of age at the time the murder was committed; and
- (8) Any other circumstances appropriate for consideration.¹⁸⁹

¹⁸⁸ IND. CODE § 35-50-2-9(b) (2006).

¹⁸⁹ IND. CODE § 35-50-2-9(c) (2006).

The defendant may present evidence relating to the aggravating circumstances alleged by the state and any of the mitigating circumstances.¹⁹⁰

After both sides have presented closing arguments, the court will instruct the jury as to “all matters of law which are necessary for [the jury’s] information in giving their verdict.”¹⁹¹

If the hearing is by jury, the jury will recommend to the court whether the death penalty, life imprisonment without parole, or neither should be imposed.¹⁹² If the jury reaches a sentencing recommendation, the court will sentence the defendant accordingly.¹⁹³ If the jury is unable to agree on a sentencing recommendation after “reasonable deliberations,” the court must dismiss the jury and proceed as if the hearing had been to the court alone.¹⁹⁴

After a verdict, finding, or plea of guilty, and if a new trial is not granted, the court will enter a judgment of conviction.¹⁹⁵ After the court pronounces the sentence, a representative of the victim’s family and friends may present a statement regarding the impact of the crime on family and friends.¹⁹⁶ The impact statement may be given orally or submitted in writing.¹⁹⁷ The statement will be given in the presence of the defendant.¹⁹⁸

When a court sentences a defendant to death, the court must pronounce the sentence and issue its order to the Department of Correction for the defendant to be held in an appropriate facility.¹⁹⁹ A copy of the order of conviction, order sentencing the defendant to death, and order committing the death-sentenced inmate to the DOC will be forwarded by the court imposing sentence to the Indiana Supreme Court Administrator’s Office.²⁰⁰ In the sentencing order, the court will set an execution date one year from the date of judgment of conviction.²⁰¹

If the defendant is convicted of murder and sentenced to death, the defendant may file a Motion to Correct Error.²⁰² A motion to correct error is not a prerequisite for appeal, except when the defendant seeks to address (1) newly discovered evidence, including alleged jury misconduct, capable of production within thirty days of the final judgment

¹⁹⁰ IND. CODE § 35-50-2-9(d) (2006).

¹⁹¹ IND. CODE § 35-37-2-2 (2006).

¹⁹² IND. CODE § 35-50-2-9(e) (2006).

¹⁹³ *Id.*

¹⁹⁴ IND. CODE § 35-50-2-9(f) (2006).

¹⁹⁵ IND. CODE § 35-38-1-1(a) (2006).

¹⁹⁶ IND. CODE § 35-50-2-9(e) (2006).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ IND. R. CRIM. P. 24(E).

²⁰⁰ *Id.*

²⁰¹ IND. R. CRIM. P. 24(F).

²⁰² IND. R. CRIM. P. 11.

which, with reasonable diligence, could not have been discovered and produced at trial; or (2) a claim that a jury verdict is excessive or inadequate.²⁰³

If the court determines that prejudicial or harmful error has been committed, it must cure the error by:

- (1) Granting a new trial;
- (2) Entering a final judgment;
- (3) Altering, amending, modifying, or correcting the judgment; or
- (4) Granting any other appropriate relief, or making relief subject to condition.²⁰⁴

In reviewing the evidence, the court will grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence.²⁰⁵ The court will enter judgment if it determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.²⁰⁶ In its order correcting error, the court will enter the final judgment or will correct the error without a new trial unless the relief is shown to be impracticable or unfair to any the parties or is otherwise improper.²⁰⁷ If a new trial is required, it will be limited to the parties and issues affected by the error, unless such relief is shown to be impracticable or unfair.²⁰⁸ If corrective relief is granted, the court will specify the general reasons.²⁰⁹ When a new trial is granted because the verdict, findings, or judgment do not accord with the evidence, the court must make special findings of fact on each material issue or element of the claim or defense upon which a new trial is granted.²¹⁰

The court may relieve a party from a final judgment for the following reasons:

- (1) Mistake, surprise, or excusable neglect;
- (2) Any ground for a motion to correct error, including newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors;
- (3) Fraud, misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.²¹¹

²⁰³ IND. R. TRIAL P. 59(A); IND. R. CRIM. P. 16.1(A).

²⁰⁴ IND. R. TRIAL P. 59(J).

²⁰⁵ IND. R. TRIAL P. 59(J)(7); *Helsley v. State*, 809 N.E.2d 292, 305 (Ind. 2004) (Boehm, J., concurring) (observing that “the trial judge is free to act as a ‘thirteenth juror’ and set aside the jury’s findings as to the occurrence of an eligibility factor”).

²⁰⁶ *Id.*

²⁰⁷ IND. R. TRIAL P. 59(J).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ IND. R. TRIAL P. 60(B).

After imposing a sentence of death, or after denial of the motion to correct error, the case will move on to the direct appeal.²¹² Upon imposing a sentence of death and finding that the defendant is indigent, the trial court must immediately enter a written order specifically naming counsel for appeal.²¹³ If the trial counsel is qualified to serve as appellate counsel, s/he will be appointed as sole or co-counsel for appeal.²¹⁴

C. The Direct Appeal

An individual convicted of capital murder and sentenced to death must have his/her conviction reviewed in the Indiana Supreme Court and may have his/her conviction reviewed in the United States Supreme Court.²¹⁵ The Indiana Supreme Court has exclusive state court jurisdiction and is obligated to review all cases in which the defendant has been convicted of murder and sentenced to death.²¹⁶ The United States Supreme Court may hear an appeal, but is not required to do so.

A person who is convicted of capital murder and sentenced to death receives an automatic appeal to the Indiana Supreme Court,²¹⁷ even if s/he pleads guilty to capital murder.²¹⁸ This appeal stays the execution until a later date that is specified in an order of suspension.²¹⁹ Upon entering a sentence of death, the trial court will order the court reporter and trial court clerk to begin immediate preparation of the Record on Appeal.²²⁰ The defendant initiates the non-automatic direct appeal of his conviction by filing a Notice of Appeal within thirty days of the final judgment.²²¹ When an eligible defendant²²² convicted after trial or a guilty plea fails to file a timely notice of appeal,

²¹² IND. CODE § 35-38-4-1(a) (2006).

²¹³ IND. R. CRIM. P. 24(J).

²¹⁴ *Id.*

²¹⁵ IND. CODE § 35-50-2-9(j) (2006).

²¹⁶ *Id.*; IND. R. APP. P. 4(A)(1)(a).

²¹⁷ IND. CODE §§ 35-50-2-9(j), 35-38-4-1(a) (2006); IND. R. APP. P. 4(A)(1)(A).

²¹⁸ *See, e.g.,* Smith v. State, 686 N.E.2d 1264 (Ind. 1997) (guilty plea with agreed recommendation for death sentence; death sentence appealed by appointed lawyers as *amicus* and upheld).

²¹⁹ IND. CODE § 35-38-4-6(a), (c) (2006).

²²⁰ IND. R. APP. P. 9(B); IND. R. CRIM. P. 24(E).

²²¹ IND. R. APP. P. 9(A); IND. R. CRIM. P. 19. A judgment is final if:

- (1) It disposes of all claims as to all parties;
- (2) The trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;
- (3) It is deemed final under Trial Rule 60(C);
- (4) It is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Rule 16 of the Rules of Criminal Procedure; or
- (5) It is otherwise deemed final by law.

IND. R. APP. P. 2(H).

²²² An “eligible defendant” is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a

s/he may file a petition for permission to file a belated notice of appeal with the trial court where (1) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (2) the defendant has been diligent in requesting permission to file a belated notice of appeal.²²³

Any party who has filed a notice of appeal must file an Appellant's Case Summary within thirty days of filing the notice of appeal.²²⁴ The defendant must file his/her brief within thirty days from the time the trial court clerk completes preparation of the transcript.²²⁵ The State's response brief must be filed within thirty days of being served with the appellant's brief²²⁶ and the appellant also may file a reply brief.²²⁷ The Court has discretion to set oral arguments.²²⁸

In the appeal, the Indiana Supreme Court must take into consideration all claims that (1) the conviction or sentence was in violation of the United States or Indiana Constitutions; (2) the sentencing court was without jurisdiction to impose a sentence; and (3) the sentence exceeds the maximum sentence authorized by law or is otherwise erroneous.²²⁹ In considering these claims, the Indiana Supreme Court will review the case to look for any irregularities in the trial court's decision.²³⁰ If the Court determines that no error occurred, the Court may affirm the decision of the trial court and order entry of Final Judgment.²³¹ If the Court determines that error did occur, the Court may react in a variety of ways, including to: (1) remand to the trial court for a clarification or new sentencing determination; (2) affirm the death sentence if the constitutional error is harmless beyond a reasonable doubt; and (3) reweigh the proper aggravating and mitigating circumstances independently at the appellate level.²³² The Court should enter

notice of appeal, filing a motion to correct error, or pursuing an appeal. IND. R. OF P. FOR POST-CONVICTION REMEDIES 2.

²²³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 2, § 1.

²²⁴ IND. R. APP. P. 15(A), (B). The Appellant's Case Summary will include party information (name and contact information of the party and his/her attorney), trial information (case name, names of all parties, case number, name of judge, date the case began, date of judgment or order, whether the trial was by judge or jury, synopsis of judgment and sentence, and case type), transcript information (date notice of appeal was filed, date transcript due to be filed, and other identifying information about the transcript), and appeal information (a statement of the anticipated issues on appeal, prior appeals in same case, related appeals, whether a motion for oral argument will be filed, whether a motion for pre-appeal conference will be filed, the detention status of the defendant, and certification that the case does or does not involved issues of child custody, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute). IND. R. APP. P. 15(C).

²²⁵ IND. R. APP. P. 45(B)(1).

²²⁶ IND. R. APP. P. 45(B)(2).

²²⁷ IND. R. APP. P. 45(B)(3).

²²⁸ IND. R. APP. P. 52.

²²⁹ IND. CODE § 35-50-2-9(j) (2006).

²³⁰ See *Bivins v. State*, 642 N.E.2d 928, 957 (Ind. 1994).

²³¹ IND. R. APP. P. 66(C)(1), (6).

²³² *Bivins*, 642 N.E.2d at 957. According to the Indiana Rules of Appellate Procedure, the Court may, with respect to some or all of the parties or issues, in whole or in part:

- (1) affirm the decision of the trial court;
- (2) reverse the decision of the trial court;
- (3) order a new trial or sentencing hearing;

the final judgment or that error be corrected without a new trial or hearing unless this relief is impracticable or unfair to any of the parties or it is otherwise improper.²³³ The Indiana Supreme Court also may commute a death sentence if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.²³⁴

Once the decision has been announced, either party may file a petition for rehearing within thirty days.²³⁵

After the decision and, if a petition for rehearing has been filed, the denial of that petition, either party may file a writ of *certiorari* with the United States Supreme Court. The United States Supreme Court either may deny or accept appellant's case for review. If the United States Supreme Court accepts the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.

If the United States Supreme Court does not accept the case for review, or accepts the case but either (1) does not overturn the appellant's conviction and/or sentence or (2) reinstates the appellant's conviction and/or sentence, the appellant's conviction and sentence are considered final. Alternatively, if neither party files a writ of *certiorari* with the United States Supreme Court, the conviction and sentence becomes final once the time to file a writ of *certiorari* has expired. If the appellant wishes to continue challenging the conviction and/or sentence, s/he may file a petition for post-conviction relief.

D. State Post-Conviction

Within thirty days following completion of any rehearing, private counsel or the State Public Defender must enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request that the Indiana Supreme Court extend the stay of execution of the death sentence.²³⁶ When the request to extend the stay is received, the Indiana Supreme Court will direct the trial court to submit a case management schedule for approval.²³⁷ On the thirtieth day following the completion of any appellate review of the decision in the post-conviction proceeding, the Indiana

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- (4) order entry of Final Judgment;
 - (5) order correction of a judgment or order;
 - (6) order findings or a judgment be modified;
 - (7) make any relief granted subject to conditions; and
 - (8) grant any other appropriate relief.

IND. R. APP. P. 66(C). This Rule contains additional options for disposition that are irrelevant to a capital appeal. *Id.*

²³³ IND. R. APP. P. 66(D).

²³⁴ IND. R. APP. P. 7(B).

²³⁵ IND. R. APP. P. 54(A), (B).

²³⁶ IND. R. CRIM. P. 24(H).

²³⁷ *Id.*

Supreme Court will enter an order setting the execution date.²³⁸ It is counsel's duty to provide notice to the Indiana Supreme Court Administrator of any action filed with or decision rendered by a federal court that relates to the defendant.²³⁹

A death-sentenced individual begins post-conviction proceedings by filing a verified petition with the clerk of the court in which the conviction took place.²⁴⁰ This petition will generally be filed by the State Public Defender (or private counsel), who has entered an appearance under Rule 24(H) of the Indiana Rules of Criminal Procedure. If a *pro se* petitioner is incarcerated in the Indiana Department of Correction and has requested representation, a copy of the petition will be sent to the Public Defender's office.²⁴¹ In such cases, the Public Defender may represent the petitioner if s/he determines that the proceedings are meritorious and in the interests of justice.²⁴² The court is not required to appoint counsel for a petitioner other than the Public Defender.²⁴³

The post-conviction petition should include every possible ground known for vacating, reducing, correcting, or changing the conviction and/or death sentence.²⁴⁴ Potential grounds for relief include:

- (1) The conviction or sentence was in violation of the Constitution of the United States or the constitution or laws of Indiana;
- (2) The court was without jurisdiction to impose sentence;
- (3) The sentence exceeds the maximum authorized by law, or is otherwise erroneous;
- (4) There exists evidence of material facts, not previously presented and heard, that requires vacating the conviction or sentence in the interest of justice;
- (5) The sentence has expired, his/her probation, parole or conditional release unlawfully revoked, or s/he is otherwise unlawfully held in custody or other restraint; and
- (6) The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.²⁴⁵

All available grounds of relief must be raised in the original petition.²⁴⁶ Any ground for relief that was finally adjudicated on the merits or was not raised and knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition unless the court finds a ground for relief asserted

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 2.

²⁴¹ *Id.*

²⁴² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(a)

²⁴³ *Id.*

²⁴⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, app.

²⁴⁵ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a).

²⁴⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

which for sufficient reasons was not asserted or was inadequately raised in the original petition.²⁴⁷

The attorney general will answer the petition on behalf of the state and state the reasons, if any, that the relief request should not be granted.²⁴⁸ If the Indiana Public Defender is representing the petitioner, the office has sixty days to respond to the Attorney General's answer to the petition.²⁴⁹

The petition will be heard without a jury.²⁵⁰ Pre-trial and discovery procedures generally available in civil procedures are available in state post-conviction proceedings.²⁵¹ The court may receive affidavits, depositions, oral testimony, or other evidence, and may, at its discretion, order the petitioner to be brought before it for a hearing.²⁵² The petitioner has the burden of establishing his/her grounds for relief by a preponderance of the evidence.²⁵³

If the pleadings conclusively show that the petitioner is not entitled to relief, the court may deny the petition with no further proceedings.²⁵⁴ The court may grant a motion for summary disposition of the petition if it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits that were submitted, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.²⁵⁵ The court may request oral arguments on the legal issues and if an issue of material fact is raised, the court must hold an evidentiary hearing as soon as is reasonably possible.²⁵⁶

The court must enter written findings of fact and conclusions of law concerning all of the issues raised in the petition, regardless of whether a hearing is held.²⁵⁷ If the court holds an evidentiary hearing, it must issue its order within ninety days of the evidentiary hearing.²⁵⁸ The court may dismiss the petition within ninety days without conducting a hearing if it determines that the petition is without merit.²⁵⁹ If the court finds in favor of the petitioner, it will enter an order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and

²⁴⁷ *Id.*

²⁴⁸ IND. CODE § 35-50-2-9(i) (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(a).

²⁴⁹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(f).

²⁵⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 5. If a death-sentenced individual files a petition for post-conviction relief, the court should set a date to hold a hearing to consider the petition within ninety days of the petition being filed. IND. CODE § 35-50-2-9(i) (2006).

²⁵¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 5.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(f).

²⁵⁵ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g).

²⁵⁶ *Id.*

²⁵⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6; IND. CODE § 35-50-2-9(i) (2006).

²⁵⁸ IND. CODE § 35-50-2-9(i) (2006).

²⁵⁹ *Id.*

proper.²⁶⁰ Such an order is considered a final judgment, and either party may appeal the decision to the Indiana Supreme Court after the final decision of the trial court on the petition for post-conviction relief.²⁶¹

If the Indiana Supreme Court affirms the lower court's decision, the petitioner may file a request for *certiorari* with the United States Supreme Court. If the United States Supreme Court declines to hear the appeal or affirms the lower court decision, the collateral appeal is complete.

A petitioner may request a second or successive Petition for Post-Conviction Relief.²⁶² The court will authorize the filing of the petition if the petitioner establishes a reasonable possibility that the petitioner is entitled to post-conviction relief.²⁶³ In making this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings, including the record, briefs, and court decisions, and any other material the court deems relevant.²⁶⁴ A petitioner will not establish a reasonable possibility that s/he is entitled to post-conviction relief where the petitioner alleges grounds for relief that are not different from those that were earlier decided on the merits or if the only grounds alleged, even if different, should have been alleged in an earlier proceeding.²⁶⁵

E. Petition to Present New Evidence

A person who has been sentenced to death and already had his/her case reviewed in state post-conviction proceedings may file a written petition with the Indiana Supreme Court seeking to present new evidence challenging the person's guilt or the appropriateness of the death sentence, so long as s/he serves notice on the attorney general.²⁶⁶ The Indiana Supreme Court will then determine, either with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence.²⁶⁷ The Indiana Supreme Court may, if necessary, remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence.²⁶⁸ The Court may not make a determination in the person's favor or make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general an opportunity to be heard.²⁶⁹

²⁶⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6.

²⁶¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, §§ 6, 7.

²⁶² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(a).

²⁶³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(b).

²⁶⁴ *Id.*

²⁶⁵ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § app.

²⁶⁶ IND. CODE § 35-50-2-9(k) (2006).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

F. Federal Habeas Corpus

After the state post-conviction proceedings are finished, a petitioner (previously called the defendant) wishing to challenge his/her conviction and/or sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* with a federal court. By filing the petition, the warrant of execution for the petitioner will be stayed.

Prior to filing the petition, the petitioner must have raised all relevant federal claims in state court.²⁷⁰ In fact, a federal court could deny the petition on the merits despite the petitioner's failure to exhaust all state remedies.²⁷¹

In a petition for a writ of *habeas corpus*, the petitioner must identify and raise all possible grounds of relief and summarize the facts supporting each ground.²⁷² If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.²⁷³ Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court's decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.²⁷⁴ In addition to the petition, the petitioner may, but is not required to, attach certified copies of the indictment, plea, and judgment to the petition.²⁷⁵ If the petitioner does not include these documents with the petition, the respondent must promptly file copies of those documents with the court.²⁷⁶

The petition must be filed in the federal district court for the district wherein the petitioner is in custody or in the district where the petitioner was convicted and sentenced.²⁷⁷ Indiana has two United States District Court districts—Northern (Fort Wayne, Hammond, and South Bend) and Southern (Indianapolis, Terre Haute, Evansville, and New Albany).²⁷⁸

There are two different sets of deadlines for filing a federal *habeas* petition. Petitioners must follow one set of deadlines if the state has “opt-ed in” to the “Special Habeas Corpus Procedures in Capital Cases,”²⁷⁹ and another if it has not. “Opting in,” among other things, allows the state to use expedited procedures, but a state may only “opt-in” to these expedited procedures if (1) the Attorney General of the United States certifies that

²⁷⁰ 28 U.S.C. § 2254(b)(1) (2006).

²⁷¹ 28 U.S.C. § 2254(b)(2) (2006).

²⁷² RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁷³ 28 U.S.C. § 2254(e)(1) (2006).

²⁷⁴ 28 U.S.C. § 2254(d) (2006).

²⁷⁵ 28 U.S.C. § 2249 (2006).

²⁷⁶ *Id.*

²⁷⁷ 28 U.S.C. § 2241(d); Rule 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. PROC. 22(a).

²⁷⁸ See United States District Court, Southern District of Indiana, at <http://www.insd.uscourts.gov/> (last visited Feb. 5, 2007); United States District Court, Northern District of Indiana Divisional Offices, at <http://www.innd.uscourts.gov/divisional.shtml> (last visited Feb. 5, 2007).

²⁷⁹ 28 U.S.C. §§ 2261-2266 (2006).

the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.²⁸⁰ The state must provide, either through court rule or statute, standards for appointing, compensating, and reimbursing competent counsel.²⁸¹ This mechanism must:

- (1) Offer counsel to all state prisoners under capital sentence; and
- (2) Provide the court of record the opportunity to enter an order (a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable to completely decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.²⁸²

In states that have “opted in,” the deadline for federal *habeas corpus* petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired.²⁸³ In states that have not “opted in,” including Indiana, the deadline for filing the petition is one year from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.²⁸⁴ The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.²⁸⁵

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.²⁸⁶ If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.²⁸⁷ In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent (the State) to file an answer replying to the allegations contained in the petition.²⁸⁸ In addition to the answer, the respondent must furnish all portions of the state court transcripts it deems relevant to the petition.²⁸⁹

²⁸⁰ 28 U.S.C. § 2261(b) (2006).

²⁸¹ 28 U.S.C. § 2261(c) (2006).

²⁸² *Id.*

²⁸³ 28 U.S.C. § 2263(a) (2006).

²⁸⁴ 28 U.S.C. § 2244(d)(1) (2006).

²⁸⁵ 28 U.S.C. § 2244(d)(2) (2006).

²⁸⁶ RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁷ *Id.*

²⁸⁸ RULES 4 and 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁹ RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.²⁹⁰

Additionally, either party may submit a request for the invocation of the discovery process.²⁹¹ The judge may grant such request if the requesting party establishes “good cause.”²⁹² The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.²⁹³ This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.²⁹⁴

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing to address some or all of the petitioner’s claims is required.²⁹⁵ The judge may not hold an evidentiary hearing on a claim for which the petitioner failed to develop any factual basis during the state court proceedings unless (1) the claim is based on newly recognized constitutional law or newly discovered, previously unavailable evidence; or (2) the facts underlying the claim would be sufficient to establish that but for constitutional error no reasonable fact finder would have found the applicant guilty of the underlying offense.²⁹⁶ If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.²⁹⁷ However, if an evidentiary hearing is required, the judge should appoint counsel to the petitioner²⁹⁸ and conduct the hearing as promptly as possible.²⁹⁹

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner’s claims. Based on the evidence presented, the judge may grant the petitioner a new guilt/innocence or sentencing proceeding or a new appeal, or leave the conviction and sentence intact.

In order to appeal the district court judge’s decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.³⁰⁰ If the petitioner seeks the appeal, s/he must also request a “certificate of appealability” from either a district or circuit court judge.³⁰¹ A judge may issue a “certificate of appealability” only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.³⁰² If the “certificate of appealability” is granted, the appeal will proceed to the Seventh Circuit Court of Appeals.

²⁹⁰ *Id.*

²⁹¹ RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹² RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹³ RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁴ RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁵ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁶ 28 U.S.C. § 2254(e)(2) (2006).

²⁹⁷ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁸ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C.A. § 3006A(g) (2006) (denoting the qualifications for federal habeas corpus counsel).

²⁹⁹ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³⁰⁰ FED. R. APP. P. 4(a)(1)(A).

³⁰¹ 28 U.S.C.A. § 2253(c)(1) (2006); FED. R. APP. PROC. 22(b).

³⁰² 28 U.S.C.A. § 2253(c)(2) (2006)

In appealing to the United States Court of Appeals, an appellant (defendant/petitioner) will file a brief arguing that the district court erred in denying relief. The Office of the Attorney General, representing the State of Indiana, will file a brief in response. The court generally holds oral arguments before a three-judge panel, although the judges of the court may agree to hear a case *en banc* in some situations. After oral arguments, the court considers the briefs and the arguments and issues a written opinion either affirming or reversing the district court's decision. In rendering its decision, the Seventh Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Seventh Circuit may order a new hearing in the federal district court or the state court, or a new guilt/innocence or sentencing proceeding.

Both parties may then seek review of the Seventh Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.³⁰³ The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence or sentencing trial or a new hearing.

If the petitioner wishes to file a second or successive *habeas corpus* petition, s/he must submit a motion to the Seventh Circuit Court of Appeals requesting an order authorizing the petitioner to file and the district court to consider the petition.³⁰⁴ A three-judge panel of the Seventh Circuit must consider the motion.³⁰⁵ The panel specifically must assess whether the petition makes a *prima facie* showing that the new claims presented in the second or successive petition:

- (1) Were not previously raised; and
- (2) Rely on a new, previously unavailable constitutional rule or newly discovered, previously unascertainable facts that, if proven, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.³⁰⁶

Any second or successive petition that presents a claim raised in a prior petition will be dismissed.³⁰⁷

If the Seventh Circuit denies the motion, the petitioner may not seek appellate review of the decision.³⁰⁸ If the Seventh Circuit grants the motion, then the second or successive motion will continue through the same process as the initial petition.

³⁰³ 28 U.S.C.A. § 1254(1) (2006).

³⁰⁴ 28 U.S.C.A. § 2244(b)(3)(A) (2006).

³⁰⁵ 28 U.S.C.A. § 2244(b)(3)(B) (2006).

³⁰⁶ 28 U.S.C.A. § 2244(b)(2) (2006).

³⁰⁷ 28 U.S.C.A. § 2244(b)(1) (2006).

³⁰⁸ 28 U.S.C.A. § 2244(b)(3)(E) (2006).

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency.³⁰⁹

G. Clemency

Under the Indiana Constitution, the Governor is given the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to regulations provided by law.³¹⁰

The Indiana legislature created the Indiana Parole Board (Board), a division of the Department of Corrections, to oversee the clemency process. The Board must make a recommendation on a reprieve, commutation, parole, or pardon request before the Governor may grant or deny such a request.³¹¹

To initiate the clemency process, the inmate must file an application to the governor for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture with the Board.³¹² Statements from the trial judge and the trial prosecuting attorney must be included in the petition.³¹³ Once received, the Board must conduct an investigation, which must include the collection of records, reports, and other information relevant to the consideration of the petition.³¹⁴ In addition, the Board must conduct a hearing where the petitioner and other interested people are provided the opportunity to appear and present information regarding the application.³¹⁵ The Board may delegate to one or more members of the Board the power to conduct an inquiry, investigation, hearing, or review.³¹⁶ If one or more members act on behalf of the Board, that member or employee may exercise all of the powers of the Board, except the power to render a final decision.³¹⁷ The member(s) must instead file the complete record of the proceedings together with his/her findings, conclusions, and recommended decision.³¹⁸ The Board will render a final decision that is based upon the record and the findings, conclusions, and recommendations.³¹⁹

³⁰⁹ IND. CODE § 11-9-2-1 (2006).

³¹⁰ IND. CONST. art. 5, § 17.

³¹¹ IND. CODE § 11-9-1-2(a) (2006). One exception to the Parole Board process was the case of Michael Daniels, in which Governor Kernan acted to grant clemency before receiving the Board's recommendation. According to Jon Laramore, former Legal Counsel for Governors O'Bannon and Kernan, the Governor's office determined that the language of the Indiana Constitution does not require that a Governor receive the Parole Board's recommendation before making a clemency decision. *See* Interview with Jon Laramore, Partner, Baker & Daniels LLP, and Former Counsel to Indiana Governors Frank O'Bannon and Joe Kernan (April 14, 2006).

³¹² IND. CODE § 11-9-2-1 (2006).

³¹³ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(a) (2006). If the trial judge and/or the prosecuting attorney is deceased or otherwise unavailable, a statement from the successor(s) in office will be accepted. If either or both parties decline to make a statement, this fact will be recorded in the petition. *Id.*

³¹⁴ IND. CODE § 11-9-2-2(b)(2) (2006).

³¹⁵ IND. CODE § 11-9-2-2(b)(3) (2006); IND. ADMIN. CODE tit. 220, r. 1.1-4-4(f) (2006).

³¹⁶ IND. CODE § 11-9-1-3(a) (2006).

³¹⁷ IND. CODE § 11-9-1-3(b) (2006).

³¹⁸ *Id.*

³¹⁹ *Id.*

In making its recommendation to the governor, the Board must consider:

- (1) The nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime;
- (2) The offender's prior criminal record;
- (3) The offender's conduct and attitude during incarceration; and
- (4) The best interests of society.³²⁰

In addition, the Board may consider:

- (1) The offender's previous social history;
- (2) The offender's employment during commitment;
- (3) The offender's educational and vocational training both before and during commitment;
- (4) The offender's age at the time of committing the offense and his/her age and level of maturity at the time of the clemency appearance;
- (5) The offender's medical condition and history;
- (6) The offender's psychological and psychiatric condition and history;
- (7) The offender's employment history prior to incarceration;
- (8) The relationship between the offender and the victim of the crime;
- (9) The offender's economic condition and history;
- (10) The offender's previous parole or probation experiences;
- (11) The offender's participation in substance abuse programs;
- (12) The attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;
- (13) The attitudes and opinions of the victim of the crime, or of the relatives or friends of the victim;
- (14) The attitudes and opinions of the friends and relatives of the offender;
- (15) Any other matter reflecting upon the likelihood that the offender, if released upon parole, is able to and will fulfill the obligations of a law-abiding citizen; and
- (16) The offender's proposed places of employment and of residence were he to be released on parole.³²¹

Before the Board can recommend that the governor grant a petition for commutation, there must be an investigation of the attitudes and opinions of the community in which the crime occurred, of the victim or of the relatives and friends of the victim, or of the friends and relatives of the offender,³²² as well as a report of the offender's medical, psychological, and psychiatric condition and history.³²³ In addition, before submitting its recommendation, the Board must notify the sentencing court, the next of kin of the

³²⁰ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(d) (2006).

³²¹ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(e) (2006).

³²² IND. ADMIN. CODE tit. 220, r. 1.1-4-4(b) (2006).

³²³ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(c) (2006).

victim, unless the victim has made a written request not to be notified, and the prosecuting attorney of the county where the conviction was obtained.³²⁴

Regardless of the Board's recommendation, the Governor has discretion in deciding whether to grant clemency.³²⁵

H. Execution

The trial court originally sets an execution date in the original sentencing order for one year from the date of judgment of conviction.³²⁶ Upon petition or own its own motion, the Indiana Supreme Court will stay the initial execution date set by the trial court.³²⁷ On the thirtieth day following completion of rehearing, the Indiana Supreme Court will enter an order setting a new execution date, unless counsel has appeared and requested a stay as part of the state post-conviction proceedings.³²⁸

The Indiana Supreme Court has exclusive jurisdiction in the state courts to stay the execution of a death sentence.³²⁹ If and when the Court stays an execution, it will order the new execution date when the stay is lifted.³³⁰

Execution may not occur until at least one hundred days after the conviction.³³¹ Lethal injection is the only legal method of execution.³³²

The following people may be present at the execution:

- (1) The prison superintendent;
- (2) The person designated by the prison superintendent and any assistant who are necessary to assist in the execution;
- (3) The prison physician;
- (4) One other physician;
- (5) The convicted person's spiritual advisor;
- (6) The prison chaplain;
- (7) Up to five friends or relatives of the convicted person who are invited by the convicted person to attend;
- (8) Up to eight members of the victim's immediate family who are at least eighteen years of age, limited to the victim's spouse and one or more of the victim's children, parents, grandparents, and siblings.³³³

³²⁴ IND. CODE § 11-9-2-2(b)(1) (2006).

³²⁵ IND. CODE § 11-9-2-3 (2006); *Trueblood v. State*, 790 N.E.2d 97, 97-98 (Ind. 2003).

³²⁶ IND. R. CRIM. P. 24(F).

³²⁷ IND. R. CRIM. P. 24(G)(2).

³²⁸ *Id.*

³²⁹ IND. R. CRIM. P. 24(G)(1).

³³⁰ *Id.*

³³¹ IND. CODE § 35-38-6-1(b) (2006).

³³² IND. CODE § 35-38-6-1(a) (2006).

³³³ IND. CODE § 35-38-6-6(a) (2006).

CHAPTER TWO

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

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.¹ Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.² However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.³ The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.⁴

Thoroughness in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,⁵ and through the priorities and practices of other police oversight groups.⁶

¹ See ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115> (last visited Feb. 6, 2007).

² See National Conference of State Legislatures, DNA & Crime, *at* <http://www.ncsl.org/programs/health/genetics/dna.htm> (last visited Feb. 6, 2007); *see also* Innocence Project, Policy, *at* <http://www.innocenceproject.org/policy/> (last visited Feb. 6, 2007).

³ See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *Id.* (Standard 1-5.1) (police should be “made fully accountable” to their supervisors and to the public for their actions).

⁴ See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

⁵ Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

⁶ Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies,

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.⁷

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or state law are unavailable.⁸ Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice calls for them.⁹

Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all 50 states. Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. *See* CALEA Online, at <http://www.calea.org/> (last visited Feb. 6, 2007). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, at <http://www.asclld-lab.org> (last visited Feb. 6, 2007); NFSTC, at <http://www.nfstc.org/> (last visited Feb. 6, 2007).

⁷ Standard 1-7.3 provides:

- (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
- (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

Standard 1-7.3; *see also* Standard 1-5.2(a) (noting value of “education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society”).

⁸ *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) (“Adequate Police Resources”).

⁹ *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

Two Indiana death-row inmates have been exonerated since the reinstatement of the death penalty in 1973.¹⁰ In 2001, in order to provide for greater access to DNA testing and analysis,¹¹ the Indiana Legislature adopted section 35-38-7-1 of the Indiana Code, providing the means for individuals to challenge their convictions and sentences in certain circumstances by seeking DNA testing of evidence.¹²

A. *Preservation of DNA Evidence and Other Types of Evidence*

The State of Indiana does not statutorily require the preservation of evidence, except for physical exhibits admitted at trial¹³ and after a post-conviction petition for DNA testing has been filed.¹⁴

1. Procedures for Pre-Trial Preservation of Evidence

Indiana law enforcement agencies that collect evidence during a criminal investigation are responsible for holding and maintaining that evidence throughout the pre-trial phase. All police departments, sheriffs' departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Indiana that are certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹⁵ and/or the Indiana Law Enforcement

¹⁰ See Death Penalty Information Center, Cases of Innocence 1973 - Present, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Sept. 25, 2006). The Death Penalty Information Center lists individuals on its "innocence list" if they had "been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id.* In Indiana, the two exonerated individuals are Larry Hicks, who was acquitted at re-trial in 1980, and Charles Smith, who was acquitted at re-trial in 1991. *Id.*

¹¹ 200 Ind. Acts 49, *codified as amended at*, IND. CODE § 35-38-7-1 to -19 (2006); *see also* Lacey v. State, 829 N.E.2d 518, 519 (Ind. 2005) (citing Joel M. Schumm, *Survey: Criminal Law and Procedure: Recent Developments in Indiana Criminal Law and Procedure*, 35 IND. L. REV. 1347, 1348 (2002)).

¹² IND. CODE § 35-38-7-1 to -19 (2006).

¹³ IND. R. APP. P. 29. Nondocumentary and oversized exhibits remain in the custody of the trial court during the direct appeal. *Id.* No provision appears to be made for these materials after the direct appeal is completed.

¹⁴ IND. CODE § 35-38-7-14(1) (2006).

¹⁵ Fifteen police departments, sheriff's departments, and university/college police departments in Indiana have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). *See* CALEA Online, Agency Search, *at* <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 2, 2007) (use second search function, designating "U.S."; "Indiana"; and "Law Enforcement Accreditation" as search criteria); *see also* CALEA Online, About CALEA, *at* <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 6, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of: (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law

Accreditation Commission (ILEAC)¹⁶ are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.¹⁷ Further, any laboratory that conducts DNA analysis in Indiana must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹⁸

All crime labs that are accredited by ASCLD/LAB are required to adopt or abide by certain procedures relating to the preservation of evidence.¹⁹ Currently, the four regional state police crime laboratories, as well as one county forensic services agency, have voluntarily obtained accreditation through the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).²⁰ ASCLD/LAB specifically requires laboratories to have a written or secure electronic chain of custody record with all necessary data and a secure area for overnight and/or long-term storage of evidence.²¹ All evidence must also be marked for identification, stored under proper seal, meaning that the contents cannot readily escape, and be protected from loss, cross-transfer, contamination and/or deleterious change.²²

enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission; and (6) a hearing where a final decision on accreditation is rendered. See CALEA Online, The Accreditation Process, at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Feb. 6, 2007).

¹⁶ The Indianapolis Metropolitan Police Department has obtained accreditation under the ILEAC standards. Commission for Indiana Law Enforcement Accreditation, Accredited Agencies, at http://www.iacop.org/ileac/accredited_agencies.htm (last visited Feb. 5, 2007).

¹⁷ COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1).

¹⁸ IND. CODE § 10-13-6-14(a) (2006). The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards. See American Society of Crime Laboratory Directors/Laboratory Accreditation Board, ASCLD/LAB-Legacy, available at <http://www.asclld-lab.org/legacy/indexlegacy.html> (last visited Feb. 2, 2007).

¹⁹ ASCLD/LAB, LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

²⁰ The following laboratories in Indiana are currently accredited through the ASCLD/LAB-Legacy program: (1) Indiana State Police, Evansville Regional Laboratory; (2) Indiana State Police, Ft. Wayne Regional Laboratory; (3) Indiana State Police, Indianapolis Regional Laboratory; (4) Indiana State Police, Lowell Regional Laboratory; and (5) Indianapolis-Marion County Forensic Services Agency. See Laboratories Accredited by ASCLD/LAB, American Society of Crime Laboratories Directors/Laboratory Accreditation Board, available at <http://www.asclld-lab.org/legacy/aslablegacylaboratories.html> (last visited on Sept. 26, 2006).

²¹ ASCLD/LAB 2003 MANUAL, *supra* note 19, at 20-23.

²² *Id.*

Furthermore, Indiana law requires that quality assurance guidelines issued by the Technical Working Group on DNA Analysis Methods serve as the standard for DNA testing until national standards are set.²³ As part of the Standards for Forensic DNA Testing Laboratories issued by the Technical Working Group on DNA Analysis Methods, the laboratory must have and follow a documented evidence control system to ensure the integrity of physical evidence, including requirements that:

- (1) The laboratory shall have and follow a documented evidence control system to ensure the integrity of physical evidence. This system shall ensure that (a) evidence is marked for identification; (b) chain of custody for all evidence is maintained; (c) the laboratory follows documented procedures that minimize loss, contamination, and/or deleterious change of evidence and (d) the laboratory has secure areas for evidence storage;²⁴
- (2) Where possible, the laboratory shall retain or return a portion of the evidence sample or extract;²⁵ and
- (3) The laboratory shall have a procedure requiring that evidence sample/extract(s) are stored in a manner that minimizes degradation.²⁶

2. Procedures for Preservation of Evidence during and After Trial

All property that was seized by law enforcement will be “securely held” by the law enforcement agency under the order of the court trying the case.²⁷ Following the “final disposition of the cause at trial level or any other final disposition,” property that was seized by law enforcement may, under varying circumstances, be returned to its owner or destroyed.²⁸

The court reporter of the trial court in the county where each death penalty case is tried is responsible for retaining non-documentary and oversized exhibits admitted at trial through the direct appeal.²⁹ The clerk of the trial court in each county must maintain the case file in every case, including death penalty cases.³⁰ If an appeal is taken, a copy of the court’s file is assembled as part of the Appendix on appeal.³¹ The Appendix then is maintained by the Clerk of the Indiana Supreme Court.

The recordkeeping formats and systems and the quality and permanency requirements used for the Chronological Case Summary, the Case File, and the Record of Judgments and Orders (Order Book) must be approved by the Division of State Court

²³ IND. CODE § 10-13-6-14(b) (2006).

²⁴ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 7.1, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

²⁵ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, *supra* note 24, at Standard 7.2.

²⁶ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, *supra* note 24, at Standard 7.2.1.

²⁷ IND. CODE § 35-33-5-5(a) (2006). There are limited exceptions to this general rule.

²⁸ IND. CODE § 35-33-5-5 (2006).

²⁹ IND. R. APP. P. 29.

³⁰ IND. R. APP. P. 77(A)(2).

³¹ IND. R. APP. P. 50(B).

Administration for compliance with applicable requirements.³² Current schedules require the record of a criminal felony trial be preserved for fifty-five years after the final disposition of the case³³ and the Chronological Case Summary³⁴ and the Record of Judgments and Orders³⁵ be retained as permanent records.³⁶

If a petition for post-conviction DNA testing and analysis is filed, the state must preserve all of the evidence in its possession or control that could be subjected to DNA testing through the entirety of the proceeding.³⁷

Other than the standards discussed above, the State of Indiana does not have any uniform procedures for the preservation of evidence during the capital trial or any uniform requirements for how long evidence must be preserved after the conclusion of the trial. Furthermore, Indiana courts have held that the destruction of “potentially useful evidence” is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.³⁸ Despite this, Indiana courts have held that police and prosecutors have a duty to preserve exculpatory evidence, so long as it could be expected to play a “significant role in the suspect’s defense.”³⁹ In order to meet this standard, the evidence must have had “exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”⁴⁰

B. Post-Conviction DNA Testing

Pursuant to section 35-38-7-5 of the Indiana Code, individuals who have been “convicted of and sentenced for an offense” by a Indiana court may file a written petition with the court that sentenced the petitioner requesting forensic DNA testing and analysis of any evidence that (1) is in the possession or control of a court or the state or otherwise contained in the Indiana DNA database; (2) is related to the investigation or prosecution that resulted in the person’s conviction; and (3) may contain biological evidence.⁴¹ A petition filed by a person who has been convicted or sentenced for a crime by an Indiana

³² IND. R. CRIM. P. 23.

³³ IND. R. CT., ADMIN. R. 7(D).

³⁴ “Chronological case summaries are a sequential, brief record of the activities and actions in a particular case. The CCS is the court’s case management tool and should be accurate both as to the date events occurred, as well as in summarizing the nature of these events.” Division of State Court Administration, TRIAL RULE 77 QUICK GUIDE, Summer 2006, *available at* <http://www.in.gov/judiciary/admin/pubs/tr77-quick-guide.pdf> (last visited Feb. 2, 2007).

³⁵ “The Record of Judgment and Orders is a daily, verbatim compilation of all judgments of the court, as well as designated orders.” *Id.*

³⁶ IND. R. TRIAL P. 77.

³⁷ IND. CODE § 35-38-7-14 (2006).

³⁸ *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) and holding that “[p]otentially useful evidence is defined as ‘evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant’”).

³⁹ *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000).

⁴⁰ *Id.* at 675-76.

⁴¹ IND. CODE § 35-38-7-5 (2006).

court that seeks to require forensic DNA testing or analysis of any evidence pursuant to Indiana Code section 35-38-7-5 is considered a Petition for Post-Conviction Relief.⁴² If the defendant is indigent, the court may appoint defense counsel at any time during the proceedings.⁴³

After the petitioner has provided notice of the petition to the prosecuting attorney in the county where the offense allegedly was committed⁴⁴ and the prosecuting attorney is given the opportunity to respond, the court may, but is not required to, order a hearing on the petition.⁴⁵

Once a petition for DNA testing is filed, the court will order the state to preserve all of the evidence in its possession or control that could be subjected to DNA testing through the entirety of the proceeding.⁴⁶ In addition, the state must prepare an inventory of the evidence in its possession or control that could be subjected to DNA testing and submit a copy of the inventory to defense counsel and the court.⁴⁷ If evidence is intentionally destroyed after the court orders its preservation, the court may impose “appropriate sanctions.”⁴⁸

Before ordering DNA testing, the court must determine whether the petitioner has presented *prima facie* proof that:

- (1) The evidence sought to be tested is material to identifying the petitioner as the perpetrator of or an accomplice to the offense that resulted in the petitioner’s conviction;
- (2) A sample of the evidence that the petitioner seeks to subject to DNA testing and analysis is in the possession or control of the state, a court, or another person. If it is in the possession or control of another person, a sufficient chain of custody for the evidence must exist to suggest that the evidence has not been substituted, tampered with, replaced, contaminated, or degraded in any material aspect;
- (3) The evidence sought to be tested was not previously tested or was tested, but the requested DNA testing and analysis will provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results; and
- (4) A reasonable probability exists that the petitioner would not have been prosecuted for or convicted of the offense or received as severe a sentence for the offense if exculpatory results had been obtained through the requested DNA testing and analysis.⁴⁹

⁴² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(d).

⁴³ IND. CODE § 35-38-7-11 (2006).

⁴⁴ IND. CODE § 35-38-7-6 (2006).

⁴⁵ IND. CODE § 35-38-7-7 (2006).

⁴⁶ IND. CODE § 35-38-7-14(1) (2006).

⁴⁷ IND. CODE § 35-38-7-14(2) (2006).

⁴⁸ IND. CODE § 35-38-7-14(3) (2006).

⁴⁹ IND. CODE § 35-38-7-8 (2006).

If the court makes these findings, it will order DNA testing and analysis of the evidence.⁵⁰ The court may issue other orders that it considers appropriate, including: designating the type of DNA testing and analysis to be used; that the DNA testing and analysis satisfy the pertinent evidentiary rules concerning the admission of scientific evidence or testimony in the Indiana Rules of Evidence; the procedures to be followed during the DNA testing and analysis; the preservation of some of the sample for replicating the DNA testing and analysis; and the testing of elimination samples from third parties.⁵¹

The prosecuting attorney may provide notice to the victim's family when the defendant first files a petition for DNA testing and analysis.⁵² If the court grants the petition, the prosecuting attorney must provide notification to the victim's family, so long as the name and address is known.⁵³ The victim's family also will be notified of the results of the DNA testing.⁵⁴ If the petitioner is exonerated by DNA testing, the victim's family must be notified before the petitioner's release.⁵⁵

1. Disposition of a Motion for Post-Conviction DNA Testing

If the results of the post-conviction DNA testing are not favorable to the petitioner, the court (1) will dismiss the petition and (2) may make any further orders that the court believes are appropriate, including an order providing for notification to the parole board or probation department and/or requesting that the petitioner's sample be added to the Indiana DNA database.⁵⁶ If the results of the testing are favorable to the person who was convicted of the offense, the court will order any of the following:

- (1) Upon motion of the prosecuting attorney and a showing of good cause, order retesting of the identified biological material and stay the petitioner's motion for a new trial pending the results;
- (2) Upon a joint petition of the prosecuting attorney and the petitioner, order the release of the person; or
- (3) Order a new trial or any other relief as may be appropriate.⁵⁷

2. Limitations on Multiple Petitions

A petition to present new evidence challenging the person's guilt or the appropriateness of the sentence, when brought by a person who has been sentenced to death and who has completed state post-conviction review proceedings, is considered a Successive Petition

⁵⁰ IND. CODE § 35-38-7-9 (2006).

⁵¹ IND. CODE § 35-38-7-15 (2006).

⁵² IND. CODE § 35-38-7-16(a) (2006).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ IND. CODE § 35-38-7-16(d) (2006).

⁵⁶ IND. CODE § 35-38-7-18 (2006).

⁵⁷ IND. CODE § 35-38-7-19 (2006).

for Post-Conviction relief.⁵⁸ The court will authorize the filing of a successive petition if the petitioner establishes a reasonable possibility that s/he is entitled to post-conviction relief.⁵⁹ In making this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings, including the record, briefs and court decisions, and any other material the court deems relevant.⁶⁰

C. Location of DNA Testing

If the court orders DNA testing, it will select a laboratory that meets the quality assurance and proficiency testing standards applicable to laboratories conducting forensic DNA analysis under section 10-13-6 of the Indiana Code.⁶¹

D. Costs of DNA Testing

If the court orders DNA testing, it will order the method and responsibility for the payment of any costs associated with the DNA testing and analysis.⁶²

⁵⁸ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(e).
⁵⁹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(b).
⁶⁰ *Id.*
⁶¹ IND. CODE § 35-38-7-12 (2006).
⁶² IND. CODE § 35-38-7-10 (2006).

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence⁶³ for as long as the defendant remains incarcerated.

The State of Indiana does not have a law requiring all government entities to preserve physical evidence in death penalty cases for as long as the defendant remains incarcerated.

Despite not requiring the preservation of physical evidence through the entire legal process, there are a number of preservation requirements that apply to trial records. For example, current schedules set by the Division of State Court Administration require the record of a criminal felony trial be preserved for fifty-five years after the final disposition of the case and the Chronological Case Summary⁶⁴ and the Record of Judgments and Orders⁶⁵ be retained as permanent records.⁶⁶

Furthermore, Indiana courts have held that police and prosecutors have a duty to preserve exculpatory evidence pre-trial, so long as it could be expected to play a “significant role in the suspect’s defense.”⁶⁷ In order to meet this standard, the evidence must have had “exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”⁶⁸ Indiana courts also have held that the destruction of “potentially useful evidence”⁶⁹ is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.⁷⁰

Indiana law also requires that when a post-conviction petition for DNA testing and analysis is filed, the court must order the state to preserve all of the evidence in the state’s

⁶³ “Biological evidence” includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. See INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute.html (last visited Feb. 6, 2007).

⁶⁴ “Chronological case summaries are a sequential, brief record of the activities and actions in a particular case. The CCS is the court’s case management tool and should be accurate both as to the date events occurred, as well as in summarizing the nature of these events.” TRIAL RULE 77 QUICK GUIDE, *supra* note 34.

⁶⁵ “The Record of Judgment and Orders is a daily, verbatim compilation of all judgments of the court, as well as designated orders.” *Id.*

⁶⁶ IND. R. TRIAL P. 77; IND. R. CT., ADMIN. R. 7(D).

⁶⁷ *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000).

⁶⁸ *Id.* at 675-76.

⁶⁹ *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), and finding that “[p]otentially useful evidence is defined as ‘evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant’”).

⁷⁰ *Id.*

possession or control that could be subjected to DNA testing through the entirety of the proceeding.⁷¹

While the State of Indiana makes some limited efforts to preserve evidence, it does not ensure that all biological evidence is preserved for as long as the defendant is incarcerated and, therefore, is not in compliance with Recommendation #1.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the State of Indiana require that all biological evidence be preserved for as long as the defendant remains incarcerated.

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.

The State of Indiana provides two potential opportunities for individuals to obtain DNA testing of biological evidence in their case: (1) defendants may obtain physical evidence for DNA testing during pre-trial discovery;⁷² and (2) inmates may seek post-conviction DNA testing.⁷³

DNA Testing During Pre-Trial Discovery

Indiana law provides that parties may obtain discovery regarding any matter that is not privileged and is relevant to the subject-matter involved in the case, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of people who have knowledge of any discoverable matter.⁷⁴ Either party may ask the other party to produce and permit the party making the request, or someone acting on his/her behalf, to inspect and copy, any designated documents from which intelligence can be perceived, with or without the use of detection devices.⁷⁵ In addition, a party may inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of the discovery rules and are in the possession, custody, or control of the party upon whom the request is served.⁷⁶

Furthermore, if a party requests a mental or physical examination due to a controversy over the mental or physical condition (including the blood group) of a party, the party against whom the discovery order is made may have a detailed written report in which

⁷¹ IND. CODE § 35-38-7-14 (2006).

⁷² See IND. R. TRIAL P. 26(A),34(A)(1).

⁷³ IND. CODE § 35-38-7-1 (2006) *et seq.*; see also Lacey v. State, 829 N.E.2d 518 (Ind. 2005).

⁷⁴ IND. R. TRIAL P. 26(B)(1).

⁷⁵ IND. R. TRIAL P. 34(A)(1).

⁷⁶ *Id.*

the examiner sets out his/her findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.⁷⁷

Based on these rules, it appears that a defendant has the right to inspect and test evidence that is in the possession of the prosecution and is “relevant to the case,”⁷⁸ which could include biological evidence collected from the defendant and evidence collected from co-defendants and victims. If the defendant believes that evidence which could be subject to DNA testing is in the possession of the prosecution but was not disclosed, s/he may file a motion to compel discovery.⁷⁹

Post-Conviction DNA Testing

Pursuant to section 35-38-7-5 of the Indiana Code, a person who has been “convicted of and sentenced for an offense” by an Indiana court may file a written petition with that court requesting forensic DNA testing and analysis.⁸⁰ The statute allows DNA testing of any evidence that: (1) is in the possession or control of a court or the state or otherwise contained in the Indiana DNA database; (2) is related to the investigation or prosecution that resulted in the person’s conviction; and (3) may contain biological evidence.⁸¹ Post-conviction DNA testing motions may be made by inmates who were tried and found guilty, pleaded guilty or pleaded *nolo contendere*.⁸²

Notably, judges are not required to hold a hearing on a petitioner’s motion requesting post-conviction DNA testing.⁸³ After the petitioner provides notice of the petition to the prosecuting attorney⁸⁴ and s/he is given the opportunity to respond, the court may, in its discretion, order a hearing on the petition.⁸⁵

Regardless of whether the court holds an evidentiary hearing, it may deny the request for DNA testing if it finds that the defendant has not presented *prima facie* proof that:

- (1) The evidence sought to be tested is material to identifying the petitioner as the perpetrator of or an accomplice to the offense that resulted in the petitioner’s conviction;
- (2) A sample of the evidence that the petitioner seeks to subject to DNA testing and analysis is in the possession or control of the state, a court, or another person. If it is in the possession or control of another person, a

⁷⁷ IND. R. TRIAL P. 34(A)-(B).

⁷⁸ IND. R. TRIAL P. 26(B)(1).

⁷⁹ IND. R. TRIAL P. 37(A).

⁸⁰ IND. CODE § 35-38-7-5 (2006).

⁸¹ *Id.*

⁸² “A petition filed by a person who has been convicted or sentenced for a crime by a court of this state that seeks to require forensic DNA testing or analysis of any evidence, whether denominated as a petition filed pursuant to Ind. Code § 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief.” IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(d).

⁸³ IND. CODE § 35-38-7-7 (2006).

⁸⁴ IND. CODE § 35-38-7-6 (2006).

⁸⁵ IND. CODE § 35-38-7-7 (2006).

- sufficient chain of custody for the evidence must exist to suggest that the evidence has not been substituted, tampered with, replaced, contaminated, or degraded in any material aspect;
- (3) The evidence sought to be tested was not previously tested or was tested, but the requested DNA testing and analysis will provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results; and
 - (4) A reasonable probability exists that the petitioner would not have been prosecuted for or convicted of the offense or received as severe a sentence for the offense if exculpatory results had been obtained through the requested DNA testing and analysis.⁸⁶

Although defendants in Indiana appear to have the ability to inspect and test certain evidence in the possession of the prosecution, post-conviction petitioners in Indiana seeking DNA testing must overcome several procedural hurdles in order for a court to review the merits of their claim. The State of Indiana, therefore, is only in partial compliance with Recommendation #2.

C. Recommendation #3

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

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) and/or the Indiana Law Enforcement Accreditation Commission (ILEAC)⁸⁷ requires each accredited law enforcement agency to adopt a written directive establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing and avoiding contamination of physical evidence.⁸⁸ Fifteen law enforcement agencies in Indiana have obtained or are in the process of obtaining accreditation by CALEA,⁸⁹ and one law enforcement agency has obtained ILEAC accreditation.⁹⁰ All Indiana accredited agencies, therefore, should have a written directive establishing procedures governing the preservation of biological evidence, but the extent to which these procedures comply with Recommendation #3 is unknown.

⁸⁶ IND. CODE § 35-38-7-8 (2006).

⁸⁷ Fifteen police departments, sheriff's departments, and university/college police departments in Indiana have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 2, 2007) (use second search function, designating "U.S."; "Indiana"; and "Law Enforcement Accreditation" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 6, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States).

⁸⁸ CALEA STANDARDS, *supra* note 17, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1).

⁸⁹ See *supra* note 15.

⁹⁰ The Indianapolis Metropolitan Police Departments has obtained accreditation under the ILEAC standards. Commission for Indiana Law Enforcement Accreditation, Accredited Agencies, at http://www.iacop.org/ileac/accredited_agencies.htm (last visited Feb. 7, 2007).

Additionally, Indiana law requires every in-state laboratory that conducts forensic DNA analysis, several of which are part of law enforcement offices, to implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by the American Society of Crime Lab Directors Laboratory Accreditation Board (ASCLD/LAB).⁹¹ All four of the Indiana state police regional crime laboratories and one county forensic services agency accredited by the ASCLD/LAB are required, as a prerequisite to accreditation, to adopt specific procedures relating to the preservation of evidence.⁹²

In conclusion, although all certified crime laboratories have written procedures and policies which govern the preservation of biological evidence, it is unclear how many Indiana law enforcement agencies, certified or otherwise, have adopted such procedures. Therefore, the State of Indiana is only in partial compliance with Recommendation #3.

D. Recommendation #4

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

Indiana law mandates that every law enforcement officer complete a pre-basic and a basic training course, which includes twelve hours of instruction on “criminal investigation.” We did not, however, obtain the training materials to determine whether this mandatory training course ensures that investigative personnel are prepared and accountable for their performance.

In addition, law enforcement agencies in Indiana certified under CALEA are required to establish written directives requiring a training program⁹³ and an annual, documented performance evaluation of each employee.⁹⁴

Furthermore, while certification is not required, the Indiana Law Enforcement Training Board has approved the certification of crime scene investigators. The crime scene certification process is voluntary and the certification establishes a minimum standard of training and experience necessary for certification.⁹⁵ As part of the 120 hours of training required for certification, certified investigators must be trained in crime scene security, crime scene management, and crime scene documentation.⁹⁶

⁹¹ IND. CODE § 10-13-6-14(a) (2006).

⁹² ASCLD/LAB 2003 MANUAL, *supra* note 19, at 20-23; General Requirements for Accreditation (5.8.1).

⁹³ CALEA STANDARDS, *supra* note 17, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2).

⁹⁴ CALEA STANDARDS, *supra* note 17, at 35-1 (Standards 35.1.2).

⁹⁵ Indiana Law Enforcement Academy, *Indiana Certifies Crime Scene Investigators*, available at <http://www.in.gov/ilea/bulletin/Indiana%20Certifies%20Crime%20Scene%20Investigators.pdf> (last visited Feb. 6, 2007).

⁹⁶ *Id.*

Based on this information, it appears that law enforcement investigative personnel, including law enforcement officers, do receive mandatory pre-basic and basic training and some law enforcement agencies are required to keep performance evaluations. However, the extent to which the training courses and the CALEA certification program comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Additionally, while crime scene investigator certification is available to Indiana law enforcement agencies, such certification is not mandatory. Therefore, the State of Indiana is in partial compliance with Recommendation #4.

E. Recommendation #5

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

Law enforcement agencies in Indiana certified under CALEA and/or ILEAC are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.⁹⁷ It appears, therefore, that certified law enforcement agencies should have adopted written directives governing complaints against the agency and/or its employees. However, the extent to which these procedures comply with Recommendation #5 and the number of law enforcement agencies in the State of Indiana that have adopted such directives is unknown. Therefore, we are unable to determine whether the State of Indiana is in compliance with Recommendation #5.

F. Recommendation # 6

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

The amount of funding specifically dedicated to the preservation of biological evidence in Indiana is unknown. However, we were able to obtain the total amount of funding provided to Indiana's five publicly funded crime laboratories. The four Indiana state police labs received \$4,288,841 in fiscal year 2006-07 and \$4,286,849 in fiscal year 2005-06.⁹⁸ The Marion County crime lab had a budget of \$3,240,029 in 2005; \$3,959,674 in 2004; \$2,952,195 in 2003; and \$2,964,943 in 2002.⁹⁹ In 2002, the state crime labs received \$1 million after the legislature earmarked part of a Bureau of Motor Vehicles fee for the crime lab.¹⁰⁰ Over the following four years, the Bureau of Motor Vehicles fee was expected to draw \$12.23 million for the lab from these funds.¹⁰¹

⁹⁷ CALEA STANDARDS, *supra* note 17, at 52-1 (Standard 52.1.1).

⁹⁸ Indiana State Budget Agency, 2005 Budget, Public Safety Budget, at 7, *available at* http://www.in.gov/sba/budget/2005_budget/as_passed/pdfs/ap_2005_c_2_5_pub_saf_data.pdf (last visited Feb. 6, 2007).

⁹⁹ Marion County, 2005 Proposed Budget, *available at* <http://www.indygov.org/NR/rdonlyres/epbcddneuz5wofzbvviw542lmojp3qbukapykmyht73wudqz4b5yi6vssluymbqbwldl6tfq7iask5cy32kajdgpmsb/2005epublicsafety.pdf> (last visited Feb. 2, 2007).

¹⁰⁰ Diana Penner, *State Police Lab Doubling Unit*, INDIANAPOLIS STAR, Aug. 11, 2002, at 1B.

¹⁰¹ *Id.*

In addition to state funding, \$461,320 per year was earmarked from the federal government for funding the DNA labs during 2005-06 and 2006-07.¹⁰² Also, \$669,478 in additional funding has been appropriated for the DNA Sample Processing Fund for these years.¹⁰³ One and one half million dollars in additional funding also was appropriated to help with Indiana's methamphetamine lab investigations and enforcement.¹⁰⁴ In 2004, police received more than \$3 million in grants through President Bush's \$1 billion, five-year DNA initiative.¹⁰⁵

Even with this funding, however, it appears that Indiana's crime laboratories may be over-burdened. Since the mid-1990s, the total number of cases handled by the police crime labs has increased by 300%.¹⁰⁶ In February 2003, there were 750 unprocessed DNA cases across the State of Indiana.¹⁰⁷ As of July 2005, there was a nine month backlog for DNA testing in the Marion County lab.¹⁰⁸ In February 2005, mold was found on five evidence packages stored in the Fort Wayne state police lab, potentially jeopardizing the integrity of the evidence by breaking down biological material.¹⁰⁹

Based on this information, it is questionable whether the State of Indiana provides adequate funding to ensure the proper preservation and testing of biological evidence. Still, we were unable to gather sufficient information to appropriately assess whether the State of Indiana is in compliance with Recommendation #6.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Laura Johnston, *Financing Drying Up for DNA Lab Samples from Inmates Being Backlogged at Laboratories*, FORT WAYNE J. GAZETTE, Feb. 6, 2005.

¹⁰⁶ The Justice Project, 2 CRIM. JUSTICE REFORMER 11, Nov. 17, 2005, available at <http://www.thejusticeproject.org/about/newsletter/the-criminal-justice-2-11.html> (last visited Feb. 6, 2007).

¹⁰⁷ *DNA Can Lead to Convictions in Unsolved Cases*, WNDU.COM (on file with author).

¹⁰⁸ Press Release, Office of Bart Peterson, Mayor of Indianapolis, Mayor to Take Tour of Crime Lab (Jul. 12, 2005), at <http://www.indygov.org/eGov/Mayor/PR/2005/7/20050712b.htm> (last visited Feb. 6, 2007).

¹⁰⁹ The Justice Project, 2 CRIM. JUSTICE REFORMER 11, Nov. 17, 2005, available at <http://www.thejusticeproject.org/about/newsletter/the-criminal-justice-2-11.html> (last visited Feb. 6, 2007).

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1989 and 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.¹ In about 50 percent of these cases, there was at least one eyewitness misidentification, and 20 percent involved false confessions.²

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the group should include foils chosen for their similarity to the witness’ description,³ and the administering officer should be unaware of the suspect’s identity and should tell the witness that the perpetrator may not be in the lineup. Caution in administering lineups and show-ups is especially important because flaws may easily taint later lineup and at-trial identifications.⁴

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.⁵ In the sequential approach, the witness views one person at a time and is not told how many persons s/he will see.⁶ As each person is presented, the eyewitness states whether or not it is the perpetrator.⁷ Once an identification is made in a sequential procedure, the procedure stops.⁸ The witness thus is encouraged to compare the features of each person viewed to the witness’ recollection of the perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the “best match.”

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness’ statement regarding his/her degree of confidence in the

¹ See Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, at 528-29 (2004), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (last visited Feb. 6, 2007).

² *Id.* at 544.

³ See C.E. Luus & G.L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 L. & HUM. BEHAVIOR 43-57 (1991).

⁴ See BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES 13-17, 42-44 (2002).

⁵ *Id.* at 39; see also THE REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), available at <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf> (last visited Feb. 6, 2007) (calling into some doubt the benefits of sequential lineups over simultaneous lineups).

⁶ See CUTLER, *supra* note 4, at 39.

⁷ *Id.*

⁸ *Id.*

identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset—not just from when the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.⁹ Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

⁹ See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

Indiana case law governs pre-trial identifications and interrogations by law enforcement officers. Although the State of Indiana does not require law enforcement agencies to adopt special procedures on identifications and interrogations, it does require all law enforcement officials to take a basic training course, regulated by the Indiana Law Enforcement Training Board. Several law enforcement agencies have voluntarily obtained national accreditation through the Commission on Accreditation for Law Enforcement Agencies and one law enforcement agency has obtained local accreditation through the Indiana Law Enforcement Accreditation Commission.

A. *Indiana Law Enforcement Training Board*

The Indiana Law Enforcement Training Board (the Board) was created by the legislature to “establish, present, and manage basic and inservice training programs for Indiana law enforcement officers.”¹⁰ Some of the Board’s responsibilities include, but are not limited to, establishing:

- (1) Minimum standards of physical, educational, mental, and moral fitness which regulate the acceptance of an individual for training by a law enforcement training school or academy meeting;
- (2) Minimum standards for law enforcement training schools administered by towns, cities, counties, law enforcement training centers, agencies, or departments of the state;
- (3) Minimum standards for courses of study, attendance requirements, equipment, and facilities for approved town, city, county, and state law enforcement officer, police reserve officer, and conservation reserve officer training schools;
- (4) Minimum standards for a course of study on cultural diversity awareness which is required for each person accepted for training at a law enforcement training school or academy; and
- (5) Minimum basic training requirements for each person accepted for training at a law enforcement training school or academy that includes six hours of training in interacting with people with mental illness, addictive disorders, mental retardation, and developmental disabilities, which is provided by an entity approved by the secretary of Family and Social Services and the Board.¹¹

¹⁰ IND. ADMIN. CODE tit. 250, r. 2-1-3 (2006) (*repealed*).

¹¹ IND. CODE § 5-2-1-9(a)(1)-(10) (2006). Additional statutory responsibilities of the Board include establishing:

- (1) Minimum qualifications for instructors at approved law enforcement training schools;
- (2) Minimum basic training requirements which law enforcement officers appointed to probationary terms must complete before being eligible for continued or permanent employment;

Members of the Board are appointed by the Governor to serve a four-year term, or the time remaining in the position s/he held at the time of being appointment, whichever is less.¹² No more than half the members of the Board may be from either of the two major political parties.¹³ The members of the Board must include the following:

- (1) The superintendent of the Indiana state police department;¹⁴
- (2) The deputy director of the division of preparedness and training of the department of homeland security;¹⁵
- (3) The chief of police of a consolidated city;
- (4) One county sheriff from a county with a population of at least one hundred thousand people;
- (5) One county sheriff from a county of at least fifty thousand but less than one hundred thousand people;
- (6) One county sheriff from a county of less than fifty thousand people;
- (7) One chief of police from a city of at least thirty-five thousand people, who is not the chief of police of a consolidated city;
- (8) One chief of police from a city of at least ten thousand but under thirty-five thousand people;
- (9) One chief of police, police officer, or town marshal from a city or town of less than ten thousand people;
- (10) One prosecuting attorney;
- (11) One judge of a circuit or superior court exercising criminal jurisdiction;

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- (3) Minimum basic training requirements which law enforcement officers appointed on other than a permanent basis must complete in order to be eligible for continued employment or permanent appointment;
 - (4) Minimum basic training requirements which law enforcement officers appointed on a permanent basis must complete in order to be eligible for continued employment;
 - (5) Minimum standards for a course of study on human and sexual trafficking that must be required for each person accepted for training at a law enforcement training school or academy and for in-service training programs for law enforcement officers. The course must cover the following topics:
 - i. Examination of the human and sexual trafficking laws;
 - ii. Identification of human and sexual trafficking;
 - iii. Communicating with traumatized persons;
 - iv. Therapeutically appropriate investigative techniques;
 - v. Collaboration with federal law enforcement officials;
 - vi. Rights of and protections afforded to victims;
 - vii. Providing documentation that satisfies the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons requirements established under federal law; and
 - viii. The availability of community resources to assist human and sexual trafficking victims.

IND. CODE § 5-2-1-9(a) (2006).

¹² IND. CODE § 5-2-1-4(a) (2006).

¹³ IND. CODE § 5-2-1-4(a) (2006).

¹⁴ The superintendent of the Indiana state police department serves as chairperson of the Board. IND. CODE § 5-2-1-3(a)(1) (2006).

¹⁵ The deputy director serves as the vice chair of the Board. IND. CODE § 5-2-1-3(a)(2) (2006).

- (12) One member representing professional journalism;
- (13) One member representing the medical profession;
- (14) One member representing education;
- (15) One member representing business and industry;
- (16) One member representing labor; and
- (17) One member representing Indiana elected officials of counties, cities, and towns.¹⁶

B. Law Enforcement Officers

For purposes of this Chapter, a “law enforcement officer” is defined as “an appointed officer or employee hired by and on the payroll of the state, any of the state’s political subdivisions, or a public or private college or university whose board of trustees has established a police department” and “who is granted lawful authority to enforce all or some of the penal laws of the State of Indiana and who possesses, with respect to those laws, the power to effect arrests for offenses committed in the officer’s or employee’s presence.”¹⁷

Indiana law requires law enforcement officers to satisfy minimum qualifications¹⁸ and complete minimum basic training requirements¹⁹ at the Indiana Law Enforcement Academy operated by the Board in Plainfield, Indiana or any Board approved school or academy.²⁰ The Board may waive the minimum basic training requirements if the law enforcement officer has had previous law enforcement experience which included basic law enforcement training satisfying or exceeding the training standards in Indiana.²¹ Immediately upon the law enforcement officer’s first or original appointment, s/he must

¹⁶ IND. CODE § 5-2-1-3(a)(3)-(17) (2006).

¹⁷ IND. CODE § 5-2-1-2(1) (2006).

¹⁸ IND. CODE § 5-2-1-9(a) (2006); IND. ADMIN. CODE tit. 250, r. 2-3-1 to 2-3-9 (2006). A law enforcement officer must (1) be a United States citizen and be at least twenty-one years of age as of the end of basic training; (2) possess strength, agility, vision, and hearing necessary to complete all requirements of the approved basic training program; (3) not have a physical or mental impairment that creates a safety hazard for themselves, other students, or training staff while participating in basic training; (4) be a high school, college, or university graduate or have received a high-school equivalency degree; (5) possess a valid driver’s license from his/her state of residence; (6) be of good reputation and character as determined by a police department character and background investigation; (7) not have been convicted of any felony or any other crime or series of crimes which would indicate to a reasonable person that s/he is potentially dangerous, violent, or has a propensity to break the law; (8) pass a reading and writing examination; (9) not have been dishonorably discharged from the U.S. Armed Forces; and (10) be physically, emotionally, and mentally fit to participate and not be a active carrier of a communicable disease that is likely to infect other students or staff in a training environment. IND. ADMIN. CODE tit. 250, r. 2-3-1 – 2-3-9 (2006).

¹⁹ IND. ADMIN. CODE tit. 250, r. 2-2-1, 2-4-1 (2006). The law enforcement candidate must successfully complete a board-approved pre-basic course for the purpose of training, unless exempted, described at IND. ADMIN. CODE tit. 250, r. 2-4-1 and IND. CODE § 5-2-1-9(f) (2006).

²⁰ IND. ADMIN. CODE tit. 250, r. 2-2-2 (2006). Other law enforcement academy sites in Indiana which are approved to provide the basic training program are the: Indianapolis Police Department Academy, Fort Wayne Police Department Academy, Northwest Indiana Law Enforcement Academy, Indiana University Cadet Academy, Indiana State Police Academy, Southwest Indiana Law Enforcement Academy. Indiana Law Enforcement Academy, About the Academy, Basic Training Course, at <http://www.in.gov/ilea/about/basic.html> (last visited Feb. 6, 2007).

²¹ IND. ADMIN. CODE tit. 250, r. 2-2-1 (2006).

complete a “pre-basic” training course that consists of forty hours of instruction on various subjects, including arrest, search and seizure, use of force, and firearms qualification.²² Once the law enforcement candidate has successfully completed the pre-basic course, s/he will be authorized to make arrests, conduct searches and seizures of persons and property, and carry a firearm.²³

In all Indiana jurisdictions, excluding towns with no more than one town marshal and two deputies, law enforcement officers are required to complete a minimum basic training course within one year of the officer’s first or original appointment.²⁴ Minimum basic training consists of at least 480 hours of classroom and practical training,²⁵ including instruction in such areas as constitutional provisions, criminal law, and criminal investigation.²⁶ The town marshal basic training program consists of at least 320 hours in residence at the Indiana law enforcement academy,²⁷ to which additional home study assignments may be assigned.²⁸ The subject matter covered in these basic training programs must be approved by the Board prior to the training’s start date.²⁹

Law enforcement officers also must complete required in-service training each year.³⁰ The subject of the minimum required in-service training program must be included “within the minimum basic training curriculum approved by the board or must be approved by the board based upon a need expressed by the law enforcement agency or department employing the officer.”³¹

C. Law Enforcement Accreditation Programs

1. Commission on Accreditation for Law Enforcement Agencies, Inc.

Fifteen³² police departments, sheriff departments, state law enforcement agencies, transportation police departments, and university police departments in Indiana have been

²² IND. ADMIN. CODE tit. 250, r. 2-6-1 (2006).

²³ IND. ADMIN. CODE tit. 250, r. 2-6-2 (2006).

²⁴ IND. ADMIN. CODE tit. 250, r. 2-2-1 (2006).

²⁵ IND. ADMIN. CODE tit. 250, r. 2-4-1(1) (2006).

²⁶ See Indiana Law Enforcement Academy, Basic Course, available at <http://www.in.gov/ilea/bulletin/2006168R.pdf> (last visited Feb. 5, 2007).

²⁷ IND. ADMIN. CODE tit. 250, r. 2-4-1(2) (2006).

²⁸ *Id.*

²⁹ IND. ADMIN. CODE tit. 250, r. 2-4-1(1)-(2) (2006).

³⁰ IND. ADMIN. CODE tit. 250, r. 2-7-1 (2006). “In-service training” refers to training received by a law enforcement officer after one year has passed from the date s/he successfully completed the mandatory basic training program. IND. ADMIN. CODE tit. 250, r. 2-1-8 (2006).

³¹ IND. ADMIN. CODE tit. 250, r. 2-7-1 (2006). Some of the subjects of the in-service training programs offered by the Board include: emergency vehicle operations, firearms, physical tactics, photography, breath tests for intoxication, female survival tactics, domestic violence/sexual assault, death investigations, and leadership and management courses. See Indiana Law Enforcement Academy, About the Academy, Inservice Training, available at <http://www.in.gov/ilea/about/in-service.html> (last visited on Feb. 5, 2007).

³² CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 6, 2007) (using second search function and designating “U.S.”; “Indiana”; and “Law Enforcement Accreditation” as search criteria); see also Indiana Law Enforcement Accreditation Commission, ILEAC Accredited Agencies, at http://www.iacop.org/ilea/accredited_agencies.htm (last visited Feb. 6, 2007).

accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which is an independent accrediting authority established by the four major law enforcement membership associations in the United States.³³

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission.³⁴ After these steps have been completed, a hearing is held to make a final decision on accreditation.³⁵ The CALEA standards are used to “certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training.”³⁶ Specifically, CALEA Standard 42.2.3 requires the creation of a written directive that “establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects.”³⁷

2. Indiana Law Enforcement Accreditation Commission

The Indiana Law Enforcement Accreditation Commission (ILEAC) was created in 2005 under the direction of the Indiana Association of Chiefs of Police Foundation, Inc.³⁸ ILEAC is an “Alliance Partner” with CALEA³⁹ and upon accrediting an Indiana law

³³ CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 6, 2007) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

³⁴ CALEA Online, The Accreditation Process, available at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Feb. 5, 2007).

³⁵ *Id.*

³⁶ COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

³⁷ *Id.* at 42-3 (standard 42.2.3).

³⁸ Indiana Law Enforcement Accreditation Commission, Policies, available at http://www.iacop.org/ileac/ILEAC-Policies_09.08.06.pdf (last visited Feb. 5, 2007). The Indiana Association of Chiefs of Police Foundation is an individual member organization composed of seven local districts within the state. Indiana Association of Chiefs of Police, About IACP, at http://www.iacop.org/about_iacp.html (last visited Feb. 6, 2007). Each District elects a representative to serve a two-year term on the Board. *Id.* The organization provides networking and training for law enforcement executives in the State. *Id.*

³⁹ See CALEA Online, Agency Search, available at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Jan. 11, 2007) (using second search function and designating “U.S.”; “Indiana”; and “Alliance” as search criteria). The “Alliance Partner” designation with CALEA permits state and local accreditation programs to offer CALEA credentialing. Committee on Accreditation for Law Enforcement Agencies, Inc., CALEA Online, CALEA Alliance Program, at <http://www.calea.org/Online/CALEAPrograms/allianceprogram.htm> (last visited Feb. 6, 2007).

enforcement agency, ILEAC may share the accreditation report with CALEA for its national accreditation program.⁴⁰ Obtaining accreditation by ILEAC consists of the following: (1) submitting an application; (2) completing a self-examination of existing policies and procedures to collect information addressing compliance with ILEAC standards; and (3) participating in a two-day on-site assessment by an ILEAC assessment team addressing the agency's compliance with accreditation standards.⁴¹ At the conclusion of these steps, ILEAC will review and vote on accreditation status for the agency.⁴² Once accredited, such accreditation lasts for three years.⁴³ Currently, there is one agency in Indiana, the Indianapolis Metropolitan Police Department, which has obtained ILEAC accreditation.⁴⁴

D. Constitutional Standards Relevant to Identifications

Pre-trial witness identifications, such as those that take place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.⁴⁵ A due process violation occurs when the trial court allows testimony concerning pre-trial identification of the defendant where (1) the identification procedure used by law enforcement was impermissibly suggestive,⁴⁶ and (2) under the totality of the circumstances,⁴⁷ the suggestiveness gave rise to a very substantial likelihood of irreparable misidentification.⁴⁸ In making the determination of whether, under the totality of the circumstances, the use of an impermissibly suggestive pre-trial identification procedure would lead to a very substantial likelihood of irreparable misidentification, the court should consider the following factors: “(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 the witness’ prior description of the criminal, and (4) the level of certainty demonstrated by the witness at the confrontation.”⁴⁹

⁴⁰ Indiana Law Enforcement Accreditation Commission, Steps in ILEAC Program, *available at* http://www.iacop.org/ileac/steps_in_program.htm (last visited January 12, 2007).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Indiana Law Enforcement Accreditation Commission, Accredited Agencies, *available at* http://www.iacop.org/ileac/accredited_agencies.htm (last visited Jan. 12, 2007).

⁴⁵ *See* *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-99 (1972); *Swigart v. State*, 749 N.E.2d 540, 544 (Ind. 2001); *Harris v. State*, 619 N.E.2d 577, 580 (Ind. 1993); *Hollonquest v. State*, 398 N.E.2d 655, 656 (Ind. 1979).

⁴⁶ *Neil*, 409 U.S. at 196-97. The Indiana courts have phrased this requirement as whether the pre-trial process is “unnecessarily or impermissibly suggestive.” *Slaton v. State*, 510 N.E.2d 1343, 1348 (Ind. 1987); *see also* *Hubbell v. State*, 754 N.E.2d 884, 892 (Ind. 2001).

⁴⁷ *Neil*, 409 U.S. at 196 (noting that whether the impermissible suggestiveness of a pre-trial identification gave rise to a very substantial likelihood of misidentification must be “determined ‘on the totality of the circumstances’”); *see also* *Slaton*, 510 N.E.2d at 1348; *Harris v. State*, 619 N.E.2d 577, 580 (Ind. 1993).

⁴⁸ *Neil*, 409 U.S. at 196-97; *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Parsley v. State*, 557 N.E.2d 1331, 1333 (Ind. 1990); *Norris v. State*, 356 N.E.2d 204, 206 (Ind. 1976).

⁴⁹ *Harris v. State*, 716 N.E.2d 406, 410 (Ind. 1999); *see also* *Sawyer v. State*, 298 N.E.2d 440, 444 (Ind. 1973).

Under Indiana law, lineups should consist of at least five or six individuals, including the suspect.⁵⁰ Lineups consisting of only three or four individuals are generally inadequate.⁵¹ The Indiana State Police and the Indianapolis Police Department generally provide at least six suspects in photo arrays.⁵² However, in certain circumstances, lineups consisting of five or six individuals may not be required.⁵³ The suspects in the line-up should not “stand out so strikingly in his[/her] characteristics that [s/]he virtually is alone with respect to identifying features.”⁵⁴ However, the Indiana Supreme Court has stated that “[t]here is no requirement that law enforcement officers ‘perform the improbable if not impossible task of finding four or five other people who are virtual twins.’”⁵⁵

E. Constitutional Standards and Statutory Law Relevant to Interrogations

The State of Indiana does not require law enforcement officers to record the entirety of custodial interrogations.⁵⁶ However, the Indiana courts “strongly encourage law enforcement officers, as a matter of sound policy and fairness of proceedings, to record all custodial interrogations.”⁵⁷

Additionally, a confession is voluntary under Indiana law if, “in light of the totality of the circumstances, the confession is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will.”⁵⁸ In making the determination of whether a confession was voluntary, the court will focus on the totality of the circumstances and “not on any single act by police or condition of the suspect.”⁵⁹ Several of the factors the court will consider when assessing the totality of the circumstances include: police coercion, the length of the interrogation, the location of the interrogation, the continuity of the interrogation, the defendant's maturity, the defendant's education, the defendant's

⁵⁰ Porter v. State, 397 N.E.2d 269, 271 (Ind. 1979).

⁵¹ Patterson v. State, 386 N.E.2d 936, 940 (Ind. 1979).

⁵² Interview by Doug Cummins with Tim McClure, Retired Law Enforcement Officer, Indiana State Police (Oct. 25, 2005); Interview by Doug Cummins with Michael Duke, Sergeant, Indianapolis Police Department (Aug. 2005).

⁵³ See Farrell v. State, 622 N.E.2d 488, 494 (Ind. 1993) (ruling that a photo array of three suspects was permissible because the officers were not able to obtain other photographs of individuals who sufficiently resembled the defendant); see also J.Y. v. State, 816 N.E.2d 909, 914 (Ind. Ct. App. 2004) (finding no justification for police officers' use of photo array in which defendant and his brother were the only individuals featured in the lineup wearing a white t-shirt and who were not smiling).

⁵⁴ Farrell, 622 N.E.2d at 494 (citing Pierce v. State, 369 N.E.2d 617, 620 (Ind. 1977)).

⁵⁵ *Id.*

⁵⁶ Stoker v. State, 692 N.E.2d 1386, 1389 (Ind. Ct. App. 1998); Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005) (declining to impose a constitutional requirement to record custodial interrogations in places of detention.); see also Bumgardner v. State, 422 N.E.2d 1244, 1246 (Ind. 1981) (stating that “[w]hile utilization of [tape-recording] may be of aid in determination of voluntariness, we know of no authority which requires the use of tape recording to make a confession admissible”).

⁵⁷ Gasper, 833 N.E.2d at 1041.

⁵⁸ Scalissi v. State, 759 N.E.2d 618, 621 (Ind. 2001); see also Kelly v. State, 825 N.E.2d 420, 430-31 (Ind. Ct. App. 2005).

⁵⁹ Luckhart v. State, 736 N.E.2d 227, 229 (Ind. 2000); see also Henry v. State, 738 N.E.2d 663, 664 (Ind. 2000).

physical condition, and the mental health of the defendant.⁶⁰ The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence.⁶¹

Statements from interrogations have been considered involuntary if the interrogation “lasted for a matter of days, not hours.”⁶² In addition, Indiana courts disapprove of deceptive police interrogation tactics are disapproved by the courts,⁶³ although police deception will not necessarily render a confession involuntary.⁶⁴ Instead, police deception is one of the factors considered in the totality of the circumstances surrounding the voluntariness of the confession.⁶⁵

⁶⁰ *Miller v. State*, 770 N.E.2d 763, 767 (Ind. 2002).

⁶¹ *Kelly*, 825 N.E.2d at 430-31 (internal citations omitted); *see also Scalissi*, 759 N.E.2d at 621.

⁶² *Light v. State*, 547 N.E.2d 1073, 1079 (Ind. 1989).

⁶³ *Henry*, 738 N.E.2d at 665; *see generally* 16 William Andrew Kerr, INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 7.2(g)(4) (1991 & Supp. 2005).

⁶⁴ *Miller*, 770 N.E.2d at 768 n.5.

⁶⁵ *Id.*

II. ANALYSIS

A. Recommendation #1

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

Fifteen Indiana law enforcement agencies have obtained certification by either CALEA or ILEAC.⁶⁶ CALEA, however, does not require certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. For example, CALEA Standard 42.2.3 requires law enforcement agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects.⁶⁷

While an individual law enforcement agency could create specific guidelines that mirror the requirements of the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices) in order to comply with Standard 42.2.3 of CALEA, we were unable to obtain sufficient information to ascertain whether Indiana law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices.

Regardless of whether a law enforcement agency has obtained certification or has adopted relevant standard operating procedures, all pre-trial identification procedures administered by law enforcement agencies ultimately are subject to constitutional due process limitations. Thus, in assessing compliance with each ABA Best Practice, it also is necessary to discuss the relevant treatment by Indiana courts of certain actions by law enforcement officials in administering pre-trial identification procedures.

1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

⁶⁶ CALEA Online, Agency Search, *available at* <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 6, 2007) (using second search function and designating “U.S.”; “Indiana”; “Law Enforcement Accreditation” as search criteria); Indiana Law Enforcement Accreditation Commission, ILEAC Accredited Agencies, *at* http://www.iacop.org/ileac/accredited_agencies.htm (last visited Feb. 6, 2007).

⁶⁷ CALEA STANDARDS, *supra* note 36 at Standard 42.2.3.

Numerous law enforcement agencies in Indiana are certified by CALEA or ILEAC, which require these agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects.⁶⁸ Although the CALEA and ILEAC standards do not specifically require that all those present at a pre-trial identification be unaware of which participant is the suspect, a law enforcement agency complying with the CALEA or ILEAC standards could create such a guideline.

We were unable to ascertain whether most law enforcement agencies in Indiana, certified or otherwise, are complying with this particular ABA Best Practice.

- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

The CALEA and ILEAC standards do not specifically require that certified agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, or that, although they need not identify anyone, any identification must be in their own words. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

The Indiana Supreme Court has held that a statement by law enforcement to the witness identifying that the suspect is in the line-up or photospread can render the lineup procedure improper.⁶⁹ Yet a witness may participate in an improper pre-trial identification procedure and still render an in-court identification if the totality of the circumstances demonstrate an independent basis for the in-court identification.⁷⁰ Furthermore, in at least one case, the Indiana Supreme Court has held that a law enforcement officer’s statement to the witness that there were some suspects to observe at the police station was too general of a statement to be unduly suggestive since “[i]t is,

⁶⁸ CALEA STANDARDS, *supra* note 36, at Standard 42-3.

⁶⁹ Young v. State, 395 N.E.2d 772, 774 (Ind. 1979); McDonald v. State, 542 N.E.2d 552, 554 (Ind. 1989).

⁷⁰ Hardiman v. State, 726 N.E.2d 1201, 1205 (Ind. 2000); Swigart v. State, 749 N.E.2d 540, 544 (Ind. 2001). Some of the totality of the circumstances factors considered by the court when determining if there is an independent basis for the in-court identification include: (1) the amount of time the witness was in the presence of the suspect, (2) the distance between the witness and the suspect, (3) the lighting conditions, (4) the witness’ degree of attention to the suspect, (5) the witness’ capacity for observation, (6) the witness’ opportunity to perceive particular characteristics of the suspect, (7) the accuracy of any prior description of the suspect by the witness, (8) the witness’ level of certainty at the pre-trial identification, and (9) the length of time between the crime and the identification. *Id.*

after all, normally presumed that the police have parties at least suspected of being involved before they have witnesses view the persons or their photographs.”⁷¹

Indiana courts have used witness statements of certainty regarding the accuracy of his/her suspect identification in determining whether there is an independent basis for the identification.⁷² Despite this, neither the Indiana State Police nor the Indianapolis Police Department have a written policy requiring the witness to state in his/her own words the certainty of their identification of the suspect.⁷³ Law enforcement officers, instead, are trained to inquire about the witness’ degree of certainty addressing the identification of the suspect.⁷⁴

Ultimately, we were unable to ascertain whether most Indiana law enforcement agencies, certified or not, are in compliance with all aspects of this ABA Best Practice.

2. Foil Selection, Number, and Presentation Methods

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

A law enforcement agency complying with the CALEA or ILEAC standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. Additionally, Indiana case law holds that law enforcement officials should prepare lineups consisting of at least five or six individuals, including the suspect⁷⁵ and lineups consisting of only three or four individuals are generally inadequate.⁷⁶ The Indiana courts also require that the participants in the foils be similar to the suspect so that the suspect “does not stand out so strikingly in his[her] characteristics that [s/]he virtually is alone with respect to identifying features.”⁷⁷

⁷¹ *Id.*

⁷² *See, e.g.*, *Utey v. State*, 589 N.E.2d 232, 238 (Ind. 1992); *see also Swigart*, 749 N.E.2d at 544.

⁷³ Interview by Doug Cummins with Tim McClure, Retired Law Enforcement Officer, Indiana State Police (Oct. 25, 2005); Interview by Doug Cummins with Michael Duke, Sergeant, Indianapolis Police Department (Aug. 2005).

⁷⁴ Interview by Doug Cummins with Tim McClure, Retired Law Enforcement Officer, Indiana State Police (Oct. 25, 2005); Interview by Doug Cummins with Michael Duke, Sergeant, Indianapolis Police Department (Aug. 2005).

⁷⁵ *Porter v. State*, 397 N.E.2d 269, 271 (Ind. 1979).

⁷⁶ *Patterson v. State*, 386 N.E.2d 936, 940 (Ind. 1979).

⁷⁷ *Farrell v. State*, 622 N.E.2d 488, 494 (Ind. 1993) (citing *Pierce v. State*, 369 N.E.2d 617, 620 (Ind. 1977)); *see also Dillard v. State*, 827 N.E.2d 570, 574 (Ind. Ct. App. 2005); 16 William Andrew Kerr, *INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE – PRETRIAL* § 6.6c(2) (2006) (“[a]ll of the persons who are depicted in the photographs used in a photographic display should have similar physical characteristics, and the physical appearance of all of the persons should otherwise be similar”).

Consistent with United States Supreme Court precedent, Indiana courts have determined that a one-on-one showup is “inherently suggestive and carries with it a potential for irreparable misidentification.”⁷⁸ Indiana courts have held, however, that showup identification is not *per se* inadmissible and that the ultimate question is whether, under the totality of the circumstances, the procedure was conducted in a fashion so as to lead the witness to a mistaken identification.⁷⁹ Some of the factors that are considered to determine whether the showup identification is likely to lead to a misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the length of initial observation of the criminal, (3) lighting conditions, (4) distance between the witness and the criminal, (5) the witness’s degree of attention, (6) the accuracy of the witness’s prior description of the criminal, (7) the level of certainty demonstrated by the witness, and (8) any identifications of another person.⁸⁰ The length of time between the commission of the crime and the showup also is relevant.⁸¹ Indiana courts have failed to find pre-trial identification procedures unduly suggestive where the suspect was substantially younger than the other participants,⁸² had a different complexion,⁸³ or had different colored hair.⁸⁴ For example, although the Indiana courts have recognized some concerns in showup procedures, one Indiana court failed to find lineup procedures impermissible when the suspect was the “only African-American,” and “was presented for identification in handcuffs standing between two police officers at the end of a line of police cars.”⁸⁵

We were unable, however, to ascertain whether all Indiana law enforcement agencies are complying with this ABA Best Practice.

3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness’s confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**

⁷⁸ Goudy v. State, 689 N.E.2d 686, 693 (Ind. 1997).

⁷⁹ Wethington v. State, 560 N.E.2d 496, 501 (Ind. 1990).

⁸⁰ Mitchell v. State, 690 N.E.2d 1200, 1204 (Ind. Ct. App. 1998).

⁸¹ *Id.*

⁸² Hardy v. State, 354 N.E.2d 342, 345 (Ind. Ct. App. 1976).

⁸³ Lee v. State, 519 N.E.2d 146, 148 (Ind. 1988).

⁸⁴ Dumbsky v. State, 508 N.E.2d 1274, 1278 (Ind. 1987) (ruling that although defendant was the only individual in the photographic array with blond hair, this did not raise a substantial likelihood of misidentification based on the totality of the circumstances).

⁸⁵ Lyles v. State, 834 N.E.2d 1035, 1045 (Ind. Ct. App. 2005) (citing Gray v. State, 563 N.E.2d 108, 109-10 (Ind. 1990)).

The CALEA and ILEAC standards do not specifically require that certified agencies conducting pre-trial identification procedures video or digitally record the witness's confidence statement and any law enforcement statements made to witnesses or, in the absence of video recording, photograph the lineup. A law enforcement agency complying with the CALEA or ILEAC standards, which require the agency to establish steps for identifying suspects, could create guidelines that comply with this ABA Best Practice. Although it is not written policy, it is common for the Indianapolis Police Department to videotape showups if the taping equipment is available.⁸⁶ The Indiana State Police also does not have an explicit policy requiring the videotaping of lineups or showups.⁸⁷ Instead, the prosecutors in the county may require the Indiana State Police to videotape the lineup or showup.⁸⁸

We were unable, however, to ascertain whether all Indiana law enforcement agencies are complying with this ABA Best Practice.

- c. **The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

The CALEA and ILEAC standards do not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of confidence in any identification and document that statement accurately. A law enforcement agency complying with the CALEA or ILEAC standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

The Indiana Supreme Court requires that the witness state with a level of certainty that s/he has identified the suspect.⁸⁹ The Indianapolis Police Department does not have a written policy requiring law enforcement officers to request that the witness state his/her confidence in identifying the suspect,⁹⁰ yet law enforcement officers at the Department are trained to ask the witness his/her level of certainty.⁹¹ Similarly, the Indiana State

⁸⁶ Interview by Doug Cummins with Michael Duke, Sergeant, Indianapolis Police Department (Aug. 2005).

⁸⁷ Interview by Doug Cummins with Tim McClure, Retired Law Enforcement Officer, Indiana State Police (Oct. 25, 2005).

⁸⁸ *Id.*

⁸⁹ *See, e.g.,* Utley v. State, 589 N.E.2d 232, 238 (Ind. 1992); Swigeart v. State, 749 N.E.2d 540, 544 (Ind. 2001).

⁹⁰ Interview by Doug Cummins with Michael Duke, Sergeant, Indianapolis Police Department (Aug. 2005).

⁹¹ *Id.*

Police does not have a written policy requiring law enforcement officers to ask the witness the level of confidence in their identification of the suspect, but officers are trained to ask this question.⁹²

We were unable to ascertain whether all Indiana law enforcement agencies attempting to comply with the relevant CALEA standards are creating procedures that comply with this ABA Best Practice.

4. Immediate Post-Lineup or Photospread Procedures

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

The CALEA and ILEAC standards do not specifically require that certified agencies conducting pre-trial identification procedures avoid giving the witness feedback on whether s/he selected the proper suspect. A law enforcement agency complying with the CALEA or ILEAC standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. However, we were unable to review any law enforcement agency policies addressing this issue. We were, therefore, unable to ascertain whether all Indiana law enforcement agencies have adopted policies or procedures which meet this ABA Best Practice.

Conclusion

In conclusion, even though numerous law enforcement agencies should have adopted written directives to be in compliance with CALEA, the CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices contained in Recommendation #1. Furthermore, we were unable to obtain the written directives adopted by all Indiana law enforcement agencies to assess whether they comply with Recommendation #1. We were, therefore, unable to obtain sufficient information addressing Indiana law enforcement policies and practices to determine if the State of Indiana is in compliance with Recommendation #1.

B. Recommendation #2

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

The CALEA and ILEAC standards do not specifically require that certified law enforcement agencies conducting pre-trial identification procedures receive periodic

⁹² Interview by Doug Cummins with Tim McClure, Retired Law Enforcement Officer, Indiana State Police (Oct. 25, 2005).

training on how to implement guidelines for such procedures, including training on non-suggestive techniques for interviewing witnesses. A law enforcement agency complying with the CALEA or ILEAC standards which require the agency to establish “a written directive that requires each sworn officer [to] receive annual training on legal updates,” could create a training program that complies with Recommendation #2.⁹³ However, we were unable to sufficiently ascertain whether Indiana law enforcement agencies, certified or otherwise, are complying with this particular Recommendation. In addition, we were unable to ascertain whether prosecutors are receiving periodic training in compliance with this Recommendation.

We are, therefore, unable to determine if the State of Indiana is in compliance with Recommendation #2.

C. Recommendation #3

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

We were unable to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Indiana have established and periodically update their guidelines for conducting pre-trial identifications. Therefore, we were unable to conclude whether the State of Indiana is in compliance with the requirements of Recommendation #3.

D. Recommendation #4

Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.

Indiana courts “strongly encourage law enforcement officers, as a matter of sound policy and fairness to the proceedings, to record all custodial interrogations.”⁹⁴ As of February 2006, twenty-two law enforcement agencies in Indiana regularly record the entirety of all custodial interrogations.⁹⁵ These agencies use either audio or video recording equipment

⁹³ CALEA STANDARDS, *supra* note 36, at 33-4 (standard 33.5.1).

⁹⁴ Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005).

⁹⁵ E-mail from Thomas P. Sullivan, Esq., to Deborah T. Fleischaker, Director, ABA Death Penalty Moratorium Implementation Project (Feb. 9, 2006). These law enforcement agencies are the Allen County Sheriff, Atlanta Police Department, Auburn Police Department, Carmel Police Department, Cicero Police Department, Clark County Sheriff, Elkhart Police Department, Fishers Police Department, Fort Wayne Police Department, Greensburg County Sheriff, Hamilton County Sheriff, Hancock Police Department, Hartford Police Department, Jeffersonville Police Department, Johnson County Sheriff, Montpelier Police Department, Noblesville Police Department, Schererville Police Department, Sheridan Police Department, Steuben County Sheriff, Indiana State Police, and Westfield Police Department. *Id.*; see also Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL

to record interviews of a person under arrest in an agency facility from the moment *Miranda*⁹⁶ warnings are given until the interview ends.⁹⁷ While we commend these law enforcement agencies, the number of agencies that do memorialize custodial interrogations either through audio or videotape is far outweighed by the number of agencies that do not tape at all or only tape a portion of the custodial interrogation. Even more troubling, at least one police agency severely curtailed the videotaping of interrogations after a capitally charged defendant was acquitted in a trial that included a video replay of more than twelve hours of police questioning.⁹⁸

Based on this information, the State of Indiana is only in partial compliance with Recommendation #4.

E. Recommendation #5

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

We are unable to ascertain whether the State of Indiana provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations. We, therefore, are unable to determine whether the State of Indiana is in compliance with the requirements of Recommendation #5.

F. Recommendation #6

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

In addressing the testimony of a properly qualified expert to testify concerning eyewitness accuracy, the United States Court of Appeals for the Seventh Circuit held:

[E]xpert testimony regarding the potential hazards of eyewitness identification-regardless of its reliability-will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will

CONVICTIONS SPEC. REP., at 5 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (last visited on Jan. 17, 2007).

⁹⁶ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

⁹⁷ See Sullivan, *supra* note 95, at 5. This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police station or lockup, such as at crime scenes or in squad cars. *Id.*

⁹⁸ John Ferak, *Tapes "Useful Tools" in Interviews; Video-Recordings Policies Vary in Police Agencies*, SOUTH BEND TRIB., Jan. 4, 1998, at C1.

not contribute to their understanding' of the particular factual issues posed.⁹⁹

Despite this decision by the Seventh Circuit, the Indiana Supreme Court has determined that trial courts have discretion in determining the admissibility of expert testimony on eyewitness identification¹⁰⁰ and a trial court's determination will not be overturned absent an abuse of discretion.¹⁰¹ The Court has stated that "the circumstances under which expert eyewitness identification testimony is permitted are fact sensitive and must be assessed on a case-by-case basis."¹⁰²

The State of Indiana, therefore, is in compliance with Recommendation #6.

G. Recommendation #7

Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.

The State of Indiana does not have a jury instruction specifically providing the factors to be considered by the jury in determining lineup accuracy.

Therefore, the State of Indiana is not in compliance with Recommendation #7.

⁹⁹ U.S. v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992) (internal citations omitted).

¹⁰⁰ Cook v. State, 734 N.E.2d 563, 570-72 (Ind. 2000).

¹⁰¹ Farris v. State, 818 N.E.2d 63, 68 (Ind. Ct. App. 2004).

¹⁰² Cook, 734 N.E.2d at 570.

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.¹ While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures or the failure to follow such procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

¹ See Janine Arvizu, *Shattering the Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

A. *Crime Laboratories*

Section 10-13-6-14(a) of the Indiana Code requires that any laboratory which conducts DNA analysis must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).²

1. Indiana State Police Crime Laboratories

The Indiana State Police operate forensic laboratories in Indianapolis, Lowell, Fort Wayne and Evansville,³ all of which are accredited by ASCLD/LAB.⁴ These labs are part of the Indiana State Police Laboratory Division (Division), which is responsible for “provid[ing] forensic support to all Indiana law enforcement agencies through analytical services in controlled substances, DNA, firearms, latent print, micro-analysis and documents. Crime scene investigations, clandestine laboratory processing teams and polygraph examinations are also an intricate part of the division.”⁵

The State Police’s crime laboratories provide “competent scientific analysis, proper collection of evidentiary material and secure evidence control.”⁶ These labs conduct approximately 80 percent of their analytical services and 55 percent of their field services in support of county and municipal police agency investigations.⁷

Organizationally, the Division is split into three sections: (1) Management and Field Support; (2) Forensic Analysis; and (3) Investigative Support. The Management and Field Support Section is responsible for laboratory management⁸ and field support services.⁹ The Forensic Analysis Section is responsible for the microanalysis,¹⁰ drug,¹¹ and biology units.¹² The Investigative Support Section is responsible for the Forensic

² IND. CODE § 10-13-6-14(a) (2006).

³ American Society of Crime Laboratory Directors/Laboratory Accreditation Board-*Legacy*, Laboratories Accredited by ASCLD/LAB, at <http://www.asclclab.org/legacy/asclclablaboratories.html#IN> (last visited Feb. 6, 2007).

⁴ *Id.*

⁵ INDIANA STATE POLICE, 2004 ANNUAL REPORT 35 (on file with author) [hereinafter 2004 ANNUAL REPORT].

⁶ Indiana State Police, Bureau of Criminal Investigation, Laboratory Division, at <http://www.in.gov/isp/bci/lab/> (last visited Feb. 6, 2007).

⁷ *Id.*

⁸ This includes laboratory management for the four regional laboratories and the evidence systems within those regions, along with interaction with prosecutors, judicial officials, and agency heads on various criminal justice issues. 2004 ANNUAL REPORT, *supra* note 5, at 35.

⁹ This includes crime scene support, evidence security and tracking, and photography requests. *Id.*

¹⁰ This unit deals with trace evidence, fibers, glass, fire debris, and paint. *Id.*

¹¹ This unit deals with controlled substance identification and clandestine drug laboratory investigations.

Id.

¹² This unit deals with DNA examination and the Convicted Offender Data Base (CODIS). *Id.*

Document Unit,¹³ the Polygraph Unit,¹⁴ the Forensic Fingerprint Identification Unit,¹⁵ Forensic Firearms and Toolmark Identification Unit,¹⁶ and the Clandestine Laboratory Investigative Unit.¹⁷

2. Other Indiana Crime Laboratories

In addition to the state police crime labs, the Indianapolis-Marion County Forensic Services Agency (Agency) also is accredited by ASCLD/LAB.¹⁸ The Agency provides “scientific testing in the fields of Drug and Trace Chemistry, Serology/DNA, Firearms and Toolmark Comparisons, Forensic Documents, Latent Prints, Forensic Illustration (photography, videography and digital imaging) as well as Crime Scene and morgue support to investigative agencies within Marion County, Indiana.”¹⁹ In addition, the laboratory provides expert testimony in the areas listed above.²⁰

Two other county police departments have their own crime laboratories, neither of which is accredited by ASCLD/LAB. The Lake County Crime Lab conducts firearm identification and fingerprint analysis.²¹ The Greenwood Police Department Forensic Laboratory, on the other hand, is a full service crime analysis operation made up of three specialists: a forensic chemist/lab director, a criminologist, and a property room manager.²² The lab conducts fingerprint identification and classification, processes evidence for latent prints, develops and maintains photographs, conducts crime scene processing, drug and fire debris (arson) analysis, and coordinates evidence/property management.²³ Lab services are made available to other law enforcement agencies throughout Indiana.²⁴

Strand Analytical Laboratories, Indiana’s first private DNA lab, opened in Indianapolis in July 2005.²⁵ It has not received ASCLD/LAB accreditation.²⁶

¹³ This unit deals with handwriting comparisons, indented writing, and mechanical examinations of typewriters, ribbons, printers, and more. *Id.*

¹⁴ This unit conducts criminal investigative examinations and applicant testing. *Id.*

¹⁵ This unit conducts latent fingerprint examinations, controls the Automated Fingerprint Identification System, and the photography unit. *Id.*

¹⁶ This unit conducts firearms examinations, toolmark examinations, serial number restoration, and works with the Integrated Ballistics Identification System (IBIS). *Id.*

¹⁷ This unit responds to clandestine lab sites for processing and clean-up and trains on the dangers of methamphetamine labs. *Id.*

¹⁸ American Society of Crime Laboratory Directors/Laboratory Accreditation Board-*Legacy*, Laboratories Accredited by ASCLD/LAB, *supra* note 3.

¹⁹ INDIANAPOLIS-MARION COUNTY FORENSIC SERVICES AGENCY, 2005 ANNUAL REPORT 3, at <http://www.indygov.org/NR/rdonlyres/ezudgrp76adwcomt4bgwqd2724skc35n3yo7ltq323n2yuxda5yrbwcswoy37v5b6u4jej2al2yllmwwy62cegtjyf/2005Annualreport.pdf> (last visited Feb. 6, 2007).

²⁰ *Id.*

²¹ INDIANA LEGISLATIVE SERVICES AGENCY, PUBLIC SAFETY MATTERS EVALUATION COMMITTEE, ISSUES RELATING TO THE INDIANA STATE POLICE 34 (July 2001) (on file with author).

²² City of Greenwood, Forensic Laboratory, at <http://www.greenwood.in.gov/department/division.asp?fDD=12-82> (last visited Feb. 6, 2007).

²³ *Id.*

²⁴ *Id.*

²⁵ Vic Ryckaert, *New DNA Testing Lab Expects to Be Busy*, INDIANAPOLIS STAR, July 11, 2005, at 1B.

3. ASCLD/LAB Accreditation

“The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, personnel, operational and technical procedures, equipment and physical facilities meet established standards.”²⁷ According to the ASCLD/LAB website, all four of the State Police’s laboratories and the Indianapolis-Marion County Forensic Services Agency are currently accredited through the ASCLD/LAB program.²⁸

Because the procedures for the collection, preservation, or testing of evidence adopted by the ASCLD/LAB-accredited laboratories do not have to be “published or made available for public inspection,” it is instructive to review the requirements of the accreditation programs through which State Police laboratories and the Indianapolis-Marion County Forensic Services Agency have obtained accreditation to understand the procedures, guidelines, standards, and methods used by these laboratories.²⁹

a. Application Process for ASCLD/LAB Accreditation

To obtain ASCLD/LAB accreditation, the laboratory must submit an “Application for Accreditation,” which requests information on the qualifications of staff, laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.³⁰ In addition to the application, the laboratory must also submit a “Grade Computation/Summation of Criteria Ratings,” which is based on the laboratory’s self-evaluation of whether it is in compliance with all of the criteria contained in the ASCLD/LAB Laboratory Accreditation Board Manual.³¹

b. ASCLD/LAB Accreditation Standards and Criteria

²⁶ *Id.*

²⁷ American Society of Crime Laboratory Directors/Laboratory Accreditation Board, About ASCLD/LAB, at <http://www.ascl-d-lab.org/dual/aslabdualaboutascl-d-lab.html> (last visited Feb. 6, 2007).

²⁸ American Society of Crime Laboratory Directors/Laboratory Accreditation Board-*Legacy*, Laboratories Accredited by ASCLD/LAB, *supra* note 3.

²⁹ *See, e.g.*, ASCLD/LAB, LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL]. It should be noted that any laboratory that conducts DNA analysis in Indiana must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). IND. CODE § 10-13-6-14(a) (2006). Furthermore, Indiana law requires that quality assurance guidelines issued by the Technical Working Group on DNA Analysis Methods serve as the standard for DNA testing until national standards are set. IND. CODE § 10-13-6-14(b) (2006). Lastly, DNA laboratories receiving federal funding must also comply with the Federal Bureau of Investigation’s DNA Quality Assurance Standards, requiring periodic external audits to ensure compliance with the requisite quality assurance standards. *See* 42 U.S.C. § 14131(a)(1) (2006); DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, 2 FORENSICS SCI. COMM. 3 (July 2000).

³⁰ ASCLD/LAB 2003 MANUAL, *supra* note 29, at app. 1.

³¹ *Id.* at 3.

The ASCLD/LAB Laboratory Accreditation Board 2003 Manual (Manual) contains various standards and criteria and each criterion has been assigned a rating of Essential, Important, or Desirable.³² In order to obtain accreditation through ASCLD/LAB, the “laboratory must achieve not less than 100% of the Essential,³³ 75% of the Important,³⁴ and 50% of the Desirable³⁵ criteria.”³⁶ Some of the Essential criteria contained in the Manual require:

- (1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;³⁷
- (2) A training program to develop the technical skills of employees in each applicable functional area;³⁸
- (3) A chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;³⁹
- (4) The proper storage of evidence to protect the integrity of the evidence;⁴⁰
- (5) A comprehensive quality manual;⁴¹
- (6) The performance of an annual review of the laboratory’s quality system;⁴²
- (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;⁴³
- (8) The performance and documentation of administrative reviews of all reports issued;⁴⁴
- (9) The monitoring of the testimony of each examiner at least annually;⁴⁵ and
- (10) A documented program of proficiency testing, measuring examiners’ capabilities and the reliability of analytical results.⁴⁶

The Manual also contains Essential criteria on personnel qualifications, requiring the examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and

³² *Id.* at 2.

³³ The Manual defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence. *Id.*

³⁴ The Manual defines “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence. *Id.*

³⁵ The Manual defines “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory. *Id.*

³⁶ *Id.* (emphasis omitted).

³⁷ *Id.* at 14.

³⁸ *Id.* at 19.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 23.

⁴² *Id.* at 27.

⁴³ *Id.*

⁴⁴ *Id.* at 31.

⁴⁵ *Id.* at 32.

⁴⁶ *Id.* at 33-34.

procedures.⁴⁷ Additionally, the examiners must successfully complete a competency test prior to assuming casework and successfully complete annual proficiency exams.⁴⁸

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.⁴⁹

c. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.⁵⁰ The inspection team will also interview all trainees to evaluate the laboratory's training program.⁵¹ At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.⁵²

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the "audit committee," which is comprised of an ASCLD/LAB Board Member, the Executive Director, at least three staff inspectors, and the inspection team captain.⁵³ Accreditation decisions must be made within twelve months of "the date of the laboratory's first notification of an audit committee's consideration of the draft inspection report."⁵⁴ During this time period, the laboratory may correct any deficiencies identified by the inspection team.⁵⁵

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."⁵⁶ After the five-year time period, the laboratory must apply for reaccreditation and undergo another on-site inspection.⁵⁷

4. State Law Requirements

In addition to requiring any laboratory which conducts DNA analysis to implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory

⁴⁷ *Id.* at 38-45.

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1.

⁵⁷ *Id.*

Directors/Laboratory Accreditation Board (ASCLD/LAB),⁵⁸ Indiana law also requires that the quality assurance guidelines issued by the Technical Working Group on DNA Analysis Methods serve as the standard for DNA testing until national standards are set.⁵⁹ Some of the criteria contained in these guidelines require that:

- (1) Each laboratory has a facility designed to provide adequate security and minimize contamination;⁶⁰
- (2) Each laboratory has and follows a documented evidence control system to ensure the integrity of physical evidence;⁶¹
- (3) Each laboratory uses validated methods and procedures for forensic casework analyses;⁶²
- (4) Each laboratory monitors the analytical procedures using appropriate controls and standards;⁶³
- (5) Each laboratory has a standard operating protocol for every analytical technique used;⁶⁴
- (7) Where possible, each laboratory retains or returns a portion of the evidence sample or extract;⁶⁵
- (8) Each laboratory has and follows written general guidelines for the interpretation of data;⁶⁶
- (9) Each laboratory has a documented program for calibration of instruments and equipment;⁶⁷
- (10) Each laboratory has and follows a documented program to ensure that instruments and equipment are properly maintained;⁶⁸
- (11) Each laboratory has and follows written procedures for taking and maintaining case notes to support the conclusions drawn in laboratory reports;⁶⁹

⁵⁸ IND. CODE § 10-13-6-14(a) (2006).

⁵⁹ IND. CODE § 10-13-6-14(b) (2006).

⁶⁰ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 6.1, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶¹ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 7.1, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶² STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 8.1, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶³ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 9.4, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁴ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 9.1.1, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁵ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 7.2, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁶ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 9.6, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁷ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 10.2, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁸ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 10.3, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁶⁹ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 11.1, *at* <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

- (12) Each laboratory conducts administrative and technical reviews of all case files and reports to ensure that the conclusions and supporting data are reasonable and within the constraints of scientific knowledge;⁷⁰
- (13) Each laboratory has and follows a program that documents the annual monitoring of the testimony of each examiner;⁷¹
- (14) Examiners and other personnel who are actively engaged in DNA analysis undergo regular external proficiency testing;⁷²
- (15) Each laboratory establishes and follows procedures for corrective action whenever proficiency testing discrepancies and/or casework errors are detected;⁷³ and
- (16) Each laboratory conducts annual audits⁷⁴ and once every two years, a second agency shall participate in the annual audit.⁷⁵

B. Coroners' Offices

Indiana does not use medical examiners on a statewide basis;⁷⁶ instead, each county elects a coroner⁷⁷ who may then appoint a deputy coroner to provide “medicolegal” investigation and certify a cause of death.⁷⁸

⁷⁰ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 12.1, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷¹ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 12.2, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷² STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 13.1, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷³ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 14.1, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷⁴ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 15.1, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷⁵ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, Standard 15.2, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

⁷⁶ Despite not using medical examiners on a statewide basis, the Indiana Code states that the “commission on forensic sciences shall promulgate and adopt rules...to (1) create a medical examiner system to aid, assist, and complement the coroner in the performance of his/[her] duties by providing medical assistance in determining causes of death; and (2) establish minimum and uniform standards of excellence, performance of duties, and maintenance of records to provide information to the state regarding causes of death for cases investigated.” IND. CODE § 4-23-6-6(a) (2006). The Commission was to establish five medical examiner districts in the state. IND. CODE § 4-23-6-6(b) (2006). While it is unclear whether the Commission originally complied with the law, the rule expired in 2002 under section 4-22-2.5 of the Indiana Code, *et. seq.*, and has not been readopted. See IND. ADMIN. CODE tit. 415, r. 1 (2006). The October 2006 Final Report of the Interim Study Committee on Criminal Justice Matters recommended a legislative draft requiring that members of the Commission on Forensic Sciences be appointed by July 1, 2007, however, and that the Commission submit a report to the legislative council by November 1, 2007, including the Commission’s findings and recommendations about the creation of a medical examiner system to assist coroners. See INDIANA LEGISLATIVE SERVICES AGENCY, FINAL REPORT OF THE INTERIM STUDY COMMITTEE ON CRIMINAL JUSTICE MATTERS (2006) [hereinafter FINAL REPORT].

There is at least one medical examiner office in Indiana: the Central Indiana Medical Examiner Office, located at Indiana University Medical School in Indianapolis. According to the National Association of Medical Examiners, the Central Indiana Medical Examiner Office located at IU Medical School in Indianapolis is the only medical examiner office that is accredited in Indiana. See National Association of Medical Examiners, NAME Accredited Offices, at

1. County Coroners' Offices

a. Qualification Requirements for County Coroners and Deputy Coroners

The only requirement to be elected county coroner is residence in the county for at least one year.⁷⁹

All deputy coroners⁸⁰ must successfully complete the appropriate minimum basic training course and externship prescribed by the Coroners Training Board.⁸¹ The basic training course must consist of at least forty hours of classroom and practical training⁸² and the trainee must score a minimum of 80 percent on all written examinations.⁸³ In addition, a deputy coroner must successfully complete⁸⁴ an externship and written test within twelve months of attending the basic training course.⁸⁵

b. Powers and Duties of County Coroners

Whenever the county coroner is notified that a person in that county has died (1) from violence, (2) by casualty, (3) when apparently in good health, (4) in an apparently suspicious, unusual, or unnatural manner, or (5) has been found dead, s/he must notify a law enforcement agency before the scene of the death is disturbed.⁸⁶ The law

http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Feb. 6, 2007).

⁷⁷ IND. CONST. art. 6, § 2(a).

⁷⁸ IND. ADMIN. CODE tit. 207, r. 1-1-3 (2006).

⁷⁹ IND. CODE § 3-8-1-20 (2006). The October 2006 Final Report of the Interim Study Committee on Criminal Justice Matters recommended one new law and one constitutional amendment relating to the qualifications and training of coroners. The proposed constitutional amendment would provide that “the general assembly may prescribe by law additional qualifications for the office of coroner.” See FINAL REPORT, *supra* note 76, at 4. The proposed law would require that the Indiana law enforcement academy create and offer a mandatory introductory and annual training course for coroners and deputy coroners. In addition, the proposed law would (1) require that the courses “include instruction regarding death investigation, crime scenes, and preserving evidence at a crime scene for police and crime lab technicians”; (2) require that the law enforcement academy “consult with the coroners training board and a pathologist in creating the training courses;” and (3) provide that a coroner or deputy coroner’s paycheck may be withheld for failing to successfully complete the introductory or annual training course. *Id.* at 4-5.

⁸⁰ “‘Deputy coroner’ means a part-time or full-time person appointed by a county coroner for purposes of providing medicolegal investigation and endorsed by a county coroner to be authorized to certify a cause of death.” IND. ADMIN. CODE tit. 207, r. 1-1-3 (2006).

⁸¹ IND. ADMIN. CODE tit. 207, r. 1-2-1 (2006). The Coroners Training Board is responsible for adopting standards for continuing education and training for county coroners, mandatory training and continuing education requirements for deputy coroners, and minimum requirements for continuing education instructors approved by the board. IND. CODE § 4-23-6.5-7 (2006).

⁸² IND. ADMIN. CODE tit. 207, r. 1-3-1 (2006).

⁸³ IND. ADMIN. CODE tit. 207, r. 1-2-4 (2006).

⁸⁴ Successful completion means obtaining a passing score on the examinations. IND. ADMIN. CODE tit. 207, r. 1-2-4 (2006). The externship is administered on a pass/fail basis. *Id.*

⁸⁵ IND. ADMIN. CODE tit. 207, r. 1-2-3 (2006).

⁸⁶ IND. CODE § 36-2-14-6(a) (2006).

enforcement agency then will assist the coroner in conducting an investigation into how the person died and a medical investigation into the cause of death.⁸⁷

The coroner must file a certificate of death within seventy-two hours of being notified about the death.⁸⁸ If the coroner considers an autopsy necessary, s/he is required to perform an autopsy,⁸⁹ but if an autopsy is requested by the county's prosecuting attorney, the coroner must use a physician who is certified by the American Board of Pathology or holds an unlimited license to practice medicine in Indiana and acts under the direction of a physician certified by the American Board of Pathology.⁹⁰ The physician must be paid at least \$50 from the county treasury.⁹¹ An autopsy need not be performed if:

- (1) The decedent's spouse, a child of the decedent (if the decedent does not have a spouse), a parent of the decedent (if the decedent does not have a spouse or children), a sibling of the decedent (if the decedent does not have a spouse, children, or parents), or a grandparent of the decedent (if the decedent does not have a spouse, children, parents, or sibling) request that an autopsy not be performed;
- (2) Two or more witnesses who corroborate the circumstances surrounding the death are present; and
- (3) Two physicians who are licensed to practice medicine in the state and who have made separate examinations of the decedent certify the same cause of death in an affidavit within twenty-four hours after death.⁹²

In conducting an investigation, the coroner will examine people who want to testify and may examine people s/he has summoned by subpoena.⁹³ "After viewing the body, hearing the evidence, and making all necessary inquiries," the coroner will "draw up and sign" his/her verdict on the death.⁹⁴ The coroner also must write a report giving an accurate description of the deceased person, his/her name (if it can be determined), and the amount of money and other property found with the body.⁹⁵

⁸⁷ *Id.*

⁸⁸ IND. CODE § 36-2-14-6(b) (2006). If the cause of death is not established with reasonable certainty within seventy-two hours, the coroner will file a coroner's certificate of death, with the cause of death designated as "deferred pending further action." *Id.* As soon as s/he determines the cause of death, the coroner will file a supplemental report indicating his/her findings. *Id.*

⁸⁹ Except in limited circumstances, "[a] county coroner may not certify the cause of death in the case of the sudden and unexpected death of a child who is at least one (1) week old and not more than three (3) years old unless an autopsy is performed at county expense." IND. CODE § 36-2-14-6(f) (2006).

⁹⁰ IND. CODE § 36-2-14-6(d) (2006). The statute also provides that a coroner may use the services of the medical examiner system when an autopsy is required, despite the fact that no medical examiner system currently exists in Indiana. *Id.*

⁹¹ *Id.*

⁹² IND. CODE § 36-2-14-6(e) (2006).

⁹³ IND. CODE § 36-2-14-7 (2006).

⁹⁴ IND. CODE § 36-2-14-10(a) (2006).

⁹⁵ *Id.*

In addition to the duties described above, the coroner will perform the duties of the county sheriff when the sheriff (1) “is interested or incapacitated from serving;” and (2) “has no chief deputy who may perform his[her] duties.”⁹⁶

2. Coroner’s Training Board

The Indiana State Coroners Training Board (Board) was created in 1993 to adopt:

- (1) Standards for continuing education and training for county coroners;
- (2) Mandatory training and continuing education requirements for deputy coroners; and
- (3) Minimum requirements for continuing education instructors approved by the Board.⁹⁷

The Board has seven members and must include:

- (1) The Commissioner of the State Department of Health or the Commissioner’s designee;
- (2) The Chair of the Commission on Forensic Sciences or the Chair’s designee;
- (3) The Superintendent of the State Police Department or the Superintendent’s designee; and
- (4) Four county coroners appointed by the Governor.⁹⁸

No more than two of the county coroner members may be from the same political party and, in naming appointees, the governor must consider appointing coroners who are women or “members of minority groups.”⁹⁹

As part of its work, the Board created a certification program for coroners and deputy coroners.¹⁰⁰ As of February 2006, the Board had trained 937 coroners and deputy coroners and certified 380.¹⁰¹

⁹⁶ IND. CODE § 36-2-14-4 (2006).

⁹⁷ IND. CODE § 4-23-6.5-3, -7 (2006)

⁹⁸ IND. CODE § 4-23-6.5-4 (2006)

⁹⁹ *Id.*

¹⁰⁰ Indiana State Coroners Training Board, Resources, at <http://www.in.gov/ctb/resources/> (last visited Feb. 6, 2007).

¹⁰¹ INDIANA STATE CORONERS TRAINING BOARD, NEWSLETTER 1 (Feb. 2006) [hereinafter NEWSLETTER], at <http://www.in.gov/ctb/pdf/2006February.pdf> (last visited Feb. 6, 2007).

II. ANALYSIS

A. Recommendation #1

Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

Crime Laboratories

The State of Indiana does not require crime laboratories to be accredited, although Indiana law does require that any laboratory which conducts DNA analysis must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹⁰²

Despite the lack of an accreditation requirement, all four Indiana State Police crime laboratories and the Indianapolis-Marion County Forensic Services Agency currently are accredited by the Crime Laboratory Accreditation Program of ASCLD/LAB. There are other police crime laboratories in Indiana that are not accredited.

As a prerequisite for accreditation, the ASCLD/LAB Laboratory Accreditation Board 2003 Manual requires laboratories to take certain measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the laboratory is required to have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.¹⁰³ These procedures must be included in the laboratory's quality manual.¹⁰⁴

The ASCLD/LAB accreditation program also requires laboratory personnel to possess certain qualifications.¹⁰⁵ For example, the ASCLD/LAB Laboratory Accreditation Board 2003 Manual requires the examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and procedures.¹⁰⁶ The examiners also must successfully complete a competency test prior to assuming casework responsibility and annual proficiency tests.¹⁰⁷

Even though Indiana law does not require laboratories to obtain accreditation, section 10-13-6-14(b) of the Indiana Code requires that the quality assurance guidelines issued by

¹⁰² IND. CODE § 10-13-6-14(a) (2006).

¹⁰³ ASCLD/LAB 2003 MANUAL, *supra* note 29.

¹⁰⁴ *Id.* at 21.

¹⁰⁵ *Id.* at 60.

¹⁰⁶ *Id.* at 37-50.

¹⁰⁷ *Id.*

the Technical Working Group on DNA Analysis Methods serve as the standard for DNA testing in all laboratories until national standards are set.¹⁰⁸ Specifically, these guidelines require laboratories to have clear procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.¹⁰⁹

Despite the accreditation of all four Indiana State Police crime laboratories and the Indianapolis-Marion County Forensic Services Agency (IMCFSA), the validity and reliability of work completed at one of these laboratories has been called into question. In January 2004, because of concerns in the Marion County Prosecutor's Office, a special prosecuting attorney was appointed to investigate the following issues related to the DNA/Serology Division of the Indianapolis-Marion County Forensic Services Agency:

- (1) The supervision and management of the DNA/Serology Division of the IMCFSA and the relevant management personnel including the Director and any other pertinent personnel;
- (2) The testing practices of the DNA Lab;
- (3) Any potential criminal acts that may have occurred including but not limited to perjury;
- (4) Any cover-up or failure to disclose pertinent information that may have been discoverable for trial purposes; and
- (5) Any other matters or personnel within the crime lab that may reflect on the reliability or credibility of testimony that has or may be solicited from any crime lab personnel.¹¹⁰

While the report concluded that there are "no legitimate concerns affecting the credibility of the DNA testing process," the report also found that:

- (1) The DNA section was struggling with internal management and administration issues in early 2004 in which the integrity and reliability of the scientific results produced by the lab might be threatened;
- (2) Certain past conduct likely violated the lab's internal policies as well as the National DNA Advisory Board standards, including the failure to use control samples in reamplifying a suspect DNA sample and permitting an unqualified DNA scientist to continue to extract and interpret DNA samples;
- (3) An incident in May 2002 that suggests the possibility of tampering and threatened the destruction of data was never fully resolved, despite quality controls being implemented to prevent similar occurrences in the future;
- (4) The Director of the lab failed to communicate to lab's board, the Marion County Prosecutor's Office, and the Indiana State Police about the

¹⁰⁸ IND. CODE § 10-13-6-14(b) (2006).

¹⁰⁹ STANDARDS FOR FORENSIC DNA TESTING LABORATORIES, at <http://www.fbi.gov/hq/lab/codis/forensic.htm> (last visited Feb. 6, 2007).

¹¹⁰ Final Report of Special Prosecuting Attorney, available at <http://www.ballistics-experts.com/News/Jim%20Hamby/Special%20Prosecutor%20Report.PDF> (last visited Feb. 6, 2007).

reported interference of certain DNA analysis equipment by at least one scientist working within the laboratories in 2002, in addition to the failure to disclose that a DNA scientist used amplification procedures on at least one occasion that were contrary to the accepted standards; and

- (5) The lab Director failed to appreciate his legal duty to disclose any information or data which may arguably have been exculpatory.¹¹¹

Additionally, mold, which can break down biological material, was found on five evidence packages at the Indiana State Police Crime Lab in Fort Wayne in 2005.¹¹²

Medical Examiners

The State of Indiana intended to have a statewide medical examiner system, but has so far failed to implement such a system. The Commission on Forensic Sciences (Commission) was created to promulgate and adopt rules to:

- (1) Establish a medical examiner system to aid, assist, and complement the coroner in the performance of his/her duties by providing medical assistance in determining causes of death; and
- (2) Establish minimum and uniform standards of excellence, performance of duties, and maintenance of records to provide information to the state regarding causes of death for cases investigated.¹¹³

Under this plan, the Commission would establish five medical examiner districts within Indiana.¹¹⁴ Medical examiners appointed by the Commission would be required to be physicians licensed to practice medicine in Indiana and a preference would be given to practicing pathologists.¹¹⁵ Unfortunately, while Section 4-23-6-6 of the Indiana Code still exists, the administrative rules which gave shape to the commission expired on January 1, 2002, and have not been renewed,¹¹⁶ and no medical examiner system has been established. There appears to be considerable public and legislative support for the creation of a medical examiner system in the wake of an infamous case of misidentification of two victims of an April 2006 vehicle accident. A victim who lived was identified as a woman who had died—an error that was not corrected for several weeks.¹¹⁷

The Interim Study Committee on Criminal Justice Matters recommended passage of a preliminary bill that would require members of the Commission to be appointed by July 1, 2007, and that the Commission submit a report to the Legislative Council by

¹¹¹ *Id.*

¹¹² The Justice Project, *DNA Testing Backlogs Continue to Delay Justice*, 2 CRIM. JUSTICE REFORMER 11, Nov. 17, 2005, available at <http://www.thejusticeproject.org/about/newsletter/the-criminal-justice-2-11.html#DNA> (last visited Feb. 6, 2007).

¹¹³ IND. CODE § 4-23-6-6(a) (2006).

¹¹⁴ IND. CODE § 4-23-6-6(b) (2006).

¹¹⁵ IND. CODE § 4-23-6-6(c) (2006).

¹¹⁶ IND. ADMIN. CODE tit. 415, r. 1 (2006).

¹¹⁷ Jon Murray, *Lawmakers Want Changes to Coroner System*, INDIANAPOLIS STAR, Jan. 20, 2007, at A1.

November 1, 2007, that includes its findings and recommendations about the creation of a medical examiner system to assist coroners.¹¹⁸

The Central Indiana Medical Examiner Office, located at Indiana University Medical School in Indianapolis, is the only medical examiner office in Indiana and it is accredited by the National Association of Medical Examiners (NAME).¹¹⁹ As a prerequisite for accreditation, NAME requires medical examiner offices to adopt and implement standardized procedures to ensure the validity, reliability, and timely analysis of forensic evidence.¹²⁰

County Coroners

The State of Indiana does not require county coroners to be certified. Fifty-three of Indiana's ninety-two elected coroners have obtained voluntary certification from the Indiana State Coroners' Training Board, however.¹²¹ As of February 2006, the Board had trained 937 coroners and deputy coroners and certified 380.¹²²

County coroners are not required to have any skills, experience, or training and most county coroners hold other jobs.¹²³ Requiring minimum education and training requirements is difficult, if not impossible, under the Indiana Constitution. While Article 6, Section 2 of the Indiana Constitution allows the Indiana General Assembly to establish the duties of a coroner, it prohibits the General Assembly from barring a person without certain qualifications from being a coroner.¹²⁴

The Interim Study Committee on Criminal Justice Matters considered the issues pertaining to qualifications and training of coroners and recommended the passage of two bills.¹²⁵ The first bill would, in part, require the Indiana Law Enforcement Academy to create and offer an introductory training course and an annual training course for coroners and deputy coroners that would include instruction regarding death

¹¹⁸ FINAL REPORT, *supra* note 76, at 5.

¹¹⁹ National Association of Medical Examiners, NAME Accredited Offices, at http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Feb. 6, 2007).

¹²⁰ The National Association of Medical Examiners (NAME) is the primary accrediting entity for medical examiner offices. The NAME accreditation process for district medical examiner offices is similar to that associated with crime laboratories. The applicant must perform a self-inspection using the NAME Accreditation Checklist, file an application, and undergo an external inspection using the NAME Accreditation Checklist to evaluate whether the facility meets the NAME Standards for Accreditation. For a copy of the NAME Accreditation Checklist, see NAT'L ASS'N OF MED. EXAMINERS, ACCREDITATION CHECKLIST [hereinafter NAME ACCREDITATION CHECKLIST], at http://thename.org/index.php?option=com_docman&task=doc_download&gid=27&Itemid=26&mode=view (last visited Feb. 6, 2007).

¹²¹ Pam Elliot, *Vital Importance—An I-Team 8 Special Report*, Oct. 24, 2006, at <http://www.wishtv.com/Global/story.asp?S=5574498> (last visited Feb. 6, 2007).

¹²² NEWSLETTER, *supra* note 101, at 1.

¹²³ Pam Elliot, *Vital Importance, Part 2—An I-Team 8 Special Report*, Nov. 21, 2006, at <http://www.wishtv.com/Global/story.asp?S=5585346&ClinetType=Printable> (last visited Feb. 6, 2007).

¹²⁴ FINAL REPORT, *supra* note 76, at 2.

¹²⁵ *Id.* at 1, 4-5.

investigation, crime scenes, and preserving evidence at a crime scene for police and crime lab technicians.¹²⁶ Furthermore, each coroner and deputy coroner would be required to successfully complete the introductory training course and the annual training course.¹²⁷ The second recommended bill is a proposed constitutional amendment that would allow the general assembly to prescribe by law additional qualifications for coroners.¹²⁸

Deputy coroners have stricter training requirements than county coroners and must successfully complete the appropriate minimum basic training course and externship prescribed by the Coroners Training Board.¹²⁹ The basic training course must consist of at least forty hours of classroom and practical training¹³⁰ and the trainee must score a minimum of 80 percent on all written examinations.¹³¹ In addition, deputy coroners must successfully complete¹³² an externship within twelve months of attending the basic training course.¹³³

Conclusion

Although the State of Indiana does not require crime laboratories, medical examiner offices, or county coroners to obtain accreditation, we commend all crime laboratories, medical examiner offices, county coroners, and deputy county coroners that have voluntarily obtained such accreditation. However, there remain a number of crime laboratories and county coroners that have yet to obtain accreditation.

Based on this information, the State of Indiana is only in partial compliance with Recommendation #1.

At a minimum, the Indiana Death Penalty Assessment Team recommends that the State of Indiana develop minimum education and training requirements for all county coroners.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

We were able to obtain only limited information about the funding provided to Indiana crime laboratories and county coroner offices. It appears that at least four of Indiana's crime laboratories receive public funding, including the Indiana State Police crime labs. According to the 2005 Department of Public Safety budget, the Indiana State Police

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ IND. ADMIN. CODE tit. 207, r. 1-2-1 (2006).

¹³⁰ IND. ADMIN. CODE tit. 207, r. 1-3-1 (2006).

¹³¹ IND. ADMIN. CODE tit. 207, r. 1-2-4 (2006).

¹³² Successful completion means obtaining a passing score on the examinations. IND. ADMIN. CODE tit. 207, r. 1-2-4 (2006). The externship is administered on a pass/fail basis. *Id.*

¹³³ IND. ADMIN. CODE tit. 207, r. 1-2-3 (2006).

crime labs received \$4,286,849 in the 2005-2006 fiscal year and \$4,288,841 in the 2006-2007 fiscal year.¹³⁴ An additional \$461,320 was provided to the Indiana State Police crime labs by the federal government for the 2005-2006 and 2006-2007 fiscal years and \$669,478 was appropriated for the DNA Sample Processing Fund.¹³⁵

In addition, the Indiana State Police received over \$3 million in grants through President Bush's \$1 billion, five-year DNA initiative.¹³⁶

Even with this funding, it appears that these laboratories may be overburdened with an increasing caseload, adding to a pre-existing backlog of cases. In the mid-1990s, the Indiana State Police crime labs tested between 400 and 500 cases per year.¹³⁷ Since that time, the total number of cases handled per year has tripled and backlogs have grown to over 900 cases.¹³⁸ For example, the number of DNA cases increased by 41% from 1999 to 2000 and, as of May 29, 2001, 494 DNA cases were backlogged.¹³⁹ In February 2005, this had grown to a backlog of 940 DNA samples from unsolved criminal cases.¹⁴⁰ While several hundred of these have been outsourced to private labs, the state crime labs still must process the remaining samples.¹⁴¹ Commenting on the backlog, Indiana State Police Crime Lab Manager Lisa Black stated that pieces of evidence will "sit in our backlog for six months before anyone even looks at it...If no additional cases were submitted as of today, it would take us approximately eight months to get through what we've got right now."¹⁴²

Because we were unable to obtain sufficient information to appropriately assess the adequacy of the funding provided to crime laboratories and county coroner offices, we cannot determine whether the State of Indiana is in compliance with Recommendation #2.

¹³⁴ Indiana State Budget Agency, 2005 Budget, Public Safety Budget, *available at* http://www.in.gov/sba/budget/2005_budget/as_passed/pdfs/ap_2005_c_2_5_pub_saf_data.pdf (last visited Feb. 6, 2007).

¹³⁵ *Id.*

¹³⁶ Laura Johnston, *Financing Drying Up for DNA Lab Samples from Inmates Being Backlogged at Laboratories*, FORT WAYNE J. GAZETTE, Feb. 6, 2005.

¹³⁷ The Justice Project, *DNA Testing Backlogs Continue to Delay Justice*, 2 CRIM. JUSTICE REFORMER 11, Nov. 17, 2005, *available at* <http://www.thejusticeproject.org/about/newsletter/the-criminal-justice-2-11.html#DNA> (last visited Feb. 6, 2007).

¹³⁸ *Id.*

¹³⁹ INDIANA LEGISLATIVE SERVICES AGENCY, PUBLIC SAFETY MATTERS EVALUATION COMMITTEE, ISSUES RELATING TO THE INDIANA STATE POLICE 39 (2001).

¹⁴⁰ Johnston, *supra* note 136.

¹⁴¹ *Id.*

¹⁴² *DNA can lead to convictions in unsolved cases*, WNDU.com, Feb. 5, 2003, *available at* http://www.wndu.com/news/dnadelay/022003/dnadelay_32923.php (last visited Feb. 6, 2007).

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels across the nation cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.¹

Prosecutorial misconduct can encompass various actions, including but not limited to, failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.² The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the

¹ STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, *BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT?* (2004), available at <http://www.publicintegrity.org/pm/> (last visited Feb. 6, 2007).

² *Id.*; see also Innocence Project, *Police and Prosecutorial Misconduct*, at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Feb. 6, 2007).

police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

I. FACTUAL DISCUSSION

A. *Prosecution Offices*

1. Prosecuting Attorneys

The State of Indiana is divided into ninety-two counties and eighty-eight judicial circuits.³ Each judicial circuit elects its own prosecuting attorney to serve a four-year term.⁴ Under Indiana law, the prosecuting attorney may appoint deputy prosecuting attorney(s)⁵ and one or more investigators to assist in “collecting and assembling evidence that may be necessary for the successful prosecution of . . .offenders.”⁶

a. Responsibilities of Prosecuting Attorneys and Deputy Prosecuting Attorneys

Prosecuting attorneys must:

- (1) Conduct all prosecutions for felonies, misdemeanors, or infractions and all such suits on forfeited recognizances;
- (2) Superintend, on behalf of counties or any of the trust funds, all suits in which the counties or trust funds may be interested or involved; and
- (3) Perform all other duties required by law.⁷

In accordance with the statutory responsibilities listed above, a prosecuting attorney may delegate his/her duties and responsibilities to a deputy prosecutor(s).⁸ The prosecuting attorney, his/her staff, and any witnesses that s/he would like to testify are permitted to attend grand jury proceedings.⁹ Prosecuting attorneys and deputy prosecuting attorneys do not have the authority to appeal criminal cases to the Indiana Court of Appeals or the Indiana Supreme Court.¹⁰

³ IND. CONST. art. 7, § 7 (dividing the State of Indiana into judicial circuits); *see also* Ind. Courts, Know Your Indiana Courts, Organizational Chart of the Indiana Judicial System, *available at* <http://www.in.gov/judiciary/about/chart/html.html> (last visited Feb. 6, 2007).

⁴ IND. CONST. art. 7, § 16.

⁵ IND. CODE § 33-39-6-2(a) (2006). In a county that has one correctional facility that houses at least 1,500 offenders, the prosecuting attorney can appoint two additional deputy prosecuting attorneys. IND. CODE § 33-39-6-2(b) (2006). In a county that has two correctional facilities, each of which house 1,500 offenders, the prosecuting attorney can appoint one additional deputy prosecuting attorney. IND. CODE § 33-39-6-2(b) (2006).

⁶ IND. CODE § 33-39-4-1(a)(2) (2006). The appointment of an investigator must be approved by the county council(s). IND. CODE § 33-39-4-1(a) (2006). An investigator works under the direction of the prosecuting attorney. IND. CODE § 33-39-4-1(a)(1) (2006).

⁷ IND. CODE § 33-39-1-5 (2006).

⁸ *See Hill v. State*, 11 N.E.2d 141, 144 (Ind. 1937) (“A deputy prosecuting attorney is vested with power by express statutory provisions to perform the duties of the prosecuting attorney.”); *see also*, 2001 Op. Att’y Gen. 11, *2 (Ind. 2001) (this opinion can be found on Westlaw at 2002 WL 206372).

⁹ IND. CODE § 35-34-2-4(c) (2006); *see also Shattuck v. State*, 11 Ind. 473, *2 (Ind. 1859) (recognizing that the prosecutor can attend the grand jury, examine witnesses at the grand jury, and provide legal advice to the grand jury).

¹⁰ *See State v. Market*, 302 N.E.2d 528, 534 (Ind. Ct. App. 1973).

b. Funding of Prosecuting Attorney Offices

The prosecuting attorney and chief deputy prosecutor are compensated every two weeks from the State general fund.¹¹ Counties comprising a judicial district are permitted to hire and fund additional deputy prosecutors upon authorization by county officials.¹² The county councils comprising the judicial districts are responsible for appropriating annual funds for personnel and services needed to ensure the “proper discharge of the duties imposed by law” upon the prosecuting attorney.¹³

2. Office of the Attorney General

The Attorney General for the State of Indiana is elected to serve a four-year term.¹⁴ Under State law, the Attorney General is required to designate or appoint one deputy or assistant attorney general to assist him/her in performing his/her statutory duties¹⁵ and may appoint as many deputy attorneys general as are needed.¹⁶ At least once a year, but no more than twice, the Attorney General may hold a conference of all the prosecuting attorneys “to consider, discuss, and develop coordinated plans for the enforcement of the laws of Indiana.”¹⁷

Under Indiana law, the Attorney General represents the State in all criminal cases in the Indiana Supreme Court.¹⁸ In addition, the Attorney General has the authority to represent the State in all criminal appeals to the Indiana Court of Appeals and the Indiana Supreme Court.¹⁹ The duties of the Attorney General also include consulting and advising the prosecuting attorneys and, in the “interest of the public,” s/he may assist in the prosecution of a criminal defendant.²⁰ This permits the Attorney General, upon his/her own motion, to participate in criminal trials.²¹

¹¹ IND. CODE § 33-39-6-2(f) (2006).

¹² *Id.*

¹³ IND. CODE § 33-39-6-2(g) (2006); *see also* Brown v. State *ex rel.* Brune, 359 N.E.2d 608, 609 (Ind. Ct. App. 1977) (“It is clear from a reading of this statute that the power to appropriate funds for prosecutors’ staffs has been delegated to the county councils.”).

¹⁴ IND. CODE § 4-6-1-2 (2006).

¹⁵ IND. CODE § 4-6-8-3 (2006).

¹⁶ IND. CODE § 4-6-1-4 (2006); *see also* Crawford v. State, 57 N.E. 931, 933 (Ind. 1900) (“There is nothing in the law creating the office of attorney general and prescribing his duties which fixes the number of his deputies.”).

¹⁷ IND. CODE § 33-39-6-1(e) (2006).

¹⁸ IND. CODE § 4-6-2-1 (2006); *see also* State *ex rel.* Powers v. Vigo Circuit Court, 140 N.E.2d 497, 499 (Ind. 1957). However, because *habeas corpus* is a civil proceeding, the Attorney General does not have the authority to represent the State in the Indiana Supreme Court involving *habeas corpus* appeals. *See* Winn v. Fields, 219 N.E.2d 896, 899 (Ind. 1966) (“Habeas Corpus is not a criminal proceeding: therefore, the statute providing that the Attorney General shall represent the State in all criminal cases in the Supreme Court does not apply here.”).

¹⁹ *See* State v. Doyle, 503 N.E.2d 449, 451 (Ind. Ct. App. 1987); State v. Market, 302 N.E.2d 528, 534 (Ind. Ct. App. 1973).

²⁰ IND. CODE § 4-6-1-6 (2006).

²¹ *See* Arnold v. Sendak, 416 F. Supp. 22, 23 (S.D. Ind. 1976).

B. The Indiana Prosecuting Attorneys Council

The State of Indiana has established the Indiana Prosecuting Attorneys Council (IPAC), which is composed of “all the prosecuting attorneys and their chief deputies acting in Indiana.”²² IPAC is directed by a ten-member Board of Directors that is elected by the entire IPAC membership.²³ Responsibilities of IPAC include:

- (1) Assisting in the coordination of the duties of the prosecuting attorneys of the state and their staffs;
- (2) Preparing manuals of procedure;
- (3) Giving assistance in preparing trial briefs, forms, and instructions;
- (4) Conducting research and studies that would be of interest and value to all prosecuting attorneys and their staffs;
- (5) Maintaining liaison contact with study commissions and agencies of all branches of the local, state, and federal government that will be of benefit to law enforcement and the administration of justice in Indiana; and
- (6) Adopting guidelines for the expenditure of funds derived from a deferral program or a pretrial diversion program.²⁴

IPAC may hire an executive director and staff to help fulfill its statutory responsibilities.²⁵

IPAC has a Capital Litigation Committee, consisting of prosecutors with death penalty experience and Deputy Attorneys General who handle death penalty appeals, which meets at least quarterly.²⁶ Prosecutors with pending death penalty cases, or with cases that may be death-eligible, can appear before this group to have a review of their case.²⁷

C. The Indiana Rules of Professional Conduct

The Indiana Supreme Court has adopted the Indiana Rules of Professional Conduct, which address the professional and ethical responsibilities of all attorneys, including prosecutors.²⁸

1. Professional and Ethical Responsibilities of Prosecutors

The Indiana Rules of Professional Conduct state that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”²⁹ To ensure that this

²² IND. CODE § 33-39-8-2(b) (2006).

²³ IND. CODE § 33-39-8-3 (2006).

²⁴ IND. CODE § 33-39-8-5(1)-(6) (2006).

²⁵ IND. CODE § 33-39-8-4 (2006).

²⁶ Email from Stephen Johnson to Joel Schumm (Jan. 29, 2007) (on file with author).

²⁷ *Id.*

²⁸ IND. R. PROF’L CONDUCT 3.8; 16A WILLIAM ANDREW KERR, INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 8.2 (2006) (“A prosecuting attorney is therefore subject to the provisions of the Indiana Rules of Professional Conduct as promulgated by the Indiana Supreme Court.”).

²⁹ IND. R. PROF’L CONDUCT 3.8 cmt 1; *see also* Brown v. State, 746 N.E.2d 63, 70 (Ind. 2001).

obligation is satisfied, Rule 3.8 of the Indiana Rules of Professional Conduct requires a prosecutor in a criminal case to comply with a number of rules, such as:

- (1) Refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) Making reasonable efforts to assure that the accused has been advised of the right to counsel, and the procedure for obtaining counsel, and that s/he has been given reasonable opportunity to obtain counsel;
- (3) Not seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (4) Making 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, disclosing 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;
- (5) Not subpoenaing 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; and
- (6) 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, refraining 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.³⁰

The Indiana Rules of Professional Conduct require all attorneys, including prosecutors, to report certain professional misconduct.³¹ Rule 8.3 of the Indiana Rules of Professional Conduct states, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”³²

2. Investigating Prosecuting Attorneys and Disciplining Members of the Bar

³⁰ IND. R. PROF'L CONDUCT 3.8.

³¹ IND. R. PROF'L CONDUCT 8.3.

³² IND. R. PROF'L CONDUCT 8.3(a).

A written, verified complaint alleging attorney misconduct can be filed by a member of the public, a member of the Indiana bar, a member of the Supreme Court Disciplinary Commission (the Commission),³³ or a bar association.³⁴

Grounds for attorney discipline include:

- (1) Violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or to do so through the acts of another;
- (2) Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (3) Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (4) Engaging in conduct that is prejudicial to the administration of justice;

³³ The Supreme Court Disciplinary Commission consists of nine members appointed by the Indiana Supreme Court. IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 23, § 6(b). Seven members must be attorneys and two members must be non-attorneys. *Id.* The members of the Commission serve staggered five-year terms. *Id.* Members can be removed from the Commission for good cause. *Id.* The responsibilities of the Commission include:

- (1) Appointing with approval of the Indiana Supreme Court an Executive Secretary of the Commission who shall be a member of the Bar of this State and who shall serve at the pleasure of the Commission;
- (2) Preparing and furnishing a form of request for investigation to each person who claims that an attorney is guilty of misconduct and to each bar association in this State for distribution to such persons;
- (3) Supervising the investigation of claims of misconduct;
- (4) Issuing subpoenas, including subpoenas *duces tecum*; the failure to obey such subpoena may be punished as contempt of Court, or in the case of an attorney under investigation, can subject the attorney to suspension;
- (5) Doing all the things necessary and proper to carry out its powers and duties; and
- (6) Having the right to bring an action in the Indiana Supreme Court to enjoin or restrain the unauthorized practice of law.

Id. at § 8. The Commission takes action by a majority vote of those members that are present. *Id.* at § 7(b). The Commission meets monthly and can be convened for special meetings by the Chairman. *Id.* at § 7(c). *Id.* at § 10(a). A bar association can prepare and file a claim of attorney misconduct with the Commission when the decision has:

- (1) Been made at a regular or special meeting of the Bar Association after notice has been given to the members of the Association, or if the Association is governed by a Board of Managers or Board of Directors, that the decision has been taken at a regular or special meeting of the Board of Managers or Board of Directors after notice has been provided to the Managers or Directors;
- (2) Been made by a quorum of the members of the Association, or the Board of Managers or Board of Directors are in attendance at the meeting; or
- (3) Been made by a roll call of the members, managers, or directors of the Association in attendance at the meetings, with the vote of each member present being recorded.

Id. at § 5(c)(1)-(3).

- (5) Stating or implying an ability to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct;
- (6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (7) Engaging in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.³⁵

Upon receiving a claim and conducting a preliminary investigation, the Commission's Executive Secretary will:

- (1) Dismiss the claim, with the approval of the Commission, if the Executive Secretary determines that it raises no substantial question of misconduct; or
- (2) Forward a copy of the claim to the attorney against whom the claim is brought and request a written response within twenty days if there is a substantial question of misconduct.³⁶

If the Executive Secretary forwards the claim to the attorney against whom the claim was brought, the Executive Secretary will consider the claim, the response from the attorney, and any preliminary investigation to determine if there is reasonable cause demonstrating that the attorney is guilty of misconduct.³⁷ If reasonable cause exists to believe that the attorney is guilty of misconduct, the claim will be "docketed and investigated."³⁸ If the claim is docketed, the Executive Secretary will conduct an investigation of the claim and make a report addressing the investigation³⁹ to the Commission at its next meeting.⁴⁰

Members of the Commission must consider and make a determination about the report and recommendation submitted by the Executive Director no later than the meeting following the submission of the report.⁴¹ If the Commission determines that reasonable cause exists that the attorney committed misconduct warranting disciplinary action, the Commission may file the claim with the Clerk of the Indiana Supreme Court.⁴² Upon the complaint being filed, the Indiana Supreme Court will appoint up to three hearing officer(s)⁴³ to conduct a hearing and determine the charges.⁴⁴

³⁵ IND. R. PROF'L CONDUCT 8.4.

³⁶ IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 23, § 10(a)(1)-(2).

³⁷ *Id.* at § 10(b).

³⁸ *Id.*

³⁹ When conducting an investigation of a claim against an attorney, the Executive Secretary and Commission are not limited to investigating or considering only the claims addressed in the complaint. *Id.* at § 10(d).

⁴⁰ *Id.* at § 10(c).

⁴¹ *Id.* at § 11(a).

⁴² *Id.* at § 11(b).

⁴³ The hearing officer(s) must be attorneys and members of the bar of the Indiana Supreme Court. *Id.* at § 11(b). None of the hearing officer(s) can be members of the Disciplinary Commission. *Id.* Within ten days after the appointment of the hearing officer(s), the attorney accused of misconduct can petition for a

Once one or more hearing officers are appointed, the parties involved in the proceedings are permitted discovery consistent with the Indiana Rules of Civil Procedure.⁴⁵ During the hearing, the attorney accused of misconduct is permitted to: attend the hearing in-person, be represented by counsel, cross-examine witnesses testifying against him/her, and produce evidence and/or witnesses on his/her behalf.⁴⁶ Within thirty days of the hearing's conclusion, the hearing officer(s) must determine if the misconduct has been proven by clear and convincing evidence and must submit written findings of fact to the Indiana Supreme Court.⁴⁷ Once the findings of fact are submitted to the Indiana Supreme Court, the attorney accused of misconduct has thirty days to petition for a review of the hearing officer(s) findings and recommendation for punishment by the Court.⁴⁸

When the Indiana Supreme Court assesses an appropriate sanction for attorney misconduct, it will consider several factors including “the surrounding circumstances of the misconduct, the respondent's state of mind, the duty that was violated through the misconduct, any actual or potential injury to the client, the risk to the public, the duty of [the] Court to preserve the integrity of the legal profession, and any mitigating or aggravating factors.”⁴⁹ In addition, any “prior disciplinary offenses, a pattern of misconduct, and multiple offenses” could warrant imposing a more severe sanction.⁵⁰

Upon being found guilty of misconduct, an attorney may be permanently disbarred; suspended for an indefinite period of time subject to reinstatement; suspended for a definite period of time, not to exceed six months, with automatic reinstatement upon satisfying conditions specified in an order by the Indiana Supreme Court;⁵¹ publicly reprimanded; privately reprimanded; or given a private administrative admonition.⁵²

change of hearing officer(s) upon demonstrating good cause. *Id.* at § 14(b). Responsibilities of the hearing officers include:

- (1) Conducting a hearing on a complaint of misconduct within sixty days after the hearing officer(s) is/are appointed and qualified;
- (2) Administering oaths to witnesses;
- (3) Receiving evidence and making written findings of fact and recommendations to the court; and
- (4) Doing all the things necessary and proper to carry out their responsibilities.

Id. at § 13(a)-(d).

⁴⁴ *Id.* at § 11(b).

⁴⁵ *Id.* at § 14(d).

⁴⁶ *Id.* at § 14(f).

⁴⁷ *Id.* at § 14(h).

⁴⁸ *Id.* at § 15(a).

⁴⁹ *In re Snyder*, 706 N.E.2d 1080, 1082 (Ind. 1999); *In re Wilson*, 715 N.E.2d 838, 842 (Ind. 1999).

⁵⁰ *Wilson*, 715 N.E.2d at 842.

⁵¹ The Indiana Disciplinary Commission can file written objections to the automatic reinstatement of an attorney. IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 23, § 4(c). The written objections must be accompanied with reasons for the objections and are limited to:

- (1) The attorney's failure to comply with the terms of the Indiana Supreme Court's order;

D. Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

a. Prosecutorial Discretion

Prosecutors have “broad and unfettered” discretion to seek the death penalty.⁵³ When considering whether to seek the death penalty, a prosecutor will consider the particular facts of the crime and the appropriateness of seeking the death penalty based on such factors as the heinous nature of the crime, the type and amount of evidence available for trial, and the likelihood that a jury may impose the death penalty.⁵⁴ Some prosecutors also consider the physical and mental ability of the victim’s family to endure a death penalty trial and the appeals process.⁵⁵

b. Notice of Intent to Seek the Death Penalty

If the decision is made to seek a death sentence, the prosecutor should file a notice of intent to seek the death penalty.⁵⁶ According to the Indiana Code, the notice of intent

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- (2) The pendency of other complaints against the attorney;
 - (3) The attorney’s failure to:
 - (a) Not undertake new legal matters between service of the Indiana Supreme Court’s order and the effective date of the discipline;
 - (b) Not maintain a presence or occupy an office where the practice of law is conducted; and
 - (c) File an affidavit with the Indiana Supreme Court showing that all clients represented by the attorney in pending matters have been informed of the nature and duration of the suspension and those clients in need of attorney services during the period of the suspension have been placed in the care of an attorney with the consent of the client, and clients not consenting to be represented by substitute counsel have been advised to seek the services of counsel of their own choice.
 - (4) The attorney’s failure to fully pay the costs of the disciplinary proceedings.

Id. at § 4(c)(1)-(4).

⁵² *Id.* at § 3(a).

⁵³ *Bivins v. State*, 642 N.E.2d 928, 948 (Ind. 1994); *see also Roche v. State*, 596 N.E.2d 896, 899 (Ind. 1992) (“The prosecutor in his/[her] discretion may seek the death penalty against a particular defendant.”); *Conner v. State*, 580 N.E.2d 214, 218 (Ind. 1991) (“Under our State’s system of criminal justice, the prosecutor always has been allowed broad discretion in representing the people of the State in determining what crimes to prosecute and in requesting the imposition of various sentences.”); *Coleman v. State*, 558 N.E.2d 1059, 1065 (Ind. 1990); Interview by Doug Cummins with Lance Hammer, Johnson County Prosecutor (August 2005); Interview by Doug Cummins with Carl Bizzi, Marion County Prosecutor (May 11, 2006); Interview by Doug Cummins with Steve Stewart, Clark County Prosecutor (May 2006).

⁵⁴ Interview by Doug Cummins with Lance Hamner, Johnson County Prosecutor (August 2005); Interview with Carl Brizzi, Marion County Prosecutor (May 11, 2006); Interview by Doug Cummins with Steve Stewart, Clark County Prosecutor (May 2006).

⁵⁵ Interview by Doug Cummins with Carl Brizzi, Marion County Prosecutor (May 11, 2006).

⁵⁶ IND. CODE § 35-50-2-9(a) (2006).

must be on separate page from the rest of the charging instrument⁵⁷ and allege at least one aggravating factor.⁵⁸ Despite this, providing written notice in accordance with the Indiana Code is not always necessary.⁵⁹ For example, because the defendant's prior criminal history could be prematurely imparted to the jury when the aggravating circumstance for seeking the death penalty is either a prior murder conviction, a prior murder unrelated to the current offense, or a prior life sentence, the Indiana Supreme Court has held that it is sufficient to provide notice of intent to seek the death penalty during the arraignment of the defendant.⁶⁰

A request to enhance a possible sentence to include the death penalty may be filed after the filing of the original charging instrument.⁶¹ Enhancing the sentence of the original charge to include the death penalty is improper, however, if "it operates to prejudice a defendant's substantive rights."⁶² When making this assessment, the court will consider the time frame between filing the death penalty request and the trial and whether any continuances sought by the defendant are granted by the court.⁶³ The sentence enhancement will not be permitted if the court determines that the defendant's "opportunity for a fair trial was detrimentally affected."⁶⁴

⁵⁷ A charging instrument provides the defendant with notice of the crime(s) that s/he is being charged so that s/he can prepare a defense. 15 IND. LAW ENCYCLOPEDIA § 28 (2006). The charging instrument must state:

- (1) The title of the action and the name of the court in which the indictment or information is filed;
- (2) The name of the offense in the words of the statute or any other words conveying the same meaning;
- (3) The statutory provision alleged to have been violated;
- (4) The nature and elements of the offense charged in plain and concise language without unnecessary repetition;
- (5) The date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense;
- (6) The time of the offense as definitely as can be done if time is of the essence of the offense;
- (7) The place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed;
- (8) The place of the offense as definitely as can be done if the place is of the essence of the offense;
- (9) The name of every defendant, if known, and if not known, by designating the defendant by any name or description by which s/he can be identified with reasonable certainty.

Id.

⁵⁸ IND. CODE § 35-50-2-9(a) (2006).

⁵⁹ *See Brewer v. State*, 417 N.E.2d 889, 905-06 (Ind. 1981).

⁶⁰ *Id.*

⁶¹ *See Games v. State*, 535 N.E.2d 530, 535 (Ind. 1989); *McIntyre v. State*, 717 N.E.2d 114, 125 (Ind. 1999); *see also supra* note 57 (describing charging instrument).

⁶² *Games*, 535 N.E.2d at 535.

⁶³ *Id.*

⁶⁴ *Id.* at 535-36.

A prosecutor also has the sole discretion to withdraw a notice of intent to seek the death penalty, and Indiana prosecutors generally do not delegate this decision to deputies.⁶⁵ The trial court will dismiss the charging instrument upon the prosecutor's request.⁶⁶ In addition, the court must order the dismissal of a notice to seek the death penalty if the defendant is found to be mentally retarded.⁶⁷

2. Plea Agreements

A defendant has no constitutional right to engage in plea negotiations⁶⁸ and prosecutors are given "wide discretionary power" to select defendants with whom to do so.⁶⁹ However, Indiana courts have encouraged plea negotiations as essential in the "conservation of limited judicial and prosecutorial resources."⁷⁰

When reviewing a plea agreement, the court must first determine whether the defendant voluntarily accepted the agreement without any promises, force, or threats being used.⁷¹ A court's inquiry addressing the voluntariness of a plea agreement includes, but is not limited to, the defendant: (1) understanding the nature of the charges; (2) being informed that a guilty plea waives several constitutional rights including trial by jury, confrontation of witnesses, compulsory process, and proof beyond a reasonable doubt without self-recrimination; and (3) being informed of the maximum and minimum sentences for the crime charged.⁷² Additionally, the court will accept the plea only after it is satisfied that,

⁶⁵ Interview by Doug Cummins with Lance Hammer, Johnson County Prosecutor (August 2005); Interview with Carl Brizzi, Marion County Prosecutor (May 11, 2006); Interview by Doug Cummins with Steve Stewart, Clark County Prosecutor (May 2006).

⁶⁶ IND. CODE § 35-34-1-13(a) (2006).

⁶⁷ IND. CODE § 35-36-9-5 (2006); *see also* Smallwood v. State, 773 N.E.2d 259, 261 (Ind. 2001) ("Indiana statutory law requires the dismissal of a request for the death penalty or for life without parole upon a determination that the defendant is mentally retarded.").

⁶⁸ *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); Mabry v. Johnson, 467 U.S. 504, 507 (1984); Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1986).

⁶⁹ Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000).

⁷⁰ Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986).

⁷¹ IND. CODE § 35-35-1-3(a) (2006); *see also* State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997) ("The trustworthiness of a guilty plea in a capital case is ensured by several procedural protections, including the requirement that the plea be voluntary—a protection for defendants recognized by our cases since early this century.").

⁷² *See* State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997). The Indiana Code specifically provides that before accepting a plea agreement, the court must first determine if the defendant:

- (1) Understands the nature of the charge against him/her;
- (2) Has been informed that by his/her plea s/he waives his rights to:
 - (a) A public and speedy trial by jury;
 - (b) Confront and cross examine the witnesses against him/her;
 - (c) Have compulsory process for obtaining witnesses in his/her favor; and
 - (d) Require the state to prove his guilt beyond a reasonable doubt at a trial which the defendant may not be compelled to testify against him/herself;
- (3) Has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction(s), and any possibility of the imposition of consecutive sentences; and

based upon an examination of the defendant or the evidence, there is a factual basis for the plea.⁷³

3. Discovery

a. Discovery Requirements

There is no federal or state constitutional right to discovery in criminal cases.⁷⁴ However, state and federal law entitles a defendant to receive all exculpatory information and evidence.⁷⁵ The prosecutor “is not required to deliver his[/her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”⁷⁶ This includes the disclosure of impeachment evidence that could be used to show bias or interest on the part of a key State witness.⁷⁷ Accordingly, the State is under a duty to reveal any deal or agreement with a witness concerning pending criminal charges, even an informal one.⁷⁸ A prosecutor also “has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, and thus is charged with knowledge of potentially exculpatory evidence of which the police are aware.”⁷⁹

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- (4) Has been informed that the person will lose the right to possess a firearm if the person is convicted of a crime of domestic violence; and
 - (5) Has been informed that if:
 - (a) there is a plea agreement in accordance with the Indiana Code; and
 - (b) the court accepts the plea;the court is bound by the terms of the plea agreement.

IND. CODE § 35-35-1-2 (2006). Any variance(s) from these provisions which do not violate the constitutional rights of the defendant are not a basis for setting aside the guilty plea. IND. CODE § 35-35-1-2(c) (2006).

⁷³ IND. CODE § 35-35-1-3(b) (2006).

⁷⁴ See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *U.S. v. Williams*, 792 F. Supp. 1120, 1123 (S.D. Ind. 1992); *Bernard v. State*, 230 N.E.2d 536, 691 (Ind. 1967) (overruled on other grounds) (recognizing that a defendant’s right to discovery has not been required by the constitutional guarantee of due process, but that within the general nature of the trial court is the power to order various types of discovery).

⁷⁵ This is known as *Brady* material. See *Brady v. Maryland*, 373 U.S. 83 (1963); see also *Goodner v. State*, 714 N.E.2d 638, 642 (Ind. 1999).

⁷⁶ *United States v. Bagley*, 473 U.S. 667, 675 (1985); see also *Averhart v. State*, 614 N.E.2d 924, 931 (Ind. 1993) (“An item is material for this purpose [use during a capital sentencing hearing] if the failure to release it to defense counsel undermines confidence in the jury’s recommendation.”).

⁷⁷ See *Turney v. State*, 759 N.E.2d 671, 675 (Ind. Ct. App. 2001) (“In *United States v. Bagley*, the United States Supreme Court determined that the *Brady* rule encompassed both material impeachment evidence and exculpatory evidence.”).

⁷⁸ See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *State v. Bowens*, 722 N.E.2d 368, 369 (Ind. 2000); *Goodner*, 714 N.E.2d at 642; *Birkla v. State*, 323 N.E.2d 645, 648 (Ind. 1975).

⁷⁹ *Penley v. State*, 734 N.E.2d 287, 289 (Ind. Ct. App. 2000); see also *Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997) (ruling that because the police were aware of blood test results, the prosecutor is responsible for knowing about the results as well).

Indiana Trial Rule 26(B) “allows a wide scope of discovery” in criminal cases.⁸⁰ In Indiana, trial courts have the authority to initiate pre-trial discovery by issuing a discovery order *sua sponte*.⁸¹ Because trial courts can issue discovery orders *sua sponte*, some courts in Indiana have adopted local court rules requiring the prosecutor to disclose certain information.⁸² For example, the Wayne County Criminal Rules state that the prosecutor will disclose to defense counsel and, upon request, permit defense counsel to inspect and copy the following:

- (1) The names and addresses of persons known to be witnesses, together with copies of their written and recorded statements;
- (2) Copies of any written and recorded statements and the substance of any oral statements made by the accused, or made by the codefendant;
- (3) Those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses who appeared before the grand jury with reference to the particular case;
- (4) Copies of any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;
- (5) Copies of any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the accused;
- (6) Any record of prior criminal convictions or persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.⁸³

Additionally, the prosecutor must disclose if there has been any electronic surveillance of any conversation to which the accused was a party.⁸⁴

In St. Joseph County, the local criminal court rules provide that upon request, the prosecutor will disclose and permit defense counsel to inspect and copy the following:

- (1) The names and last known addresses of persons whom the State intends to call as witnesses, with their relevant written or recorded statements;
- (2) Any written, oral, or recorded statements made by the accused or by a co-defendant and a list of witnesses to the making and acknowledgement of such statements;
- (3) A transcript of those portions of grand jury minutes containing testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

⁸⁰ Vaughn v. State, 378 N.E.2d 859, 864 (Ind. 1978); *see also* Hudson v. State, 354 N.E.2d 164, 167 (Ind. 1976).

⁸¹ *See State ex rel. Keller v. Criminal Court of Marion County, Division IV*, 317 N.E.2d 433, 435 (Ind. 1974).

⁸² IND. R. TRIAL P. 81(A); *see also* S.T. v. State, 764 N.E.2d 632, 635 (Ind. 2002) (“Trial courts in the State of Indiana are permitted to make and amend rules governing their practice provided the rules are not inconsistent with the Indiana Rules of Trial Procedure.”).

⁸³ WAYNE COUNTY CRIM. R. 13(A).

⁸⁴ *Id.*

- (4) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
- (5) Any books, papers, documents, photographs, or tangible objects that the prosecuting attorney intends to use in the hearing or trial or which were obtained or belonged to the accused;
- (6) Any record of prior criminal convictions that may be used for impeachment of the persons whom the State intends to call as witnesses at the hearing or trial;
- (7) Any police reports concerning the investigation of the crime or crimes with which the defendant is charged.⁸⁵

Several other counties also have adopted local court rules requiring mandatory disclosures by the prosecution.⁸⁶

Despite mandatory discovery disclosures, the State does not have to disclose, any reports, memoranda, or other internal state documents made by deputy prosecutors, other state agents, or law enforcement officers in connection with investigating or prosecuting the case.⁸⁷ Additionally, the State does not have to disclose proceedings of the grand jury.⁸⁸

b. Challenges to Discovery Violations

If the prosecution or defense fails to comply with a discovery order, either prior to or during the proceedings, “the court has wide discretion to remedy the transgression.”⁸⁹ Rule 37 of the Indiana Rules of Trial Procedure provides sanctions that can be imposed by the court if either party fails to adhere to a discovery order, including, but not limited to:⁹⁰

- (1) Ordering that the matters or designated facts be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

⁸⁵ ST. JOSEPH CRIM. R. 305.5(1)-(7).

⁸⁶ MARION COUNTY SUPER. CT. CRIM. R. 7(2)(a)(1)-(7) (mandating pre-trial discovery disclosures); MARION COUNTY SUPERIOR CT. CRIM. R. 7(1) (mandating disclosures in discovery order); ALLEN COUNTY SUPER. CT. CRIM. R. 13(A)(1)-(10) (mandating pre-trial discovery disclosures).

⁸⁷ IND. R. TRIAL P. 26(B)(3); *see also* Robinson v. State, 693 N.E.2d 548, 552 (Ind. 1998); Johnson v. State, 584 N.E.2d 1092, 1103 (Ind. 1992).

⁸⁸ IND. CODE § 35-34-2-4(i) (2006). Some counties have local discovery rules that require, for example, “[a] transcript of those portions of grand jury minutes containing testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.” MARION COUNTY SUPERIOR CT. CRIM. R. 7(2)(a)(3).

⁸⁹ Chandler v. State, 419 N.E.2d 142, 144 (Ind. 1981).

⁹⁰ IND. R. TRIAL P. 37. Although the Indiana Trial Rules apply primarily to civil cases, they “shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by [the Indiana Supreme Court] for the conduct of criminal proceedings.” IND. R. CRIM. P. 21. Trial Rule 37(B)(2) also provides sanctions for a party’s “failure to obey a discovery order and applies in criminal cases.” Fields v. State, 679 N.E.2d 1315, 1319 (Ind. 1997).

- (2) Ordering that the disobedient party may not support or oppose designated claims or defenses, or may not introduce designated matters in evidence;
- (3) Ordering pleadings stricken, a stay of proceedings until the court's order is obeyed, a dismissal of the action, or an entry of default judgment against the disobedient party;
- (4) Ordering that the disobedient party is in contempt of court for failure to obey the discovery orders.⁹¹

Usually, the proper remedy for the prosecution's failure to adhere to a discovery order is to issue a continuance⁹² to give the defendant time to review the discoverable evidence or meet with the witness and adjust his/her trial strategy accordingly.⁹³ However, the evidence can be excluded "where the violation 'has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial.'"⁹⁴ A mistrial is an appropriate remedy if the defendant is placed in "a position of grave peril to which [s/]he should not have been subjected."⁹⁵

Following the trial, a defendant may obtain relief for the prosecution's failure to disclose *Brady*⁹⁶ material at trial by proving that:

- (1) The evidence must have been suppressed by the State;
- (2) The evidence at issue is favorable to the accused because it is either exculpatory or impeachment material; and
- (3) The evidence was material to an issue at trial.⁹⁷

Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁹⁸ The prosecution's failure to disclose *Brady* evidence that is material to guilt may result in a mistrial,⁹⁹ but a mistrial is "an extreme remedy granted only when no other method can rectify the situation."¹⁰⁰ A less extreme remedy could involve re-calling a witness and

⁹¹ IND. R. TRIAL P. 37(B)(2)(a)-(d).

⁹² See *Wisehart v. State*, 491 N.E.2d 985, 990 n. 2 (Ind. 1986); *Lund v. State*, 345 N.E.2d 826, 829 (Ind. 1976); see also *Fields*, 679 N.E.2d at 1319 ("Courts generally remedy a situation where a party fails to disclose a witness by providing a continuance rather than by disallowing the testimony.").

⁹³ See *Stephenson v. State*, 742 N.E.2d 463, 490 (Ind. 2001).

⁹⁴ *Dye v. State*, 717 N.E.2d 5, 11 (Ind. 1999) (quoting *Kindred v. State*, 524 N.E.2d 279, 287 (Ind.1988)); see also *Armstrong v. State*, 499 N.E.2d 189, 191 (Ind. 1986).

⁹⁵ *Chandler v. State*, 419 N.E.2d 142, 145 (Ind. 1981).

⁹⁶ *Brady* held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁹⁷ See *Ben-Yisrayl v. State*, 738 N.E.2d 253, 268 (Ind. 2000); *Azania v. State*, 730 N.E.2d 646, 655 (Ind. 2000); *Williams v. State*, 714 N.E.2d 644, 649 n.2 (Ind. 1999); *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998); *State v. Nikolaenko*, 687 N.E.2d 581, 583 (Ind. Ct. App. 1997).

⁹⁸ *Beauchamp v. State*, 788 N.E.2d 881, 894 (Ind. Ct. App. 2003); see also *Lowrimore v. State*, 728 N.E.2d 860, 867 (Ind. 2000) ("A claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that it had a probable persuasive effect on the jury's decision.").

⁹⁹ See *Lowrimore*, 728 N.E.2d at 867.

¹⁰⁰ *Id.*

permitting the defendant an opportunity to question the witness to address the belatedly disclosed evidence.¹⁰¹

4. Limitations on Arguments

a. Substantive Limitations

When determining if there has been prosecutorial misconduct in a case, including whether the prosecutor's opening or closing statement is improper, the court considers:

- (1) Whether the prosecutor in fact engaged in misconduct;¹⁰²
- (2) Whether the misconduct, under all the circumstances, placed the defendant in a position of grave peril to which s/he should not have been subjected;¹⁰³

The prosecutor's statement is considered "in the context of the argument as a whole."¹⁰⁴ Whether the misconduct subjects the defendant to "grave peril" is determined by the probable persuasive effect of the misconduct on the jury's decision and not by the degree of the impropriety.¹⁰⁵ Even if an isolated instance of misconduct fails to establish grave peril, repeated instances of misconduct that demonstrate a deliberate attempt to improperly prejudice the defendant may result in a reversal of the defendant's conviction.¹⁰⁶

Courts have held that a prosecutor may not reference his/her personal opinions during opening and closing statements,¹⁰⁷ express his/her personal opinion addressing the validity of a witness's testimony,¹⁰⁸ disparage opposing counsel,¹⁰⁹ inform the jury that

¹⁰¹ *Id.*

¹⁰² *Maldonado v. State*, 355 N.E.2d 843, 848 (Ind. 1976). The court considers case law and the Rules of Professional Responsibility to determine if the prosecutor's argument constituted misconduct. *Id.*; *see also* *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006).

¹⁰³ *Maldonado*, 355 N.E.2d at 848; *see also* *Caldwell v. State*, 508 N.E.2d 27, 28 (Ind. 1987); *Holmes v. State*, 671 N.E.2d 841, 847 (Ind. 1996) ("A claim of prosecutorial misconduct is to be approached upon consideration of whether in fact the prosecutor engaged in misconduct, and if so, whether the misconduct placed the defendant in a position of grave peril to which [s/]he should not have been subjected.").

¹⁰⁴ *See Hollowell v. State*, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999).

¹⁰⁵ *Maldonado*, 355 N.E.2d at 848; *see also Hollowell*, 707 N.E.2d at 1024; *see also Collins v. State*, 643 N.E.2d 375, 381 (Ind. Ct. App. 1994) ("Thus, even though a prosecutor's comments may be improper, they will not constitute reversible error unless they place appellant in such grave peril as to deny him[her] a fair trial.").

¹⁰⁶ *Maldonado*, 355 N.E.2d at 848; *see also Brown v. State*, 746 N.E.2d 63, 70 (Ind. 2001); *Stevens v. State*, 691 N.E.2d 412, 420 (Ind. 1997).

¹⁰⁷ *See United States v. Young*, 470 U.S. 1, 9 (1989); *Rodriguez v. State*, 795 N.E.2d 1054, 1059 (Ind. Ct. App. 2003).

¹⁰⁸ *See Schlomer v. State*, 580 N.E.2d 950, 957 (Ind. 1991).

¹⁰⁹ *See Splunge v. State*, 641 N.E.2d 628, 630-31 (Ind. 1994) (superseded on other grounds); *Marcum v. State*, 725 N.E.2d 852, 858-59 (Ind. 2000).

the defendant has the burden of proof in a criminal case,¹¹⁰ or “ask the jury to convict a defendant for any other reason other than his[/her] guilt.”¹¹¹

b. Challenges to Prosecutorial Arguments

If the prosecutor makes improper statements during his/her opening or closing statement, defense counsel must make a contemporaneous objection.¹¹² Defense counsel also must request the trial judge to admonish the jury to disregard the prosecutor’s statement, and must file a motion to strike the statement or file a motion for a mistrial.¹¹³ Should the court determine that the prosecutor’s conduct subjected the defendant to grave peril, the court may declare a mistrial.¹¹⁴ However, a mistrial is “an extreme remedy in a criminal case that should be granted only when nothing else can rectify a situation.”¹¹⁵ Usually, the court finds that an admonishment to the jury is an adequate cure for prosecutorial misconduct.¹¹⁶

Even in the absence of a contemporaneous objection, Indiana appellate courts may find reversal appropriate when the misconduct rises to the level of fundamental error.¹¹⁷ For example, in one recent case the Indiana Supreme Court reversed a sentence of life imprisonment without parole because the comments “were not solely misstatements of law. The unmistakable theme woven through the deputy prosecutor’s rebuttal remarks was that [the defendant] deserved life without parole because he was an unsavory character.”¹¹⁸

¹¹⁰ See *Stephenson v. State*, 742 N.E.2d 463, 483 (Ind. 2001).

¹¹¹ *Caldwell v. State*, 508 N.E.2d 27, 28 (Ind. 1987).

¹¹² See *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002).

¹¹³ See *Caldwell*, 508 N.E.2d at 28; *Brown v. State*, 464 N.E.2d 361, 363 (Ind. Ct. App. 1984).

¹¹⁴ See *Owens v. State*, 714 N.E.2d 250, 252 (Ind. Ct. App. 1999).

¹¹⁵ *Schlomer v. State*, 580 N.E.2d 950, 955 (Ind. 1991).

¹¹⁶ See *id.* at 956; *Underwood v. State*, 535 N.E.2d 507, 518 (Ind. 1989); *Williams v. State*, 408 N.E.2d 123, 124-25 (Ind. Ct. App. 1980).

¹¹⁷ See *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006).

¹¹⁸ *Id.* at 841.

II. ANALYSIS

A. Recommendation #1

Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

The State of Indiana “does not require a written policy for determination of who will be prosecuted with a death penalty charge”¹¹⁹ and the Indiana Prosecuting Attorneys Council (IPAC) is unaware of any prosecutor's offices that have written policies governing the exercise of prosecutorial discretion.¹²⁰ Despite this, IPAC has a Capital Litigation Committee which is made up of prosecutors with death penalty experience and Deputy Attorneys General who handle capital appeals.¹²¹ Prosecutors with pending death penalty cases, or with cases that may be death-eligible, may, but are not required to, appear before the Committee to have their case reviewed.¹²²

In addition, the Indiana Supreme Court, has established the Indiana Rules of Professional Conduct (Rules), which address prosecutorial discretion generally in the context of the role and responsibilities of prosecutors.¹²³ The Rules describe the prosecutor as “a minister of justice”¹²⁴ and prosecutors have an obligation to “see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”¹²⁵ The Rules also require prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”¹²⁶ Accordingly, the Indiana Supreme Court has recognized that prosecutors should be held to “a high standard of ethical conduct.”¹²⁷

Indiana law provides prosecutors with “broad and unfettered” discretion to seek the death penalty.¹²⁸ The Indiana Code provides that a prosecutor should file a notice of intent to seek the death penalty,¹²⁹ but such notice can be filed “at any time before, during or after trial so long as it does not prejudice the substantial rights of the defendant.”¹³⁰ In fact, a

¹¹⁹ *Townsend v. State*, 533 N.E.2d 1215, 1222 (Ind. 1989).

¹²⁰ Email from Stephen Johnson to Joel Schumm (Jan. 29, 2007).

¹²¹ *Id.*

¹²² *Id.*

¹²³ IND. R. PROF'L CONDUCT 3.8; *see also* 16A WILLIAM ANDREW KERR, INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 8.2 (2006) (“A prosecuting attorney is therefore subject to the provisions of the Indiana Rules of Professional Conduct as promulgated by the Indiana Supreme Court.”).

¹²⁴ IND. R. PROF'L CONDUCT 3.8 cmt 1.

¹²⁵ *Id.*

¹²⁶ IND. R. PROF'L CONDUCT 3.8(a).

¹²⁷ *In re Wrinkler*, 834 N.E.2d 85, 90 (Ind. 2005).

¹²⁸ *Bivins v. State*, 642 N.E.2d 928, 948 (Ind. 1994); *see also Roche v. State*, 596 N.E.2d 896, 899 (Ind. 1992) (“The prosecutor in his[her] discretion may seek the death penalty against a particular defendant.”).

¹²⁹ IND. CODE § 35-50-2-9(a) (2006).

¹³⁰ *Games v. State*, 535 N.E.2d 530, 535 (Ind. 1989). Because the Indiana Supreme Court has determined that filing a notice of intent to seek the death penalty is analogous to “filing a subsequent request that a defendant be charged as a habitual offender,” a notice to seek the death penalty is not an “amendment” to

court considers whether notice has been filed belatedly and, therefore, improperly by considering whether there has been a prejudicial impact upon the defendant's preparation for trial.¹³¹

Based on this information, we were unable to determine whether prosecutors in the State of Indiana are exercising their discretion in a way that ensures fair, efficient, and effective enforcement of criminal law. In addition, the prosecutors we spoke to have not adopted written policies addressing prosecutorial discretion in seeking the death penalty.¹³² Consequently, we are unable to ascertain whether the State of Indiana is in compliance with Recommendation #1.

We note that despite the broad and unfettered discretion afforded to prosecutors in their decision to seek the death penalty, there is at least one bill currently before the Indiana General Assembly that would remove this discretion and require prosecutors to seek the death penalty in some child murders.¹³³ IPAC opposes this legislation.¹³⁴

Based on this information, the Indiana Death Penalty Assessment Team recommends that, to assist prosecutors in making informed charging decisions, the State of Indiana should collect data on potentially death-eligible murder cases and make such data available.

B. Recommendation #2

Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

The State of Indiana does not require prosecutor offices to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or testimony of jailhouse snitches, informants and other witnesses who receive a benefit. Each prosecutor's office may have such procedures and policies, but we were unable to obtain copies of any of them and IPAC is unaware of any office that has policies on eyewitness identification, confessions, or the use of jailhouse informants.¹³⁵

We note, however, that the State of Indiana has certain trial procedures relevant to the admissibility and/or reliability of certain types of evidence. For example, the Indiana Supreme Court has "acknowledged the importance of fully disclosing express plea

the charging information under the Indiana Code and "does not in itself prejudice the substantial rights" of the defendant. *McIntyre v. State*, 717 N.E.2d 114, 125 n.6 (Ind. 1999).

¹³¹ *Games*, 535 N.E.2d at 535.

¹³² Interview by Doug Cummins with Lance Hamner, Johnson County Prosecutor (August 2005); Interview by Doug Cummins with Carl Brizzi, Marion County Prosecutor (May 11, 2006); Interview by Doug Cummins with Steve Stewart, Clark County Prosecutor (May 2006).

¹³³ Mike Smith, *Bill Pushes Death Penalty in Some Child Murders*, INDIANAPOLIS STAR, Jan. 3, 2007.

¹³⁴ *Id.*

¹³⁵ Email from Stephen Johnson to Joel Schumm (Jan. 29, 2007) (on file with author).

agreements or understandings between the State and witnesses, even where such agreements or understandings are not reduced in writing and where the prosecutor trying the case was apparently unaware of an agreement or understanding reached between the witness and another prosecutor.”¹³⁶ The Indiana Supreme Court has recognized that such disclosure of plea agreements and understandings between prosecutors and witnesses is consistent with the United States Supreme Court’s decision in *Napue v. Illinois* stating that “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt and innocence, and it is upon such subtle factors as the possible interest of the witness testifying falsely that the defendant’s life or liberty may depend.”¹³⁷

Accordingly, the Indiana Supreme Court has declared that Indiana courts “cannot continue to tolerate late inning surprises later justified in the name of harmless error” when prosecutors fail to disclose witness plea agreements prior to the witness testifying.¹³⁸

While prosecutor offices are not required to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or testimony of jailhouse snitches, informants and other witnesses who receive a benefit, we are unable to ascertain whether any individual offices have such policies. Consequently, we were unable to determine whether the State of Indiana is in compliance with Recommendation #2.

C. Recommendation #3

Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

State and federal law requires prosecutors to disclose evidence that is favorable to the defendant when such evidence is material to either the defendant’s guilt or punishment. This includes all exculpatory information or evidence.¹³⁹ Additionally, the prosecutor “has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, and thus is charged with knowledge of potentially exculpatory evidence of which the police are aware.”¹⁴⁰

Because trial courts in Indiana have the authority to initiate pre-trial discovery by issuing a discovery order *sua sponte*, some courts have adopted local court rules providing for

¹³⁶ *Wright v. State*, 690 N.E.2d 1098, 1113 (Ind. 1997).

¹³⁷ *Id.* (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

¹³⁸ *Goodner v. State*, 714 N.E.2d 638, 642 (Ind. 1999).

¹³⁹ *See Brady v. Maryland*, 373 U.S. 83 (1963); *Goodner*, 714 N.E.2d at 642.

¹⁴⁰ *Penley v. State*, 734 N.E.2d 287, 289 (Ind. Ct. App. 2000); *see also Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997).

discovery.¹⁴¹ Several of the local court rules require prosecutors to permit defendants to inspect and copy discoverable evidence.¹⁴² Such evidence that is subject to this requirement includes, but is not limited to: names and addresses of persons known to be witnesses and copies of their written or recorded statements; copies of any written or recorded statements and the substance of any oral statements made by the accused; and copies of any reports or statements of experts, including results of physical or mental examinations and of scientific tests, experiments or comparisons.¹⁴³

Prosecutors also have an ethical obligation 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.”¹⁴⁴

Based upon this information, it appears that the State of Indiana has the necessary framework in place to permit prosecutors to fully and timely disclose all information, documents, and tangible objects to the defense. It also appears that this framework permits reasonable inspection, copying, testing, and photographing of the disclosed documents and tangible objects. However, some prosecutors still fail to comply with discovery requirements despite this framework. For example, the Center for Public Integrity’s study of Indiana criminal appeals, including both death and non-death cases from 1970 to June 2003, revealed 475 Indiana cases in which the defendant alleged prosecutorial error or misconduct.¹⁴⁵ In twenty-one of these cases, judges reversed or remanded a defendant’s conviction, sentence or indictment due to a prosecutor’s conduct.¹⁴⁶ Of the cases in which judges ruled that the prosecutor’s conduct prejudiced the defendant, five involved the prosecution withholding exculpatory evidence from the defense.¹⁴⁷

Although Indiana has the necessary framework in place to permit prosecutors to fully and timely disclose evidence and many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, they do not always do so. The State of Indiana, therefore, is only in partial compliance with Recommendation #3.

¹⁴¹ IND. R. TRIAL P. 81(A); *see also* S.T. v. State, 764 N.E.2d 632, 635 (Ind. 2002) (“Trial courts in the State of Indiana are permitted to make and amend rules governing their practice provided the rules are not inconsistent with the Indiana Rules of Trial Procedure.”).

¹⁴² WAYNE COUNTY CRIM. R. 13(A); ST. JOSEPH COUNTY CRIM. R. 305.5; ALLEN COUNTY SUPER. CT. CRIM. R. 13(B)(1).

¹⁴³ *Id.*

¹⁴⁴ IND. R. PROF’L CONDUCT 3.8(d).

¹⁴⁵ Center for Public Integrity, Harmful Error, *available at* <http://www.publicintegrity.org/pm/states.aspx?st=IN> (last visited Feb. 7, 2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

D. Recommendation #4

Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.

All attorneys, including prosecutors, are required to report professional misconduct of other attorneys to the appropriate professional authority.¹⁴⁸ The State of Indiana has entrusted the Indiana Bar Association, Indiana Supreme Court Disciplinary Commission,¹⁴⁹ and Indiana Supreme Court with investigating grievances and disciplining practicing attorneys.¹⁵⁰

Initially, a written, verified complaint addressing an attorney's misconduct will be filed with the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.¹⁵¹ After the attorney accused of misconduct submits a response and a preliminary investigation is conducted, the Executive Secretary of the Indiana Supreme Court Disciplinary Commission will determine whether reasonable cause exists that the attorney is guilty of misconduct.¹⁵² If reasonable cause exists, the claim will be docketed and investigated.¹⁵³ Upon docketing the claim, the Executive Director will conduct an investigation and write a report that is submitted to the Disciplinary Commission.¹⁵⁴ If the Disciplinary Commission determines that probable cause exists that the attorney committed misconduct warranting discipline, the Commission may file the claim with the Clerk of the Indiana Supreme Court.¹⁵⁵ Upon the complaint being filed, the Indiana Supreme Court will appoint no more than three hearing officer(s) to conduct a hearing and determine the charges.¹⁵⁶ During the hearing, the attorney accused of misconduct is permitted to attend the hearing, be represented by counsel, to cross-examine witnesses testifying against him/her, and produce evidence and/or witnesses on his/her behalf.¹⁵⁷ Within thirty days of concluding the hearing, the hearing officer(s) must determine if the misconduct has been proven by clear and convincing evidence and submit written findings of fact to the Indiana Supreme Court.¹⁵⁸

When assessing an appropriate sanction for an attorney who has committed misconduct, the Indiana Supreme Court will consider several factors, including:

¹⁴⁸ IND. R. PROF'L CONDUCT 8.3(a).

¹⁴⁹ See *supra* note 43 and accompanying text (describing Indiana Supreme Court Disciplinary Commission).

¹⁵⁰ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 23, §§ 1, 5 (2007).

¹⁵¹ *Id.* at § 10(a).

¹⁵² *Id.* at § 10(b).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at § 10(c).

¹⁵⁵ *Id.* at § 11(b).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at § 14(f).

¹⁵⁸ *Id.* at § 14(h).

[T]he surrounding circumstances of the misconduct, the respondent's state of mind, the duty that was violated through the misconduct, any actual or potential injury to the client, the risk to the public, the duty of this Court to preserve the integrity of the legal profession, and any mitigating or aggravating factors.¹⁵⁹

In addition, any “prior disciplinary offenses, a pattern of misconduct, and multiple offenses” may warrant the court imposing a more severe sanction.¹⁶⁰

According to the American Bar Association Center for Professional Responsibility, the State Bar of Indiana received 1,625 complaints about alleged attorney misconduct in 2005.¹⁶¹ Of these, 957 were summarily dismissed for lack of jurisdiction, 1,486 were investigated, 629 were dismissed after investigation, and forty-one attorneys were formally charged.¹⁶² Furthermore, fifty-three lawyers were publicly sanctioned in 2005.¹⁶³ Of the forty-six lawyers who were publicly sanctioned, thirteen of them were disbarred, twenty-three were suspended, three were suspended on an interim basis (for risk of harm or criminal conviction), seventeen were publicly reprimanded and/or censured, and six were placed on probation.¹⁶⁴ We were unable to determine how many, if any, of these attorneys were or are prosecutors.

The organization HALT, which evaluates lawyer discipline systems across the country, assigned a grade of “C-” to Indiana’s lawyer discipline system and ranks it 29th in the nation overall based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of disciplinary procedures, the amount of public participation, and the promptness of follow-up on complaints.¹⁶⁵ One of the reasons for Indiana’s low grade is that attorneys, rather than the public, comprise a majority of the members on the attorney discipline hearing committees.¹⁶⁶ Additionally, fewer than five percent of investigated lawyer discipline cases result in discipline.¹⁶⁷ HALT states that Indiana’s attorney discipline system “has changed less than any disciplinary body in the country” despite the organization’s calls for reform during the past four years.¹⁶⁸

¹⁵⁹ *In re Snyder*, 706 N.E.2d 1080, 1082 (Ind. 1999); *In re Wilson*, 715 N.E.2d 838, 842 (Ind. 1999).

¹⁶⁰ *Wilson*, 715 N.E.2d at 842.

¹⁶¹ ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems, Chart 1 (2005), at <http://www.abanet.org/cpr/discipline/sold/05-ch1.xls> (last visited Feb. 7, 2007).

¹⁶² *Id.*

¹⁶³ ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems, Chart 2 (2005), at <http://www.abanet.org/cpr/discipline/sold/05-ch2.xls> (last visited Feb. 7, 2007).

¹⁶⁴ *Id.*

¹⁶⁵ HALT, LAWYER DISCIPLINE 2006 REPORT CARD, INDIANA, at http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/IN_LDRC_06.pdf (last visited Feb. 7, 2007).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Moreover, the Center for Public Integrity's study of Indiana's criminal appeals, including both death and non-death cases from 1970 to June 2003, revealed 475 cases in which the defendant alleged prosecutorial error or misconduct.¹⁶⁹ In twenty-one of these, judges reversed or remanded a defendant's conviction, sentence or indictment due to a prosecutor's conduct.¹⁷⁰ In an additional eleven cases, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant.¹⁷¹ Of the cases in which judges ruled that the prosecutor's conduct prejudiced the defendant, sixteen involved prejudicial trial arguments, questions, or comments.¹⁷² The other five involved withholding exculpatory evidence from the defense.¹⁷³ Two of the defendants who alleged prosecutorial misconduct later proved their innocence.¹⁷⁴ In the majority of cases in which the defendant alleged prosecutorial misconduct (423 out of 475), however, the prosecutor's conduct or error was found to be harmless.¹⁷⁵ We were unable to determine how many, if any, of the prosecutors in these cases were referred to the State Bar for discipline.¹⁷⁶

Although the State of Indiana has established a procedure by which grievances are investigated and members of the State Bar are disciplined, the State lawyer discipline system does not adequately investigate and impose discipline on lawyers, and does not adequately involve the public as members of the State's attorney disciplinary committees. The State of Indiana is, therefore, only in partial compliance with Recommendation #4.

E. Recommendation #5

Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.

The Indiana courts have stated that a prosecutor "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, and thus is charged with knowledge of potentially exculpatory evidence of which the police are aware."¹⁷⁷ However, the United States Supreme Court has recognized that there is no constitutional requirement that the State make available a "complete and detailed

¹⁶⁹ Center for Public Integrity, Harmful Error, *available at* <http://www.publicintegrity.org/pm/states.aspx?st=IN> (last visited Feb. 7, 2007).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Center for Public Integrity, Nationwide Numbers, *at* <http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y> (last visited Feb. 7, 2007).

¹⁷⁶ Not all disciplinary actions in Indiana result in published opinions. One recent case involving misconduct by an elected prosecutor and her chief deputy was published, however. *See In re Winkler*, 834 N.E.2d 85 (Ind. 2005).

¹⁷⁷ *Penley v. State*, 734 N.E.2d 287, 289 (Ind. Ct. App. 2000); *see also Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997).

accounting” of the entire police investigation to the defendant.¹⁷⁸ In addition, the Indiana Supreme Court has determined that the State does not have to disclose any reports, memoranda, or other internal state documents made by the prosecuting attorney, other state agents, or law enforcement officers in connection with investigating or prosecuting the case.¹⁷⁹ If the State has failed to disclose exculpatory or mitigating evidence, the defendant must satisfy the *Brady* requirements, which includes showing that:

- (1) The evidence must have been suppressed by the State;
- (2) The evidence at issue is favorable to the accused because it is either exculpatory or impeachment material; and
- (3) The evidence was material to issue at trial.¹⁸⁰

If the State fails to disclose evidence material at trial, the defendant may receive a new trial.¹⁸¹ These potential outcomes encourage all law enforcement agencies, laboratories, and other experts under the control of the prosecutor to comply with their obligation to inform the prosecutor of any potentially exculpatory or mitigating evidence.

We were unable to obtain any information addressing whether law enforcement agencies, crime laboratories, and other experts have failed to provide prosecutors with exculpatory or mitigating evidence. Despite the fact that disclosing evidence is in the best interest of prosecutors, we do not have sufficient information to draw any conclusions as to whether all prosecutors are meeting or failing to meet Recommendation # 5.

F. Recommendation #6

The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

Under Indiana law, IPAC is responsible for:

- (1) Assisting in the coordination of the duties of the prosecuting attorneys of the state and their staffs;
- (2) Preparing manuals of procedure;
- (3) Giving assistance in preparing trial briefs, forms, and instructions;
- (4) Conducting research and studies that would be of interest and value to all prosecuting attorneys and their staffs;

¹⁷⁸ Moore v. Illinois, 408 U.S. 786, 795 (1972).

¹⁷⁹ IND. R. TRIAL P. 26(B)(3); *see also* Robinson v. State 693 N.E.2d 548, 552 (Ind. 1998); Johnson v. State, 584 N.E.2d 1092, 1103 (Ind. 1992).

¹⁸⁰ *See* Ben-Yisrayl v. State, 738 N.E.2d 253, 268 (Ind. 2000); Azania v. State, 730 N.E.2d 646, 655 (Ind. 2000); Williams v. State, 714 N.E.2d 644, 649 n.2 (Ind. 1999); State v. Nikolaenko, 687 N.E.2d 581, 583 (Ind. Ct. App. 1997).

¹⁸¹ *See* 16A WILLIAM ANDREW KERR, INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 16.4 (2006); *see also* U.S. v. Agurs, 427 U.S. 97, 112-13 (1976); Newman v. State, 334 N.E.2d 684, 688 (Ind. 1975).

- (5) Maintaining liaison contact with study commissions and agencies of the branches of the local, state, and federal governments that will be of benefit to law enforcement and the administration of justice in Indiana; and
- (6) Adopting guidelines for the expenditure of funds derived from a deferral program or pretrial diversion program.¹⁸²

Some of the training and assistance provided by IPAC includes issues that arise in capital cases. For example, IPAC offered two and one half days of training on capital litigation in October, 2006.¹⁸³ Additionally, some prosecutors in Indiana have received training by the National District Attorneys' Association.¹⁸⁴ However, Indiana does not require any specific training programs to be offered to prosecuting attorneys handling capital cases.¹⁸⁵ It is also unclear if the State of Indiana provides funds for the costs of relevant training programs.

Based on this information, the State of Indiana is in partial compliance with Recommendation #6.

Consequently, the Indiana Death Penalty Assessment Team recommends that the State of Indiana offer training for all prosecutors involved in capital cases. This training for prosecutors should be incorporated into the Indiana Prosecuting Attorneys Council's training for all new prosecutors,¹⁸⁶ in addition to offering training for experienced prosecutors who are involved in a capital case or are considering filing a notice of intent to seek the death penalty.

¹⁸² IND. CODE § 33-39-8-5(1)-(6) (2006).

¹⁸³ Email from Stephen Johnson to Joel Schumm (Jan. 29, 2007) (on file with author).

¹⁸⁴ Interview by Doug Cummins with Carl Bizzi, Marion County Prosecutor (May 11, 2006).

¹⁸⁵ Interview by Doug Cummins with Lance Hammer, Johnson County Prosecutor (August, 2005); Interview by Doug Cummins with Carl Bizzi, Marion County Prosecutor (May 11, 2006).

¹⁸⁶ The need for training of all prosecutors—not just those with pending death penalty cases—is pronounced not only in discretionary charging decisions. For example, an elected county prosecutor recently told the media he was considering seeking the death penalty against a seventeen-year old defendant. See Theodore Kim & Gavin Lesnick, *Teen Arrested; Details Emerge: He Left Hunting Trip Night Before Shootings*, INDIANAPOLIS STAR, July 26, 2006, at A1. Neither the Indiana death penalty statute nor federal law allows a death sentence for a person who committed an offense while under the age of eighteen. See *Roper v. Simmons*, 543 U.S. 551 (2005).

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.¹ The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.² In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

¹ Strickland v. Washington, 466 U.S. 668 (1984).

² JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html> (last visited Feb. 7, 2007).

I. FACTUAL DISCUSSION

A. *Indiana's Indigent Legal Representation System*

In 1993, the Indiana Supreme Court adopted Rule 24 of the Indiana Rules of Criminal Procedure, which provides standards for the appointment and compensation of attorneys who represent indigent individuals in capital cases at trial and on appeal.³ This rule did not create a statewide indigent defense system for criminal cases, however, and Indiana's indigent defense at trial and on appeal still is provided on a county-by-county basis. The only state-wide indigent defense system is the State Public Defender's Office, which handles state post-conviction cases.⁴

1. Statewide Indigent Defense Resources

a. State Public Defender

As mentioned above, the State Public Defender's Office is Indiana's only state-wide indigent defense service. The State Public Defender's Office represents individuals, including those sentenced to death, in post-conviction proceedings, if the individual: (1) is confined in a penal facility in Indiana or committed to the Department of Correction due to a criminal conviction or delinquency adjudication; and (2) is financially unable to employ counsel.⁵ The purpose of the State Public Defender's Office is to provide "legal aid at public expense for those who voluntarily seek and otherwise could not obtain the advice and assistance of a competent attorney."⁶

The State Public Defender's Office has "funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like" to provide legal assistance for death-sentenced prisoners in state post-conviction proceedings.⁷ The State Public Defender's Office has a Capital Division which is staffed with five deputy State Public Defenders, one mitigation specialist, and a law clerk to assist in post-conviction relief on behalf of death-row inmates.⁸ If the State Public Defender's Office is unable to work on a post-conviction case for any reason, the office may contract with private attorneys.⁹

³ Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495, 500 (1996).

⁴ IND. CODE § 33-40-1-2(a) (2006).

⁵ *Id.*; see also *State ex rel. Bullard v. Reeves*, 169 N.E.2d 607, 607 (Ind. 1960) (stating that "[w]e further point out that the statutes of this state provide a public defender for the purpose of representing a petitioner where there is a meritorious ground for appeal and the time therefore has expired").

⁶ *State ex rel. Fulton v. Schannen*, 64 N.E.2d 798, 799 (Ind. 1946).

⁷ *Ben-Yisrayl v. Davis*, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

⁸ PUBLIC DEFENDER OF INDIANA: ANNUAL REPORT FISCAL YEAR 2004-2005, at 3 (2005) (on file with author) [hereinafter 2004-2005 ANNUAL REPORT].

⁹ *Id.* at 2.

The Indiana Supreme Court appoints a State Public Defender to serve a four-year term.¹⁰ To be eligible to serve as a State Public Defender, s/he must be: (1) a resident of the State of Indiana, and (2) a practicing attorney in Indiana for at least three years.¹¹ When considering the adequacy of the appointment for the State Public Defender position, the Indiana Supreme Court can administer any test(s) it determines are proper.¹²

b. Indiana Public Defender Council

The Indiana Public Defender Council (Council) is a support center for public defenders around the state. Public defenders are members of and are served by the Council, but they are not part of a state-wide system. The Council's membership consists of "all public defenders, contractual pauper counsel and other court appointed attorneys regularly appointed to represent indigent defendants."¹³ An eleven-member board of directors determines the activities of the Council.¹⁴

The Council is obligated to:

- (1) Assist in the coordination of the duties of the attorneys engaged in the defense of indigents at public expense;
- (2) Prepare manuals of procedure;
- (3) Assist in the preparation of trial briefs, forms, and instructions;
- (4) Conduct research and studies of interest or value to all such attorneys; and
- (5) Maintain liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that will benefit criminal defense as part of the fair administration of justice in Indiana.¹⁵

As part of its work, the Council provides a death penalty defense manual, an annual death penalty defense seminar, and regular reports "regarding developments affecting capital litigation at the trial and appellate levels."¹⁶ Additionally, the Council provides capital defense attorneys with "consultation, research, and technical assistance."¹⁷

c. Indiana Public Defender Commission

Although no statewide agency oversees the work of all public defenders at the trial and direct appeal level, the Indiana Legislature established the Indiana Public Defender Commission (Commission) to provide reimbursement from state funds for counties

¹⁰ IND. CODE § 33-40-1-1(b) (2006).

¹¹ IND. CODE § 33-40-1-1(c)(1)-(2) (2006).

¹² IND. CODE § 33-40-1-1(d) (2006).

¹³ IND. CODE § 33-40-4-2(a)-(b) (2006).

¹⁴ IND. CODE § 33-40-4-3 (2006). Ten of the eleven Board of Directors are elected by the entire membership of the Council, and the State Public Defender. *Id.*

¹⁵ IND. CODE § 33-40-4-5(1)-(5) (2006).

¹⁶ Indiana Public Defender Council, IPDC Membership, *available at* <http://www.in.gov/pdc/general/memberinfo.html> (last visited Feb. 6, 2007).

¹⁷ *Id.*

which comply with guidelines established by the Commission for the provision of indigent defense services.¹⁸ The Commission is mandated to “recommend standards for indigent defense in capital cases, to adopt guidelines of salary and fee schedules for individual county reimbursement eligibility, and to review and approve requests for reimbursement in capital cases.”¹⁹ The Commission has developed guidelines to govern reimbursement for both capital and non-capital indigent defense services. Specifically, the Commission’s responsibilities include:

- (1) Making recommendations to the Indiana Supreme Court concerning the standards for indigent defense services for defendants against whom the State has sought the death penalty, including:
 - (a) Determining indigency and eligibility for legal representation;
 - (b) Selecting and qualifying attorneys to represent indigent defendants at public expense;
 - (c) Determining conflicts of interest;
 - (d) Providing investigative, clerical, and other support services necessary for adequate legal representation.
- (2) Adopting guidelines and standards for indigent defense services under which the counties are eligible for reimbursement under section 33-40-6 of the Indiana Code, including, but not limited to the following subjects:
 - (a) Determining indigency and eligibility for legal representation;
 - (b) Issuing and enforcing orders requiring the defendant to pay for the costs of court appointed legal representation;
 - (c) Using and expending funds in the county supplemental public defender services fund;
 - (d) Qualifying attorneys to represent indigent defendants at public expense;
 - (e) Compensating rates for salaried, contractual, and assigned counsel;
 - (f) Establishing minimum and maximum caseloads of public defender offices and contract attorneys;
- (3) Making recommendations concerning the delivery of indigent defense services in Indiana; and
- (4) Submitting an annual report to the Governor, the General Assembly, and the Indiana Supreme Court on the operation of the public defense fund.²⁰

The Commission is composed of eleven members, none of whom may be a law enforcement officer or court employee.²¹ The Commission’s membership includes:

- (1) Three members appointed by the Governor, with no more than two belonging to the same political party;

¹⁸ Indiana Public Defender Commission, About the Commission, Overview, available at <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007).

¹⁹ *Id.*

²⁰ IND. CODE § 33-40-5-4 (2006).

²¹ IND. CODE § 33-40-5-2(a)-(b) (2006).

- (2) Three members appointed by the Chief Justice of the Indiana Supreme Court, with no more than two belonging to the same political party;
- (3) One attorney admitted to practice law in Indiana, appointed by the Board of Trustees of the Indiana Criminal Justice Institute;
- (4) Two members from the Indiana State House of Representatives who do not belong to the same political party, appointed by the Speaker of the House;
- (5) Two members from the Indiana State Senate who do not belong to the same political party, appointed by the President Pro Tempore of the Senate.²²

Each member of the Commission serves a four-year term.²³ If a vacancy occurs on the Commission prior to the expiration of a member's term, the vacancy is filled in the same manner as the original appointment.²⁴ An appointee filling a vacancy that occurs before an unexpired term will serve on the Commission until the term ends.²⁵

With respect to capital cases, the Commission has adopted Rule 24 of the Indiana Rules of Criminal Procedure as its guideline to be complied with for state reimbursement.²⁶

B. Appointment, Qualifications, Workload Limitations, Training, Compensation, and Resources Available to Attorneys Handling Death Penalty Trials and Appeals

1. Appointment of Counsel

Indiana law provides that an indigent person charged with a capital crime is eligible for appointed counsel at trial and on direct appeal. Rule 24 of the Indiana Rules of Criminal Procedure (Rule 24) requires that upon finding the defendant indigent, the court must appoint two qualified attorneys to represent him/her in capital trial proceedings.²⁷ One counsel is designated as lead counsel and the other as co-counsel.²⁸

²² *Id.*

²³ IND. CODE § 33-40-5-3(b) (2006).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Indiana Public Defender Commission, About the Commission, Overview, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007).

²⁷ IND. R. CRIM. P. 24(B); *see also* Bellmore v. State, 602 N.E.2d 111, 123 (Ind. 1992) (stating that “[b]eginning January 1, 1992, we now require the appointment of two qualified attorneys to represent an indigent person where the death penalty is sought”). The Indiana Supreme Court has determined that it is mandatory to appoint counsel in a capital case pursuant to the requirements of Rule 24. *See* Lowrimore v. State, 728 N.E.2d 860, 864 (Ind. 2000). There are two exceptions to this requirement: (1) the defendant has retained private counsel; or (2) a competent defendant knowingly, intelligently, and voluntarily waived his/her right to counsel in a timely and unequivocal manner. *Id.*; *see also* Stroud v. State, 809 N.E.2d 274, 286 (Ind. 2004).

²⁸ IND. R. CRIM P. 24(B)(1)-(2).

The method used by judges for appointing qualified counsel in capital cases at trial and on appeal varies from county to county and from court to court.²⁹ In some cases, the judge will appoint lead counsel and permit that attorney to select his/her co-counsel, or appoint co-counsel and permit that attorney to select lead counsel.³⁰ In other cases, the judge will ask a chief public defender's office to assist in appointing counsel.³¹ In still other cases, judges or chief public defender's offices will inquire about counsel's qualifications and/or how the attorney is perceived in the legal community.³² In some counties, such as Lake and Marion, in which there is a public defender agency with a chief public defender, the judge looks to the chief public defender to identify counsel for appointment.³³ In these counties, compensation for death penalty representation comes from the public defender agency budget, rather than from the Court.³⁴ Rule 24 of the Indiana Rules of Criminal Procedure does not address the compensation scheme when the public defender identifies counsel in a capital case.

Under certain circumstances, a judge may contact the State Public Defender to provide a qualified attorney for an indigent defendant if the judge determines that:

- (1) S/he is unable within a reasonable time to appoint an available attorney, public defender or otherwise, who is competent in the practice of law in criminal cases as legal counsel for any person charged in the court with a criminal offense and who does not have sufficient means to employ an attorney; or
- (2) In the interest of justice an attorney from another judicial circuit, not regularly practicing in the court, should be appointed to defend the indigent defendant or appeal the defendant's case, but the judge is unable within a reasonable time to provide for the direct appointment of an attorney.³⁵

If a judge issues this request, the State Public Defender must: (1) accept the appointment him/herself; (2) appoint any of the state public defender's deputies, or (3) appoint any practicing attorney if the attorney is admitted to practice in Indiana and competent to practice law in a criminal case.³⁶

As part of its work, the Commission maintains a roster of "attorneys who qualify for appointment in capital cases as lead counsel, co-counsel, or appellate counsel on the basis of their experience and their compliance with the training requirements in Criminal Rule

²⁹ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Aug. 12, 2005).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ IND. CODE § 33-40-2-1(a)(1)-(2) (2006). This method is sometimes used for direct appeal but rarely used at the trial level. 2004-2005 ANNUAL REPORT, *supra* note 8, at 24.

³⁶ IND. CODE § 33-40-2-2 (2006).

24.”³⁷ Attorneys are added to the roster on a voluntary basis.³⁸ The roster is intended to assist judges with the appointment of counsel in capital cases, but judges may appoint counsel not listed on the roster if appointed counsel satisfy the experience and training requirements of Rule 24.³⁹

2. Court-Appointed Attorney Qualifications

Under Rule 24, a court-appointed attorney designated as lead counsel at trial must:

- (1) Be an experienced and active trial practitioner with at least five years of criminal litigation experience;
- (2) Have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion;
- (3) Have prior experience as lead or co-counsel in at least one case in which the death penalty was sought; and
- (4) Have completed within two years prior to the appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.⁴⁰

Court-appointed co-counsel in a capital case at trial must:

- (1) Be an experienced and active trial practitioner with at least three years of criminal litigation experience;
- (2) Have prior experience as lead or co-counsel in no fewer than three felony jury trials which were tried to completion; and
- (3) Have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.⁴¹

In some circumstances, the Indiana Supreme Court has temporarily waived the Rule 24 training requirements for court-appointed counsel in capital cases at trial.⁴²

Under Rule 24, a court-appointed appellate attorney must:

- (1) Be an experienced and active trial or appellate practitioner with at least five years of criminal litigation experience;

³⁷ Indiana Public Defender Commission, About the Commission, Activities, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007); *see also* Indiana Public Defender Commission, Roster of Attorneys, *available at* <http://www.in.gov/judiciary/pdc/roster.html> (last visited Feb. 6, 2007).

³⁸ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

³⁹ *Id.*

⁴⁰ IND. R. CRIM. P. 24(B)(1)(a)-(d).

⁴¹ IND. R. CRIM. P. 24(B)(2)(a)-(c).

⁴² *See, e.g.,* State v. Walker, 84S00-0606-DP-227, order dated June 23, 2006.

- (2) Have prior experience within the last five years as appellate counsel in no fewer than three felony convictions in federal or state court;
- (3) Have completed within two years prior to the appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.⁴³

Appointed trial counsel will be appointed as sole or co-appellate counsel if s/he meets the qualification requirements.⁴⁴

3. Attorney Workload Limitations

Rule 24 establishes a maximum caseload for all attorneys, including salaried or contractual public defenders, who are appointed to represent defendants in capital cases at trial and on appeal.⁴⁵ According to Rule 24, an attorney accepting a trial appointment in a capital case must “provide each client with quality representation in accordance with constitutional and professional standards.”⁴⁶ In addition, the attorney must “not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.”⁴⁷ Prior to appointing an attorney to a capital case, the judge must assess the impact of the capital case on the attorney’s workload.⁴⁸

When appointing a salaried public defender or a contractual public defender in a capital case at trial, Rule 24 requires the court to consider the following workload requirements:

- (1) The public defender’s caseload cannot exceed twenty open felony cases while the capital case is pending in the trial court;
- (2) No new cases may be assigned to the public defender within thirty days of the date the capital trial is scheduled to begin;
- (3) None of the public defender’s cases may be set for trial within fifteen days of the date the capital trial is scheduled to begin; and
- (4) Compensation must be provided as detailed in the Indiana Rules of Criminal Procedure.⁴⁹

Additionally, the appointment of a salaried, full-time capital public defender is limited to counsel’s ability to provide quality representation in accordance with constitutional and

⁴³ IND. R. CRIM. P. 24(J)(1).

⁴⁴ IND. R. CRIM. P. 24(J).

⁴⁵ IND. R. CRIM. P. 24(B)(3), 24(J)(2).

⁴⁶ IND. R. CRIM. P. 24(B)(3)(a).

⁴⁷ *Id.*

⁴⁸ IND. R. CRIM. P. 24(B)(3)(b).

⁴⁹ IND. R. CRIM. P. 24(B)(3)(c)(i)-(iv); *see also* *Wrinkles v. State*, 749 N.E.2d 1179, 1201 (Ind. 2001). If Court-appointed counsel’s exceeding the workload requirements of Rule 24 does not necessitate a new trial. *Id.* at 1202. Instead, courts have determined that a violation of this Rule requires withholding payment to counsel for time spent on cases in violation of the Rule. *Id.*

professional standards.⁵⁰ Public defenders may not accept a case if it will interfere with the rendering of quality representation or will cause a breach of professional obligations.⁵¹ In the event that a salaried, full-time capital public defender is appointed, assessment of workload must be guided by Standard J of the Indiana Public Defender Commission’s *Standards for Indigent Defense Services in Non-Capital Cases*,⁵² and

⁵⁰ Although Rule 24 allows for salaried, full-time capital public defenders, to date no county has qualified an attorney under this designation.

⁵¹ IND. R. CRIM. P. 24(B)(3)(d).

⁵² Standard J of the Standards for Indigent Defense Services in Non-Capital Cases provides tables used to calculate the workload for counsel without adequate staff and counsel with adequate staff. The combined total of assigned cases should not exceed 100%. The tables are as follows:

Caseloads for Counsel Without Adequate Support Staff

Attorneys without an adequate support staff should not be assigned more than the number of cases in Table 1 in any one category in a 12-month period. If attorneys are assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should generally not exceed 100%.

Table 1

Type of Case	Full Time (number of cases)	Part Time (number of cases) (50%)
All felonies (This category is used in cases under Indiana Criminal Rule 24)	120	60
Non-capital murder; Class A, B, C felonies	100	50
Class D felonies only	150	75
Misdemeanors only	300	150
Juvenile Delinquency (JD)-Class C felony and above	200	100
JD-Class D felony	250	125
JD-Misdemeanors	300	150
JS-juvenile status	400	200
JC-juvenile CHINS	100	50
JT-TPR	100	50
Juvenile probation violation	400	200
JM-juvenile miscellaneous	400	200
Other (e.g., probation violation, contempt, extradition)	300	150
Appeal	20	10

Caseloads for Counsel with Adequate Support Staff

Salaried counsel with the support staff provided in Table 2 should not be assigned more than the number of cases in Table 3 in any one category in a 12-month period. If counsel is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100%.

Table 2

Paralegal-felony	One for every four attorneys
Paralegal-misdemeanor	One for every five attorneys
Paralegal-juvenile	One for every four attorneys
Paralegal-mental health	One for every two attorneys
Investigator-felony	One for every four attorneys

should consider all capital cases as the equivalent of forty felony cases “under the Commission’s ‘all felonies’ category.”⁵³

According to Rule 24, when appointing appellate counsel, “the judge shall assess the nature and volume of the workload...to assure that counsel can direct sufficient attention to the appeal of the capital case.⁵⁴ In the event the appointed appellate counsel is under a contract to perform other defense or appellate services for the court of appointment, no new cases for appeal shall be assigned to such counsel until the Appellant’s Brief in the death penalty case is filed.”⁵⁵

4. Training Requirements and Training Sponsors

a. Training Requirements

Rule 24 requires all court-appointed lead trial counsel, co-counsel, and appellate counsel in capital cases to have completed, within two years prior to appointment, at least twelve

Investigator-misdemeanor	One for every six attorneys
Investigator-juvenile	One for every six attorneys
Law clerk-appeal	One for every two attorneys
Secretary-felony	One for every two attorneys
Secretary-misdemeanor	One for every six attorneys
Secretary-juvenile	One for every five attorneys

Table 3

Type of Case	Full Time (number of cases)	Part Time (number of cases) (50%)
All felonies (This category is used in cases under Indiana Criminal Rule 24)	150	75
Non-capital murder; Class A, B, C felonies	120	60
Class D felonies only	200	100
Misdemeanors only	400	200
JD-C felony and above	250	125
JD-D felony	300	150
JD-Misdemeanors	400	200
JS-juvenile status	500	250
JC-juvenile CHINS	120	60
JT-TPR	120	60
Juvenile probation violation	500	250
JM-juvenile miscellaneous	400	200
Other (e.g., probation violation, contempt, extradition)	400	200
Appeal	25	12

See IND. PUBLIC DEFENDER COMMISSION, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES 14-17 (2006).

⁵³ *Id.*

⁵⁴ IND. R. CRIM. P. 24(J)(2).

⁵⁵ *Id.*

hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.⁵⁶

b. Training Sponsors

The Indiana Public Defender Council offers and funds an annual two-day Death Penalty Defense Seminar and an annual three and one-half day capital trial skills program.⁵⁷ In addition, there are a variety of other training seminars that have been approved by the Indiana Public Defender Commission.⁵⁸ Other approved sponsors include: Indiana Continuing Legal Education Forum, Ohio Public Defender Commission, Illinois Capital Resource Center, Capital Case Resource Center of Tennessee, California Attorneys for Criminal Justice, National Legal Aid and Defender Association, and the NAACP Legal Defense Fund.⁵⁹ Additional training seminars that have been approved include: a seminar sponsored by the Associations of Criminal Defense Lawyers of Alabama, Georgia, Tennessee, Louisiana, and Greater Birmingham; the McRae Death Penalty Seminar sponsored by the Ohio Bar Association; and Death Penalty Seminar sponsored by the Alabama Criminal Defense Lawyers Association.⁶⁰

5. Compensation Limits and Rates for Appointed Attorneys

Indiana law requires that hourly rate capital trial and appellate defense counsel be compensated according to the rate set by the Executive Director of the Division of State Court Administration.⁶¹ The Executive Director of the Division of State Court Administration adjusts the hourly rate every two years for trial and appellate counsel.⁶² The current hourly rate is \$101 per hour⁶³ for “those services determined by the trial judge to be reasonable and necessary for the defense of the defendant.”⁶⁴ The trial judge's determination of what is “reasonable and necessary” must be made within thirty days of counsel submitting a billing statement, although counsel may seek advance authorization from the trial judge, *ex parte*, for specific activities or expenditures of counsel's time.⁶⁵ A trial or appellate judge can determine that the “rate of compensation is not representative of practice in the community” and request that the Executive Director of the Division of State Court Administration adjust the hourly rate in a particular case.⁶⁶

⁵⁶ IND. R. CRIM. P. 24(B)(1)(d), (B)(2)(c), (J)(1)(c).

⁵⁷ Indiana Public Defender Council, Seminar Calendar, *available at* <http://www.in.gov/pdc/general/calendar.html> (last visited Feb. 6, 2007).

⁵⁸ Interview with Michael Murphy, Staff Counsel, Indiana Public Defender Commission (May 17, 2006).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ IND. R. CRIM. P. 24(C), (K)(1).

⁶² IND. R. CRIM. P. 24(C)(1), (K)(1).

⁶³ Letter from Lilia G. Judson, Executive Director, Ind. Supreme Court Division of Staff Court Administration, to Norman Lefstein, Chair, Indiana Public Defender Commission (June 8, 2006) (on file with author).

⁶⁴ IND. R. CRIM. P. 24(C)(1), (K)(1).

⁶⁵ *Id.*

⁶⁶ IND. R. CRIM. P. 24(C)(1), (K)(1).

If a county elects to qualify and appoint a salaried, full-time capital public defender, the salary and benefits should be the same as a prosecuting attorney's salary and benefits.⁶⁷

a. Obtaining Compensation

If a county has adopted an assigned counsel system as described in section 33-40-7-9 of the Indiana Code, court-appointed counsel in a capital case should submit a voucher to the court for compensation.⁶⁸ Assigned hourly counsel must submit periodic billing statements no less than every thirty days, describing in detail the date, activity, and time duration for which counsel is seeking compensation.⁶⁹

If a county qualifies and uses a salaried full-time capital public defender, s/he must submit monthly reports detailing the date, activities, and time duration of the services performed.⁷⁰ Salaried full-time capital public defenders are paid and receive benefits equivalent to prosecutors in the county.⁷¹ No county has elected to qualify and use salaried full-time capital public defenders. In some counties, like Lake and Marion, where there are public defender agencies and chief public defenders, attorneys are selected by the chief public defender but appointed by the Court, and payment comes from the public defender agency budget.⁷² Attorneys in those counties submit their vouchers to the chief public defender for approval and payment. Rule 24 does not address payment of appointed attorneys who are selected by the public defender.

When an attorney from the State Public Defender's Office provides representation, the county is billed according to the current fee schedule.⁷³ After the voucher is approved by the appropriate judge, the claim is processed by the county auditor.⁷⁴

The Public Defense Fund has been established by the Indiana Legislature to reimburse counties for expenses associated with capital and non-capital criminal cases.⁷⁵ The county auditor may submit a request to the Public Defender Commission on a quarterly basis, for reimbursement from the Public Defense Fund of at least fifty percent of the county's expenditures for indigent defense services associated with capital cases.⁷⁶ To receive the reimbursement requested from the Public Defense Fund, the county must

⁶⁷ IND. R. CRIM. P. 24(C)(4), (K)(3).

⁶⁸ IND. CODE § 33-40-7-9 (2006).

⁶⁹ IND. R. CRIM. P. 24(C), (K).

⁷⁰ IND. R. CRIM. P. 24(C).

⁷¹ IND. R. CRIM. P. 24(C)(4).

⁷² Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

⁷³ 2004-2005 ANNUAL REPORT, *supra* note 8, at 23.

⁷⁴ IND. CODE § 33-40-7-9 (2006).

⁷⁵ IND. CODE § 33-40-6-1 (2006).

⁷⁶ IND. CODE § 33-40-6-4(a) (2006). Requests for reimbursement by the counties must be made on an approved claim form and include all signatures that are indicated. Interview by Doug Cummins with Michael Murphy, Staff Counsel, Indiana Public Defender Commission (May 17, 2006). The claim form needs to be accompanied by itemized invoices, billing statements, and certification of payments. *Id.* Claims need to be submitted within 120 days of the date the county pays the underlying attorney claim; claims submitted after 120 days may be refused by the Commission at its discretion. *Id.*

comply with Indiana Public Defender Commission guidelines and standards for providing representation to indigent criminal defendants.⁷⁷ These standards include the following requirements of Rule 24: (1) the qualification standards for appointed lead and co-counsel; (2) the maximum workload requirements; (3) requirements for sufficient support staff, and (4) the compensation standards.⁷⁸

b. Reimbursement for Expenses

Court-appointed hourly rate trial counsel can request prior authorization from the judge for expenses for investigators, experts, or other services “necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”⁷⁹ This request is made *ex parte* and will be granted by the judge upon a demonstration of reasonableness and necessity.⁸⁰ Salaried public defenders and other attorneys appointed in counties where there is a public defender agency and a chief public defender are provided with funds for similar expenses, such as investigators, experts, and other such services, as determined by the head of the local public defender agency or the judge.⁸¹ Appointed trial and appellate counsel will be reimbursed for “reasonable incidental expenses as approved by the court of appointment.”⁸²

After the attorney’s claim for expenses is processed by the county auditor, the county must submit a request for reimbursement to the Indiana Public Defender Commission.⁸³ The Commission can refuse to reimburse the county if the claim is submitted more than 120 days following payment by the county auditor.⁸⁴ The Indiana Public Defender Commission will reimburse, without limit, all attorney and non-attorney costs associated with capital defense.⁸⁵ These costs include expenses such as: defense paralegals and law clerks, costs of defense attorney’s motel room during the trial, photocopying, telephone, postage, mileage, daily transcripts, depositions, and appellate transcripts.⁸⁶

⁷⁷ IND. CODE § 33-40-6-5(a) (2006). For a discussion of the Public Defender Commission standards and guidelines for methods of providing legal services for indigent criminal defendants, *see supra* note 18, *et seq.* and accompanying text.

⁷⁸ SPANGENBERG GROUP, KEEPING DEFENDER WORKLOADS MANAGEABLE 15 (2001) [hereinafter SPANGENBERG GROUP], *available at* <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> (last visited Feb. 6, 2007).

⁷⁹ IND. R. CRIM. P. 24(C)(2).

⁸⁰ *Id.* Counsel may also make an *ex parte* request for advance authorization of any specific incidental expenses. *Id.*

⁸¹ *Id.*

⁸² IND. R. CRIM. P. 24(C)(2), (K)(4).

⁸³ IND. CODE § 33-40-6-4(a) (2006).

⁸⁴ Indiana Public Defender Commission, Commission Guidelines Related to Capital Cases, at 2, *available at* <http://www.in.gov/judiciary/pdc/docs/standards/cap.pdf> (last visited Feb. 6, 2007).

⁸⁵ Interview by Doug Cummins with Michael Murphy, Staff Counsel, Indiana Public Defender Commission (May 17, 2006).

⁸⁶ *Id.*

6. Resources Available to Attorneys Representing Indigent Capital Defendants

Although capital defendants in Indiana are not entitled to any type or number of experts that the defendant believes may be helpful,⁸⁷ trial counsel may make an *ex parte* request for “adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”⁸⁸ A defendant who request funds for an expert witness has the burden of demonstrating the need for that expert.⁸⁹ When determining whether to appoint an expert, the court must consider:

- (1) Whether defense counsel already possess the skills to cross-examine the expert or could prepare to do so by studying published writings;
- (2) Whether the purpose of the expert is exploratory only; and
- (3) Whether the nature of the expert testimony involves precise physical measurements and chemical testing, the results of which are not subject to dispute.⁹⁰

In death penalty cases, the court also must permit the defendant to have the “appropriate resources to retain an expert who would give an opinion concerning the statutory mitigator.”⁹¹ The court makes a determination on a case-by-case basis whether the retention of an expert paid by public funds is appropriate.⁹²

Salaried public defenders also are provided with “adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”⁹³ The provision of adequate funds to full-time, salaried public defenders is determined by the head of the local public defender agency or the trial judge if there is no local agency or office.⁹⁴ Public defenders in counties with public defender agencies and chief public defenders, even if not qualified under Rule 24 as “salaried, full-time capital public defenders,” are generally provided with resources by the public defender agency, just as they are compensated by the agency.⁹⁵ Rule 24 does not address payment of expert services by a public defender agency.

⁸⁷ See *Kennedy v. State*, 578 N.E.2d 633, 639 (Ind. 1991); *Tidwell v. State*, 644 N.E.2d 557, 560 (Ind. 1994); *Jackson v. State*, 758 N.E.2d 1030, 1034 (Ind. Ct. App. 2001).

⁸⁸ IND. R. CRIM. P. 24(C)(2). “Every stage of the proceeding” refers to pre-trial, guilt and innocence, and the sentencing phases of the capital trial. *Id.*

⁸⁹ *Williams v. State*, 669 N.E.2d 1372, 1383 (Ind. 1996).

⁹⁰ *James v. State*, 613 N.E.2d 15, 21 (Ind. 1993).

⁹¹ *Id.*; see also *Castor v. State*, 587 N.E.2d 1281, 1288 (Ind. 1992) (finding that “[t]he failure of the trial court to approve the expenditure of the funds necessary to further develop this opinion [the statutory mitigator] was erroneous and requires reversal of the death penalty”).

⁹² *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990); *Scott v. State*, 593 N.E.2d 198, 200 (Ind. 1992).

⁹³ IND. R. CRIM. P. 24(C)(2).

⁹⁴ *Id.*

⁹⁵ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

Additionally, the court can approve the reimbursement of appointed trial and appellate counsel for reasonable and necessary incidental expenses.⁹⁶

C. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Capital Cases in State Post-Conviction Proceedings.

1. Appointment of Counsel

The State Public Defender's Office represents death-sentenced indigent inmates in state post-conviction proceedings.⁹⁷ As a general matter, if the petitioner requested representation and the post-conviction court finds the petitioner indigent and that s/he is incarcerated in the Indiana Department of Corrections, the petitioner will be permitted to proceed *in forma pauperis* and his/her petition will be forwarded by the Clerk of Court to the Public Defender's office.⁹⁸ In capital cases, retained private counsel or the State Public Defender must enter an appearance in the trial court within thirty days of the denial of rehearing on direct appeal and advise that court of the intent to file a petition for post-conviction relief.⁹⁹ The State Public Defender may represent a death-sentenced indigent inmate throughout all state post-conviction proceedings, including appeals, "if the Public Defender determines the proceedings are meritorious and in the interests of justice."¹⁰⁰ The court is "not required to appoint counsel for a [death-sentenced inmate] other than the Public Defender,"¹⁰¹ although a death-sentenced inmate may hire his/her own attorney or proceed *pro se*.¹⁰²

If the State Public Defender's Office is unable to work on a post-conviction case for any reason, the Office may contract with private attorneys that are paid according to the current fee schedule.¹⁰³

If the court authorizes the filing of a successive post-conviction petition, the case may be referred to the State Public Defender to represent the petitioner as described above.¹⁰⁴ As a practical matter, however, pro bono counsel who drafts the request to file a successive post-conviction petition will continue to represent the defendant, and will generally petition the Court for compensation and resources through the State Public Defender Office.

⁹⁶ IND. R. CRIM. P. 24(C)(2), (K)(4).

⁹⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9; *see also* Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (stating that "for more than half a century, Indiana has offered state-financed legal assistance to prisoners seeking post-conviction relief").

⁹⁸ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 2.

⁹⁹ IND. R. CRIM. P. 24(H).

¹⁰⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(a).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 2004-2005 ANNUAL REPORT, *supra* note 8, at 2.

¹⁰⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(c).

2. Qualifications and Workload Limitations on State Post-Conviction Attorneys

There are no required qualifications for attorneys who represent indigent capital defendants in state post-conviction proceedings, other than that the State Public Defender must be: (1) a resident of the State of Indiana, and (2) a practicing attorney in Indiana for at least three years.¹⁰⁵ While the Indiana Supreme Court may administer any test(s) it determines are proper in considering the adequacy of the appointment for the State Public Defender position, it is not required to do so.¹⁰⁶

There are no workload limitations set by statute or court rule for attorneys who handle state post-conviction cases. The State Public Defender's Capital Division is staffed with five deputy State public defenders.¹⁰⁷

3. Training Requirements

There are no specific training requirements for attorneys who represent indigent death-sentenced inmates in state post-conviction proceedings, other than the general continuing legal education rules that apply to all attorneys licensed to practice in the state.¹⁰⁸

4. Resources Available to State Post-Conviction Attorneys

Indiana law provides funding for investigative services during state post-conviction proceedings¹⁰⁹ and the State Public Defender's Office has "funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like" to provide legal assistance for death-sentenced prisoners in state post-conviction.¹¹⁰ The State Public Defender's Office has a Capital Division which is staffed with five deputy State Public Defenders, one mitigation specialist, and a law clerk.¹¹¹

D. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Federal Habeas Corpus Petitions

1. Appointment of Counsel

Both of the United States District Courts for the Northern and Southern Districts of Indiana adhere to the federal statutory authority when appointing counsel to represent indigent death-sentenced inmates in federal *habeas corpus* proceedings.¹¹² Counsel is

¹⁰⁵ IND. CODE § 33-40-1-1(c)(1), (2) (2006).

¹⁰⁶ IND. CODE § 33-40-1-1(d) (2006).

¹⁰⁷ 2004-2005 ANNUAL REPORT, *supra* note 8, at 13.

¹⁰⁸ *See generally* IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 29.

¹⁰⁹ *Williams v. State*, 808 N.E.2d 652, 658 (Ind. 2004). The *Williams* court also ruled that there is no provision for publicly funded investigators in a successive state-post conviction proceeding until the inmate has "met the requirement for demonstrating a 'reasonable possibility' of entitlement to relief." *Id.*

¹¹⁰ *Ben-Yisrayl v. Davis*, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

¹¹¹ 2004-2005 ANNUAL REPORT, *supra* note 8, at 13.

¹¹² *See* N.D. IND. CRIM. R. 47.2(a)(5). The local rule refers to the appointment of counsel under 21 U.S.C. § 848(q). N.D. IND. CRIM. R. 47.2(a)(5). 21 U.S.C. § 848(q) has since been repealed and has been replaced

appointed if: (1) the prisoner sentenced to death is not already represented by counsel, (2) is financially unable to obtain representation, and (3) requests that counsel be appointed.¹¹³

In addition to these requirements, the United States District for the Southern District of Indiana has adopted a local criminal rule for the appointment of counsel in federal *habeas corpus* proceedings which provides that: “[m]otions or requests for the appointment of counsel shall be presented to, and counsel appointed by, the Judge to whom such action is assigned.”¹¹⁴

2. Qualifications and Workload Limitations

According to Title 18 of the United States Code Section 3599, indigent death-sentenced inmates must be appointed “one or more” attorneys prior to the filing of a formal, legally sufficient federal *habeas corpus* petition.¹¹⁵ To be qualified for appointment in *habeas corpus* proceedings, at least one of the appointed attorneys must “have been admitted to practice in the [Court of Appeals for the Seventh Circuit] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.”¹¹⁶ The court may appoint another attorney for “good cause,” “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”¹¹⁷ Attorneys appointed pursuant to Section 3599 are compensated at a rate of not more than \$125 per hour for in-court and out-of-court time.¹¹⁸

3. Training Requirements

There are no training requirements for attorneys who represent indigent death-sentenced inmates in federal *habeas corpus* proceedings.

4. Resources Available to Federal *Habeas* Attorneys

The court may authorize the appointed attorney(s) to obtain investigative, expert, or other services which are reasonably necessary for the representation of the petitioner.¹¹⁹ Fees and expenses for these services may not exceed \$7,500 in any case, unless the court

with 18 U.S.C. § 3599. See 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.2 n.64 (2d. ed. 2007).

¹¹³ N.D. IND. CRIM. R. 47.2(a)(5).

¹¹⁴ S.D. IND. CRIM. R. 6.1(f).

¹¹⁵ 18 U.S.C. § 3599(a)(2) (2006); see also *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹¹⁶ 18 U.S.C. § 3599(c) (2006).

¹¹⁷ 18 U.S.C. § 3599(d) (2006).

¹¹⁸ 18 U.S.C. § 3599(g)(1) (2006). However, the Judicial Conference is authorized to raise the maximum hourly payment specified in 18 U.S.C. § 3599(g)(1) up to the aggregate of the overall adjustment rates of pay for the General Schedule made pursuant to 5 U.S.C. § 5305, and such raises may not be raised at intervals of less than one year. *Id.*

¹¹⁹ 18 U.S.C. § 3599(f) (2006).

authorizes payment in excess of the limit “as necessary to provide fair compensation for services of an unusual character or duration” and it is approved by the Chief Judge of the District Court.¹²⁰

E. Appointment of Attorneys Handling Clemency Petitions

While the State of Indiana does not provide counsel in clemency cases, the federal courts have held that a death row inmate has the right to petition the federal court to have counsel represent him/her in state clemency proceedings.¹²¹

¹²⁰ 18 U.S.C. § 3599(g)(2) (2006).

¹²¹ 21 U.S.C. 848(q)(8) (2006); *see also* Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (“Under the conditions established in *Hill* (a non-frivolous federal habeas petition and an absence of state means for providing clemency counsel), the entitlement to appointed clemency counsel under § 848(q)(8) cannot reasonably be read so as not to include state clemency proceedings.”)

II. ANALYSIS

A. Recommendation # 1

In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings – pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal *habeas corpus*, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

Under state and federal law, indigent defendants charged with or convicted of a capital offense in the State of Indiana are guaranteed counsel at every stage of the legal proceedings. Indiana law specifically provides counsel to indigent defendants charged with or convicted of a capital offense pre-trial, during trial and direct appeal, through state post-conviction, and in federal *habeas corpus* proceedings.¹²² Death-sentenced inmates petitioning for clemency in Indiana also are entitled to appointed counsel,¹²³ although there is no provision for this in Indiana law.

Upon a finding of indigence, individuals charged with or convicted of a capital crime are entitled to appointed counsel at every stage of the legal proceedings.¹²⁴ Specifically, upon sentencing an indigent defendant to death, the court must “immediately” enter an order appointing counsel to provide representation during the direct appeals process;¹²⁵ retained private counsel or the State Public Defender must enter an appearance in the trial court within thirty days of the denial of rehearing on direct appeal and advise that court of the intent to file a petition for post-conviction relief;¹²⁶ and counsel is appointed for federal *habeas corpus* proceedings prior to filing a formal, legally sufficient *habeas corpus* petition.¹²⁷

¹²² See IND. R. CRIM. P. 24 (2006); 18 U.S.C. § 3599(a)(2) (2006); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹²³ See *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1124 (S.D. Ind. 2001) (holding that entitlement to counsel during federal clemency proceedings cannot be read to not apply to state clemency proceedings); 18 U.S.C. § 3599(e).

¹²⁴ IND. R. CRIM. P. 24(B) (providing for the appointment of two qualified attorneys to represent an indigent defendant in a trial proceeding in which the death penalty is sought); IND. R. CRIM. P. 24(J) (providing for appointment of counsel to represent an individual sentenced to death in appellate proceedings); IND. R. OF P. FOR POST-CONVICTION REMEDIES I, § 9 (providing for counsel to represent an individual sentenced to death in state post-conviction proceedings); N.D. IND. CRIM. R. 47.2(a)(5) (providing for appointment of counsel to represent an individual sentenced to death in *habeas corpus* proceedings); S.D. IND. CRIM. R. 6.2(e) (providing for appointment of counsel to represent an individual sentenced to death in *habeas corpus* proceedings); *Lowery*, 138 F. Supp. 2d at 1124 (providing for appointment of counsel to represent indigent death-sentenced inmate in state clemency proceedings).

¹²⁵ IND. R. CRIM. P. 24(J).

¹²⁶ IND. R. CRIM. P. 24(H).

¹²⁷ See 18 U.S.C. § 3599(a)(2) (2006); *McFarland*, 512 U.S. at 856-57; N.D. IND. CRIM. R. 47.2(a)(5); S.D. IND. CRIM. P. 6.2(e).

- a. **At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

State and federal law provides for the appointment of at least one attorney at every stage of the legal proceedings and provides access to an investigator, experts, and other resources that are needed for presenting a quality defense at trial, in state post-conviction and in federal *habeas corpus* proceedings. The qualifications for court-appointed counsel during all phases of the proceedings will be discussed below under Recommendation #2.

Appointment of Counsel

Rule 24 of the Indiana Rules of Criminal Procedure requires that two qualified attorneys be appointed to represent an indigent defendant at the trial level of a capital case,¹²⁸ one as lead counsel and the other as co-counsel.¹²⁹

On direct appeal, the court must appoint counsel to represent an indigent death-sentenced inmate.¹³⁰ If the court-appointed trial counsel satisfies the appellate-level experience and training requirements, trial counsel will be appointed as “sole or co-counsel” during the appeal.¹³¹ It is therefore not a requirement that two attorneys be appointed for direct appeal.

The State Public Defender Office will be appointed to represent an indigent death-sentenced inmate in state post-conviction proceedings.¹³² There is no requirement that two attorneys be appointed, although at least two lawyers have staffed cases in recent years.¹³³

While the State of Indiana does not provide counsel in clemency cases, the federal courts have held that a death row inmate has the right to petition the federal court to have counsel represent him/her in state clemency proceedings.¹³⁴ Because two attorneys are not required to be appointed in federal *habeas* proceedings,¹³⁵ it follows that two attorneys are not required to be appointed in clemency proceedings.

¹²⁸ IND. R. CRIM. P. 24(B).

¹²⁹ IND. R. CRIM. P. 24(B)(1), (2).

¹³⁰ IND. R. CRIM. P. 24(J).

¹³¹ *Id.*

¹³² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9.

¹³³ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

¹³⁴ 21 U.S.C. 848(q)(8) (2006); *see also* Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (“Under the conditions established in *Hill* (a non-frivolous federal habeas petition and an absence of state means for providing clemency counsel), the entitlement to appointed clemency counsel under § 848(q)(8) cannot reasonably be read so as not to include state clemency proceedings.”)

¹³⁵ N.D. IND. CRIM. R. 47.2(a)(5); *see also* 18 U.S.C. § 3599(a)(2) (2006); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

Access to Investigators and Mitigation Specialists

Court-appointed attorneys, including full-time, salaried public defenders, who represent indigent capital defendants at trial are provided funds for investigative, expert, and other resources that are “necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”¹³⁶ The court also must permit the defendant to have the “appropriate resources to retain an expert who would give an opinion concerning the statutory mitigator.”¹³⁷

There is no provision providing funds for expert and investigative resources on appeal, except that the court can approve reimbursement for reasonable and necessary “incidental” expenses.¹³⁸

Indiana case law provides funding for investigative services during state post-conviction proceedings.¹³⁹ Furthermore, the State Public Defender’s Office, which handles state post-conviction claims in capital cases, has “funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like”¹⁴⁰ and its Capital Division has one mitigation specialist and a law clerk on staff.¹⁴¹

The procedures for obtaining such investigators, experts, and other resources will be discussed below in Subsection c.

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

The State of Indiana does not require any member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Rather, Rule 24 of the Indiana Rules of Criminal Procedure requires court-appointed trial and appellate counsel to have “completed within two years of the appointment at least twelve hours of training the defense of capital cases in a course approved by the Indiana Public Defender Commission.”¹⁴² The State of Indiana

¹³⁶ IND. R. CRIM. P. 24(C)(2).

¹³⁷ *Id.*; see also *Castor v. State*, 587 N.E.2d 1281, 1288 (Ind. 1992) (finding that the failure of the trial court to approve the expenditure of funds to further develop expert opinion of a statutory mitigator was erroneous and required reversal of the death penalty).

¹³⁸ IND. R. CRIM. P. 24(K)(4).

¹³⁹ *Williams v. State*, 808 N.E.2d 652, 658 (Ind. 2004) (approving funds for experts and investigators in an initial petition for post-conviction relief). The *Williams* court also ruled that there is no provision for publicly funded investigators in a successive state-post conviction proceeding until the inmate has “met the requirement for demonstrating a ‘reasonable possibility’ of entitlement to relief.” *Id.*

¹⁴⁰ *Ben-Yisrayl v. Davis*, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

¹⁴¹ 2004-2005 ANNUAL REPORT, *supra* note 8, at 13.

¹⁴² IND. R. CRIM. P. 24(B)(1)(d), (B)(2)(c), (J)(1)(c).

does not mandate that this training include any information on mental or psychological disorders or impairments.

There are no training requirements for attorneys who represent death-sentenced inmates in state post-conviction or clemency proceedings.

The annual two-day seminar sponsored by the Indiana Public Defender Council and/or any of the courses or seminars that have been approved by the Indiana Public Defender Commission may sometimes provide training on screening individuals for the presence of mental or psychological disorders or impairments.¹⁴³ Yet, despite the possible availability of these training courses and seminars, the State of Indiana does not require any member of the defense team, at any level, to be trained on these issues.

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
 - i. Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.**
 - ii. Counsel should have the right to have such services provided by persons independent of the government.**
 - iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

In the State of Indiana, attorneys representing indigent defendants charged with or convicted of capital offenses are provided resources for investigators, experts, and other services in trial, state post-conviction and federal *habeas corpus* proceedings, but may not be provided these resources during direct appeal and clemency proceedings. When approved, the costs associated with retaining investigators, experts, and other resources are covered by county funds, with some counties eligible for partial reimbursement by the state.

Private Court-Appointed Attorneys and Public Defenders at Trial

An indigent defendant charged with a capital offense is not entitled to any type or number of experts that may be helpful to his/her defense.¹⁴⁴ However, private court-appointed counsel will be provided “upon an *ex parte* showing to the trial court of reasonableness and necessity, with adequate funds for investigative, expert, and other services necessary

¹⁴³ Specifically, in the past five years, training from the Indiana Public Defender Council has included: 1-1.25 hour elective workshop (2002), 1-1.25 hour mandatory lecture (2003), .5-hour mandatory lecture and 1-hour elective workshop (2005); and 1-1hour elective workshop (2006). No training specifically addressing mental retardation was offered in 2004. Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Dec. 11, 2006).

¹⁴⁴ *Kennedy v. State*, 578 N.E.2d 633, 639 (Ind. 1991).

to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”¹⁴⁵

In cases in which a public defender is representing an indigent defendant charged with a capital offense, s/he also is “provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”¹⁴⁶ The provision of funds necessary for investigative and expert expenses is determined by the head of the local public defender agency or office.¹⁴⁷ If there is no such office, the trial judge is responsible for approving the expenditure.¹⁴⁸

Private Court-Appointed Attorneys and Public Defenders on Appeal

There is no provision providing funds for expert and investigative resources on appeal, except that the court can approve reimbursement for reasonable and necessary “incidental” expenses.¹⁴⁹

Attorneys Representing Death-Sentenced Inmates in State Post-Conviction Proceedings

The State Public Defender’s Office, which handles state post-conviction claims in capital cases, has “funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like.”¹⁵⁰ Its Capital Division has one mitigation specialist and one law clerk on staff.¹⁵¹

Attorneys Representing Death-Sentenced Inmates in Federal *Habeas Corpus* Proceedings

Indigent death-sentenced inmates petitioning for federal *habeas corpus* relief may request and the court may provide investigative, expert, or other services necessary for the inmate’s defense.¹⁵² The fees for these services cannot exceed \$7,500 in any case, unless payment in excess of this limit is certified by the court.¹⁵³

Conclusion

Under state and federal law, an individual charged with and/or convicted of a capital offense must be appointed counsel at every stage of the proceedings. The State of

¹⁴⁵ IND. R. CRIM. P. 24(C)(2).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ IND. R. CRIM. P. 24(C)(2), (K)(4); *see also* Kennedy v. State, 578 N.E.2d 633, 639 (Ind. 1991) (finding that a defendant who requests funds for an expert witness has the burden of demonstrating the need for that expert). Reimbursement for specific incidental expenses can be sought by counsel in advance. IND. R. CRIM. P. 24(C)(2), (K)(4).

¹⁵⁰ Ben-Yisrayl v. Davis, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

¹⁵¹ 2004-2005 ANNUAL REPORT, *supra* note 8, at 13.

¹⁵² 18 U.S.C. § 3599(f) (2006).

¹⁵³ 18 U.S.C. § 3599(g)(2) (2006).

Indiana requires the appointment of two qualified attorneys at the trial stage of a capital case and one or more court-appointed attorneys during direct appeal, state post-conviction, federal *habeas corpus*, and clemency proceedings. The State also requires funding for investigators, experts, and other services to be made available at trial, in state post-conviction proceedings, and in federal *habeas corpus*, but not explicitly during the direct appeal or clemency proceedings. Furthermore, despite the existence of training requirements for appointed counsel at trial and on appeal, the State does not specifically require training in the screening of mental illness or psychological disorders or defects in capital defendants. The State of Indiana is, therefore, in partial compliance with Recommendation #1.

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

- a. **The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- b. **In formulating qualification standards, the jurisdiction should insure:**
 - i. **That every attorney representing a capital defendant has:**
 - (a) **obtained a license or permission to practice in the jurisdiction;**
 - (b) **demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;**
and
 - (c) **satisfied the training requirements set forth in Guideline 8.1.**
 - ii. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**
 - (a) **substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
 - (b) **skill in the management and conduct of complex negotiations and litigation;**
 - (c) **skill in legal research, analysis, and the drafting of litigation documents;**
 - (d) **skill in oral advocacy;**
 - (e) **skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;**
 - (f) **skill in the investigation, preparation, and presentation of evidence bearing upon mental status;**
 - (g) **skill in the investigation, preparation, and presentation of mitigating evidence; and**

(h) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

The State of Indiana currently has not adopted the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, but some of the requirements set forth in Guideline 5.1 (reproduced above as Recommendation #2) are required under Rule 24 of the Indiana Rules of Criminal Procedure for counsel at trial and on direct appeal.

In 1993, the Indiana Supreme Court adopted Rule 24 of the Indiana Rules of Criminal Procedure, providing minimum experience and training requirements for court-appointed attorneys handling death penalty cases at trial and on appeal.¹⁵⁴ There are no experience or training requirements for the appointment of counsel in state post-conviction proceedings. Because federal *habeas corpus* counsel may be appointed to represent the defendant in state clemency proceedings,¹⁵⁵ the attorney must meet the experience requirements for federal *habeas* attorneys, which require that at least one of the appointed attorneys must “have been admitted to practice in the [Court of Appeals for the Seventh Circuit] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.”¹⁵⁶

Qualifications for Attorneys Handling Death Penalty Cases

The qualification standards contained in Rule 24 differ slightly for trial attorneys and appellate attorneys and for lead counsel and co-counsel, but the requirements apply to all attorneys handling death penalty cases at trial and on appeal, including public defenders and private court-appointed attorneys.

Indiana requires that court-appointed lead trial counsel:

- (1) Be an experienced and active trial practitioner with at least five years of criminal litigation experience;
- (2) Have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion;
- (3) Have prior experience as lead or co-counsel in at least one case in which the death penalty was sought; and
- (4) Have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.¹⁵⁷

¹⁵⁴ See Lefstein, *supra* note 3, at 500.

¹⁵⁵ 18 U.S.C. § 3599(e) (2006); *see also* Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (holding that the entitlement to appointed clemency counsel under § 3599(a)(2) (formerly § 848(q)(8)) cannot reasonably be read so as not to include state clemency proceedings).

¹⁵⁶ 18 U.S.C. § 3599(c) (2006).

¹⁵⁷ IND. R. CRIM. P. 24(B)(1).

Indiana law does not require appointed lead trial counsel to have “a demonstrated commitment to providing zealous advocacy,” nor does it require demonstrated skills and knowledge in the areas listed above. Furthermore, the training required under Indiana law does not include the requirements listed in Guideline 8.1 (discussed in more detail in Recommendation #5).

Appointed co-counsel at the trial level is required to:

- (1) Be an experienced and active trial practitioner with at least three years of criminal litigation experience;
- (2) Have prior experience as lead or co-counsel in no fewer than three felony jury trials which were tried to completion; and
- (3) Have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.¹⁵⁸

Again, Indiana law does not require trial level co-counsel to have “a demonstrated commitment to providing zealous advocacy,” nor does it require demonstrated skills and knowledge in the areas listed above. Furthermore, the training required under Indiana law does not include the requirements listed in Guideline 8.1 (discussed in more detail in Recommendation #5).

On direct appeal, Indiana law requires that in order to be eligible for appointment as appellate counsel, an attorney must:

- (1) Be an experienced and active trial or appellate practitioner with at least three years experience in criminal litigation;
- (2) Have prior experience within the last five years as appellate counsel in no fewer than three felony convictions in federal or state court; and
- (3) Have completed within the last two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.¹⁵⁹

If the appointed trial counsel satisfies these requirements, s/he will be appointed as sole or co-counsel for the appellate proceedings.¹⁶⁰

Indiana law does not require attorneys on appeal to have “a demonstrated commitment to providing zealous advocacy,” nor does it require demonstrated skills and knowledge in the areas listed above. Furthermore, the training required under Indiana law does not specify any of the requirements listed in Guideline 8.1 (discussed in more detail in Recommendation #5).

¹⁵⁸ IND. R. CRIM. P. 24(B)(2).

¹⁵⁹ IND. R. CRIM. P. 24(J)(1)(a)-(c).

¹⁶⁰ IND. R. CRIM. P. 24(J).

There are no qualification and training requirements for attorneys who represent death-sentenced individuals in state post-conviction proceedings.

The United States Code requires that at least one of the appointed attorneys in federal *habeas corpus* “have been admitted to practice in the [Court of Appeals for the Seventh Circuit] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.”¹⁶¹ The United States District Court for the Southern District of Indiana previously enacted supplemental qualifications that required the Court to select two qualified attorneys from a panel maintained by the Clerk of Court to represent an indigent death-sentenced inmate.¹⁶² Under this Rule, lead counsel was required to:

- (1) Be an experienced and active practitioner with at least five years of litigation experience, at least three years’ experience in the handling of appeals;
- (2) Have prior experience in at least one case, as appellate counsel in state appeal or post-conviction proceedings or in federal *habeas corpus* proceedings, in which the death penalty was imposed; and
- (3) Have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases, of which six hours must relate to federal *habeas corpus* proceedings; or, in the alternative, be recommended for appointment by the Director of the Federal Resource Center for Indiana.¹⁶³

Furthermore, co-counsel was required to:

- (1) Be an experienced and active practitioner with at least three years of litigation experience; and
- (2) Have completed within two years prior to the appointment at least twelve hours of training in the defense of capital cases, of which six hours must relate to federal *habeas corpus* proceedings; or, in the alternative, be recommended for appointment by the Director of the Federal Resource Center for Indiana.¹⁶⁴

Unfortunately, the U.S. District Court for the Southern District of Indiana “significantly amended” Local Criminal Rule 6.2,¹⁶⁵ eliminating the experience and training requirements and, as of January 1, 2007, only requires that “[m]otions or requests for the appointment of counsel shall be presented to, and counsel appointed by, the Judge to whom such action is assigned.”¹⁶⁶

¹⁶¹ 18 U.S.C. § 3599(c) (2006).

¹⁶² S.D. IND. CRIM. R. 6.2(e)(2).

¹⁶³ S.D. IND. CRIM. R. 6.2(f)(1)(A)-(C).

¹⁶⁴ S.D. IND. CRIM. R. 6.2(f)(2)(A)-(B).

¹⁶⁵ S.D. IND. CRIM. R. 6.1 (“Note: Current Rule was formerly numbered 6.2, and was significantly amended effective January 1, 2007.”).

¹⁶⁶ S.D. IND. CRIM. R. 6.1(f).

In conclusion, we commend the State of Indiana for developing and publishing qualification standards for defense counsel in capital cases at trial and on appeal. The quality of representation has improved markedly as a result.¹⁶⁷ Although Indiana has a high quality pool of lawyers who litigate many of its death penalty cases, cases can be, and sometimes are, litigated by lawyers who have very limited experience and training in death penalty litigation. Rule 24 requires only twelve hours of training in the two years prior to appointment, and does not require further training during the pendency of a case, even if more than two years has elapsed since the attorney's training. Therefore, we are unable to conclude that the State of Indiana has effective qualification standards that comply with Guideline 5.1. The State of Indiana does not require attorneys handling death penalty cases to meet many of the qualification requirements for trial and appellate lawyers and has no qualification requirements for attorneys representing death-sentenced inmates in state post-conviction and, apart from those mandated by federal law, clemency proceedings. Moreover, there is no mechanism to measure whether lawyers have "demonstrated" the crucial skills delineated in this Recommendation. Attending a two-day continuing legal education seminar within two years before the date of appointment falls far short of this. The State of Indiana, therefore, is only in partial compliance with Recommendation #2.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the State of Indiana adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Furthermore, workload requirements should be amended to state that no attorney may have more than two capital cases at any given time.

C. Recommendation # 3

The selection and evaluation process should include:

- a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:**
 - i. A defender organization that is either:**
 - (a) a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - (b) a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**

¹⁶⁷ See generally Lefstein, *supra* note 3.

ii. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The State of Indiana does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of capital felonies. Rather, this responsibility is divided among a number of entities: (1) county public defender boards; (2) county public defender offices; (3) the State Public Defender; (4) the Indiana Public Defender Council; (5) the Indiana Public Defender Commission; and (6) the judiciary. Yet while these organizations each have a role in the appointment of counsel in capital cases, primary authority is given to the presiding judge in each county to appoint counsel.¹⁶⁸

Indiana law provides that county public defender offices are “not controlled by and do not have a loyalty to the State or any employee of the State.”¹⁶⁹ Each county public defender is appointed by the county Public Defender Board, however, and two of the Board’s three members are selected by a majority vote of the county judges with jurisdiction over felony and juvenile cases.¹⁷⁰ Thus, county public defender offices can only be described as quasi-independent of the judiciary.

The State Public Defender is appointed to represent indigent death-sentenced inmates in state post-conviction proceedings.¹⁷¹ In addition, if a judge is unable to select an attorney for trial or appellate proceedings in a reasonable amount of time, the presiding judge may contact the State Public Defender to assist in appointing counsel.¹⁷² However, the State Public Defender Office is a judicial branch agency under the control of the Indiana Supreme Court.¹⁷³

The Indiana Public Defender Council consists of “all public defenders, contractual pauper counsel and other court appointed attorneys regularly appointed to represent indigent defendants”¹⁷⁴ and is responsible for (1) assisting in the coordination of the duties of the attorneys engaged in the defense of indigents at public expense; (2) preparing manuals of procedure; (3) assisting in the preparation of trial briefs, forms, and instructions; (4) conducting research and studies of interest or value to all such attorneys; and (5) maintaining liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that will benefit criminal defense as part

¹⁶⁸ IND. R. CRIM. P. 24(B). Some county public defenders have a large role in this process. *See* IND. CODE § 33-40-2-1(a)(1)-(2) (2006); see also Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (August 12, 2005).

¹⁶⁹ *Henson v. State*, 798 N.E.2d 540, 543 n.3 (Ind. Ct. App. 2003).

¹⁷⁰ IND. CODE § 33-40-7-3(a), (c) (2006).

¹⁷¹ IND. CODE § 33-40-1-2(a) (2006).

¹⁷² IND. CODE § 33-40-2-1(a)(1)-(2) (2006).

¹⁷³ IND. CODE § 33-40-1-1(b) (2006) (requiring that the State Public Defender be appointed by the state supreme court and serve at the pleasure of the court).

¹⁷⁴ IND. CODE § 33-40-4-2(a)-(b) (2006).

of the fair administration of justice in Indiana.¹⁷⁵ The Council is not involved in making attorney appointments, but is independent of the judiciary.¹⁷⁶

The Indiana Public Defender Commission (Commission) recommends standards for indigent defense in capital cases, adopted guidelines of salary and fee schedules for individual county reimbursement eligibility, and reviews and approves requests for reimbursement in capital cases.¹⁷⁷ While the Commission has no appointing authority, it does maintain a roster of “attorneys who qualify for appointment in capital cases as lead counsel, co-counsel, or appellate counsel on the basis of their experience and their compliance with the training requirements in Criminal Rule 24.”¹⁷⁸ The Commission is only partially independent of the judiciary, as three of its eleven members are appointed by the Chief Justice of the Indiana Supreme Court.¹⁷⁹ Four of the members are state legislators, many of whom may not be lawyers, much less criminal defense lawyers.

The training, selection, and monitoring of counsel will be discussed in Subparts b and c.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

As indicated above, the State of Indiana does not vest in one statewide independent appointing authority the responsibility for developing and maintaining a roster of attorneys qualified under Rule 24 for appointment in capital cases. Rather, the Indiana Public Defender Commission has developed and maintains a roster of “attorneys who qualify for appointment in capital cases as lead counsel, co-counsel, or appellate counsel solely on the basis of their experience and their compliance with the training requirements of Rule 24.”¹⁸⁰ This roster is intended to assist judges with the appointment of qualified counsel in capital cases.¹⁸¹ Therefore, although the Public Defender Commission is a statewide organization, it is not responsible for making appointments and thus cannot be considered an appointing authority. Furthermore, because three members of the eleven-member Commission are appointed by the Chief Justice of the Indiana Supreme Court, the Commission cannot be considered independent of the judiciary.

¹⁷⁵ IND. CODE § 33-40-4-5(1)-(5) (2006).

¹⁷⁶ IND. CODE § 33-40-4-3 (2006). Ten of the eleven Board of Directors are elected by the entire membership of the Council, and the State Public Defender. *Id.*

¹⁷⁷ Indiana Public Defender Commission, About the Commission, Overview, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007).

¹⁷⁸ Indiana Public Defender Commission, About the Commission, Activities, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007).

¹⁷⁹ IND. CODE § 33-40-5-2(a)-(b) (2006).

¹⁸⁰ Indiana Public Defender Commission, About the Commission, Activities, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 6, 2007).

¹⁸¹ *Id.*

c. The statewide independent appointing authority should perform the following duties:

As indicated above, the State of Indiana does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony. Instead, this responsibility is divided among the county public defender boards, the Indiana Public Defender Council, the Indiana Public Defender Commission, the county public defender offices, the State Public Defender, and the judiciary.

i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

The Indiana Public Defender Commission has developed and maintains a list of counsel qualified under Rule 24 to represent indigent capital defendants at trial and on appeal. The list is maintained by the Public Defender Commission based on attorney attendance records at its capital punishment defense training seminars and attorneys must volunteer to have their names included on the list.¹⁸² As of October 2006, there were fourteen qualified lead counsel, twenty-two qualified co-counsel, and ten qualified appellate counsel on the Public Defender Commission's list.¹⁸³ This is far from a complete list, however, as judges can—and frequently do—make appointments of Rule 24-qualified lawyers known to them who are not listed on the roster.¹⁸⁴

In addition, those counties that choose to provide indigent representation at trial and on appeal via the “assignment” method of panel attorneys are required to maintain a roster of qualified lawyers.¹⁸⁵

ii. Draft and periodically publish rosters of certified attorneys;

As indicated above, the Indiana Public Defender Commission maintains a registry of attorneys qualified to handle death penalty cases at trial and on appeal. The Public Defender Commission's registry is available on the Commission's website¹⁸⁶ and is periodically updated.¹⁸⁷ In addition, those counties that choose to provide indigent representation at trial and on appeal via the “assignment” method are required to maintain a roster of qualified lawyers.¹⁸⁸

¹⁸² Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

¹⁸³ Indiana Public Defender Commission, Roster of Attorneys, *available at* <http://www.in.gov/judiciary/pdc/roster.html> (last visited Feb. 6, 2007).

¹⁸⁴ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Aug. 12, 2005).

¹⁸⁵ IND. CODE § 33-40-7-9(1) (2006).

¹⁸⁶ Indiana Public Defender Commission, Roster of Attorneys, *available at* <http://www.in.gov/judiciary/pdc/roster.html> (last visited Feb. 6, 2007).

¹⁸⁷ *Id.* It was most recently updated in October 2006. *Id.*

¹⁸⁸ IND. CODE § 33-40-7-9(1) (2006).

iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

The Indiana Public Defender Commission was established to draft and make recommendations to the Indiana Supreme Court addressing “standards for indigent defense services for defendants against whom the State has sought the death penalty.”¹⁸⁹ Their responsibilities include: (1) determining indigency and eligibility for legal representation; (2) the selection and qualifications of attorneys to represent indigent defendants at public expense; (3) determining conflicts of interest; and (4) providing investigative, clerical, and other support services necessary to provide adequate legal representation.¹⁹⁰ The certification standards for attorneys appointed to represent indigent defendants charged with a capital crime are published in Rule 24.¹⁹¹

iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The presiding trial court judge is responsible for assigning attorneys to represent an indigent capital defendant at the trial and appellate levels.¹⁹² Most commonly, counsel will vary dependent upon the county and judge assigning the attorney.¹⁹³ A judge may appoint qualified counsel from the roster maintained by the Indiana Public Defender Commission, but inclusion on that roster is not mandatory and it is therefore not a complete listing of qualified attorneys.¹⁹⁴ In some cases, the judge will appoint the lead counsel and permit that attorney to select his/her co-counsel, or vice versa.¹⁹⁵ In other cases, a judge sometimes will request the chief public defender’s office to assist in the appointment of counsel.¹⁹⁶ The judge also may appoint the State Public Defender’s Office which then will hire a qualified private attorney to provide representation.¹⁹⁷

After sentencing a defendant to death, the judge must immediately enter an order appointing appellate counsel.¹⁹⁸ Trial counsel will be appointed by the judge as appellate counsel or co-counsel if s/he satisfies the experience and training requirements set forth in Rule 24.¹⁹⁹

¹⁸⁹ IND. CODE § 33-40-5-4(1) (2006).

¹⁹⁰ IND. CODE § 33-40-5-4(1)(A)-(D) (2006).

¹⁹¹ IND. R. CRIM. P. 24(B), (J).

¹⁹² Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (August 12, 2005).

¹⁹³ *Id.*

¹⁹⁴ Indiana Public Defender Commission, About the Commission, Activities, *available at* <http://www.in.gov/judiciary/pdc/about.html> (last visited Feb. 7, 2007).

¹⁹⁵ Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (August 12, 2005).

¹⁹⁶ *Id.*

¹⁹⁷ IND. CODE § 33-40-2-2 (2006).

¹⁹⁸ IND. R. CRIM. P. 24(J).

¹⁹⁹ *Id.*

The court will appoint the State Public Defender's Office to represent a death-sentenced indigent inmate in state post-conviction proceedings.²⁰⁰ The State Public Defender can provide representation to the death-sentenced indigent inmate through all state post-conviction proceedings, including appeals, "if the Public Defender determines the proceedings are meritorious and in the interests of justice."²⁰¹

v. Monitor the performance of all attorneys providing representation in capital proceedings;

If a judge has knowledge that a lawyer's actions have violated the Rules of Professional Conduct "and raise a substantial question as to the lawyer's honesty, trustworthiness or fitness," the judge must inform the appropriate authority.²⁰² The Indiana Public Defender Commission proposed that it be able to remove an attorney from the list of qualified attorneys to receive appointments under Rule 24 if there "was "compelling evidence that an attorney has inexcusably ignored basic responsibilities," however, the Indiana Supreme Court did not adopt this provision.²⁰³

vi. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

Attorneys voluntarily agree to be added to the Indiana Public Defender Commission's list of qualified capital defense counsel.²⁰⁴ An attorney can be removed from the list after being provided written notice and an opportunity to be heard "if there was 'compelling evidence that an attorney has inexcusably ignored basic responsibilities.'"²⁰⁵ The Commission does not appear to engage in any type of review to determine whether lawyers are providing "high quality legal representation." Indeed, we were unable to determine whether any attorneys have been removed from the list by the Public Defender Commission because the attorney failed to provide high quality legal representation to a capital defendant.

vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

The Indiana Public Defender Commission is the only entity in the State that approves training programs and seminars addressing the defense of death penalty cases. The Commission has approved a variety of training seminars for attorneys who represent

²⁰⁰ IND. R. CRIM. P. 24(H); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9; *see also* Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000).

²⁰¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9.

²⁰² IND. CODE OF JUD. CONDUCT, CANON 3D(2).

²⁰³ Lefstein, *supra* note 3, at 503.

²⁰⁴ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (August 12, 2005).

²⁰⁵ Lefstein, *supra* note 3, at 503.

defendants in capital cases,²⁰⁶ including a two-day annual seminar offered by the Indiana Public Defender Council.

viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

There is no one entity that is responsible for investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases. Trial and appellate courts are neutral referees responsible for ensuring fair proceedings and generally do not have the tools or information necessary to monitor attorneys' performance in death penalty cases or to take corrective action. When judges receive information indicating a "substantial likelihood" that an attorney has committed a violation of the Indiana Rules of Professional Conduct, the Indiana Code of Judicial Conduct requires the judge to "take appropriate action."²⁰⁷ Appropriate action may include "direct communication with the . . . [attorney] who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body."²⁰⁸ Attorneys also are obligated to report misconduct by other lawyers.²⁰⁹

In conclusion, the State of Indiana has not vested with one or more independent entities all of the responsibilities contained in Recommendation #3. The State of Indiana also has failed to remove the judiciary from the capital attorney selection and monitoring process. Trial courts are able to appoint lawyers who have only minimal training in capital cases, and they are obligated only to report only ethical violations known to them. No entity provides any review, much less a thorough review, of the quality of the representation provided by lawyers. Because Indiana does not have a statewide appointing authority, its ability to protect against the appointment or retention of unqualified attorneys for reasons other than his/her qualifications is severely compromised. For example, the Indiana Public Defender Commission, a quasi-independent entity, is responsible for maintaining rosters of qualified attorneys to be appointed as trial and appellate counsel in death penalty cases. Even if this roster was complete, maintenance of a roster of those who meet minimal qualifications falls far short of ensuring high quality representation that should be expected in every capital case. Based on this information, the State of Indiana is only in partial compliance with Recommendation #3.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the State of Indiana create an independent appointing authority made up solely of defense counsel that is responsible for appointing defense attorneys. The independent appointing authority should be required to appoint at least two attorneys at every stage of a capital

²⁰⁶ See *supra* notes 57-60 and accompanying text in the Factual Discussion detailing training seminars available to capital defenders.

²⁰⁷ IND. CODE OF JUD. CONDUCT, CANON 3D(2).

²⁰⁸ IND. CODE OF JUD. CONDUCT, CANON 3D cmt.

²⁰⁹ IND. RULES OF PROF'L CONDUCT R. 8.3(a); see also *Goodner v. State*, 714 N.E.2d 638, 643 (Ind. 1999) (stating that members of the bar and the trial bench should remember their obligation to report misconduct to the appropriate authorities).

case. In making these appointments, there should be a presumption that trial counsel will not represent the death row inmate on appeal, regardless of the attorney's qualifications.

D. Recommendation # 4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by the ABA Guideline 9.1, by the defense team and outside experts selected by counsel.²¹⁰**

Counties in Indiana are responsible for funding the cost of legal representation for indigent capital defendants at trial and on appeal. However, Rule 24 of the Indiana Rules of Criminal Procedure permits counties to receive a 50% reimbursement of the costs associated with the defense of capital cases at trial and on appeal if the county complies with the Rule's qualification, workload, and compensation standards.²¹¹ During Fiscal Year 2005-2006, the State reimbursed eligible counties \$767,836 for capital cases.²¹²

- b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
 - i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
 - ii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
 - iii. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The hourly rate for a court-appointed attorney representing an indigent defendant in a capital case is determined by the Executive Director of the Division of State Court

²¹⁰ In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g. Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

²¹¹ SPANGENBERG GROUP, *supra* note 78, at 15.

²¹² Indiana Public Defender Commission, Reimbursements in Capital Cases (Dec. 14, 2006), available at <http://www.in.gov/judiciary/pdc/docs/finances/reimbursement-cap.pdf> (last visited Feb. 6, 2007).

Administration²¹³ and adjusted every two years.²¹⁴ The current rate as of January 1, 2007, is \$101 per hour.²¹⁵

The Indiana Public Defender Commission has adopted standards addressing the compensation of salaried public defenders. Counties must adhere to these standards to be eligible for state reimbursement of expenses in capital cases.²¹⁶ The standards require that salaried public defenders “be paid salary and benefits equivalent to the average of the salary and benefits paid to lead prosecuting attorneys and prosecuting attorneys serving as co-counsel, respectively, assigned to capital cases in the country.”²¹⁷

The Indiana Supreme Court sets the salaries for the Indiana Public Defender and his/her deputies.²¹⁸ These salaries are generally regarded as competitive, especially with regard to other public defenders in the state.²¹⁹

If an indigent death-sentenced inmate requests the appointment of counsel for clemency proceedings, the federal *habeas* court may appoint counsel.²²⁰ This attorney will be compensated with federal funds and the court can cap the amount of compensable time that is “reasonably necessary” for the clemency proceeding.²²¹

- c. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

²¹³ IND. R. CRIM. P. 24(C)(1).

²¹⁴ *Id.*

²¹⁵ Indiana Public Defender Council, Rates, *available at* <https://secure.in.gov/pdc/members/dp/index.html> (last visited Feb. 7, 2007) (behind firewall; on file with author).

²¹⁶ *See* IND. CODE § 40-60-1 *et seq.*

²¹⁷ IND. R. CRIM. P. 24(C)(4).

²¹⁸ IND. CODE § 33-40-1-4 (2006).

²¹⁹ Interview by Joel Schumm with Paula Sites, Assistant Executive Director, Indiana Public Defender Counsel (Aug. 12, 2005).

²²⁰ 18 U.S.C. § 3599(e) (2006).

²²¹ *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1126 (S.D. Ind. 2001).

The State of Indiana provides resources to attorneys appointed in death penalty cases for investigators, experts, and other services at the trial and state post-conviction level. It is unclear whether investigators and experts are provided at the appellate level.

Rule 24 of the Indiana Rules of Criminal Procedure authorizes that appointed counsel, upon demonstrating reasonableness and necessity, be provided “with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”²²² The court has authority to “maintain reasonable oversight on the volume and amount of Crim.R. 24(C) expenses.”²²³

Additionally, the court can approve the reimbursement of appointed appellate counsel for reasonable and necessary incidental expenses,²²⁴ but there is no provision for the specific appointment of investigators, experts, or other services.

Indiana law provides funding for investigative services during state post-conviction proceedings²²⁵ and the State Public Defender office has “funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like” to provide legal assistance for death-sentenced prisoners in state post-conviction.²²⁶ The Capital Division of the State Public Defender Office has one mitigation specialist and a law clerk on staff.²²⁷

In federal *habeas corpus* proceedings, the court may authorize appointed counsel to obtain investigative, expert, or other services that are reasonably necessary for representation.²²⁸ The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of the limit.²²⁹

In clemency proceedings, the court may authorize appointed counsel to be compensated for services that are “reasonably necessary.”²³⁰ This potentially could include compensating non-attorney members of the defense team.

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

The issue of additional compensation in unusually protracted or extraordinary cases is not an issue for most cases because counsel is paid an hourly rate without limitation on those

²²² IND. R. CRIM. P. 24(C)(2).

²²³ *Williams v. State*, 669 N.E.2d 1372, 1384 (Ind. 1996) (vacated on other grounds); *Aki-Khuam v. Davis*, 328 F.3d 366 (7th Cir. 2003). The court, however, cannot unreasonably limit the hours of the experts’ work. *Id*

²²⁴ IND. R. CRIM. P. 24(C)(2), (K)(4).

²²⁵ *See Williams v. State*, 808 N.E.2d 652, 658 (Ind. 2004).

²²⁶ *Ben-Yisrayl v. Davis*, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

²²⁷ 2004-2005 ANNUAL REPORT, *supra* note 8, at 13.

²²⁸ 18 U.S.C. § 3599(f) (2006).

²²⁹ 18 U.S.C. § 3599(g)(2) (2006).

²³⁰ *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1126 (S.D. Ind. 2001).

hours. Moreover, this is not a concern in cases where a public defender is providing representation as these attorneys are salaried employees.

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

The issue of compensation for reasonable incidental expenses would not appear to be an issue in cases where a public defender is providing representation, as these attorneys are salaried employees and their offices are provided with resources for funding the costs associated with death penalty case. In some cases, however, there could be subtle pressure by supervisors to keep expenses low. Requiring counsel to petition to the trial court for reimbursement would allow for better monitoring of this and create a record for appeal, if necessary.

When counsel is appointed to a capital case, incidental expenses can be reimbursed by the court upon demonstrating that the expenses are “reasonable and necessary.”²³¹ Appointed counsel also can seek prior-authorization for reimbursement of incidental expenses through an *ex parte* request to the judge.²³²

In conclusion, the State of Indiana has a hybrid system for compensation of court-appointed counsel in capital cases with set hourly rates for appointed private counsel and competitive compensation for salaried public defenders, although no county has used the latter option. Although counsel appointed to provide representation in clemency proceedings may be capped by federal judges in determining “reasonable and necessary” hours for work, there does not seem to be a cap on expenses imposed by state judges at the trial level. The State of Indiana is, therefore, in partial compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

It does not appear that any money for training is provided to private attorneys who are appointed to represent capital defendants. The State Public Defender provides considerable resources for training its lawyers, and some county public defender agencies appear to provide at least some training resources.

Despite this, training, professional development, and continuing education is required for all defense counsel appointed to a capital case at trial and on appeal.²³³ Rule 24 of the

²³¹ IND. R. CRIM. P. 24(C)(2).

²³² *Id.*

²³³ IND. R. CRIM. P. 24(B)(1)(d), (B)(2)(c), (J)(1)(c).

Indiana Rules of Criminal Procedure requires counsel to “have completed within two years prior to appointment at least twelve hours of training in the defense of criminal cases in a course approved by the Indiana Public Defender Commission.”²³⁴

The Indiana Public Defender Council provides a two-day annual seminar in the defense of capital cases and there are numerous other seminars and training programs for defense counsel in capital cases that have been approved by the Indiana Public Defender Commission.²³⁵

- b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
 - i. relevant state, federal, and international law;**
 - ii. pleading and motion practice;**
 - iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
 - iv. jury selection;**
 - v. trial preparation and presentation, including the use of experts;**
 - vi. ethical considerations particular to capital defense representation;**
 - vii. preservation of the record and of issues for post-conviction review;**
 - viii. counsel’s relationship with the client and his family;**
 - ix. post-conviction litigation in state and federal courts;**
 - x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;**
 - xi. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

As discussed above, Rule 24 of the Indiana Rules of Criminal Procedure requires that court-appointed lead trial counsel, co-counsel, and appellate counsel have “completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.”²³⁶ This is not a “comprehensive training program” in the context of the highly complex area of capital litigation nor does this requirement include specialized training and presentations on any, much less all, of the important issues listed above. Indeed, it would be difficult to address more than a few of these topics in twelve hours.

- c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

²³⁴ *Id.*

²³⁵ Indiana Public Defender Council, Seminar Calendar, *available at* <http://www.in.gov/pdc/general/calendar.html> (last visited Feb. 6, 2007); *see also* Interview with Michael Murphy, Staff Counsel, Indiana Public Defender Commission (May 17, 2006).

²³⁶ IND. R. CRIM. P. 24(B)(1)(d), (B)(2)(c), (J)(1)(c).

Rule 24 of the Indiana Rules of Criminal Procedure requires attorneys appointed by the court to handle death penalty trials and direct appeals to have completed at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission within two years prior to appointment.²³⁷ The Commission may remove an attorney from the list “if there is compelling evidence that an attorney has inexcusably ignored basic responsibilities,” after providing the attorney with written notice and an opportunity to be heard.²³⁸

d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

Indiana does not require non-attorneys who wish to participate on defense teams to receive any professional education or training appropriate to their areas of expertise.

Conclusion

In conclusion, the State of Indiana requires at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission within two years prior to a trial or appellate appointment. However, this is not a “comprehensive training program” in the context of the highly complex area of capital litigation nor does this requirement include specialized training and presentations on any, much less all, of the important areas identified in the Recommendation. The State of Indiana does not require that state post-conviction or clemency counsel receive training, nor does the State provide funding for the training, professional development, and continuing legal education of appointed attorneys or other members of the defense team involved in capital cases. It appears that some counties provide funding for the training, professional development, and continuing legal education of public defenders, but the State does not specifically describe the type of training that must be completed for an attorney to be appointed in a capital case. The State of Indiana, therefore, is only in partial compliance with Recommendation #5.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the State of Indiana offer training consistent with the requirements set forth in the *ABA Guidelines* for all defense counsel involved in capital cases.

²³⁷ *Id.*

²³⁸ Lefstein, *supra* note 3, at 503.

CHAPTER SEVEN

DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review. This process of judicial review is called the direct appeal. As the United States Supreme Court stated in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction of sentence, and death penalty cases are no exception.” The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and penalty phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION

Section 35-50-2-9(j) of the Indiana Code requires that all death sentences automatically be reviewed by the Indiana Supreme Court.²³⁹ The review, which is heard under rules adopted by the Indiana Supreme Court, must be given priority over all other cases.²⁴⁰ The Supreme Court's review must take into consideration all claims that (1) the conviction or sentence was in violation of the Constitution of the State of Indiana or the Constitution of the United States; (2) the sentencing court was without jurisdiction to impose a sentence; and (3) the sentence exceeds the maximum sentence authorized by law or is otherwise erroneous.²⁴¹

A direct appeal commences with the filing of a notice of appeal in the trial court no later than thirty days after the sentence has been imposed or, if a motion to correct error has been filed, within thirty days of its denial.²⁴² After the trial has been transcribed, counsel for the defendant and the State each have the opportunity to file briefs²⁴³ with the Indiana Supreme Court and to make oral arguments before the Court.²⁴⁴ The issues that may be raised on appeal are largely within the discretion of counsel,²⁴⁵ but the defendant cannot waive appellate review of the sentence in a death penalty case, even if s/he pleaded guilty pursuant to an agreement that required the imposition of the death penalty.²⁴⁶

A. *Types of Reviewable Trial Errors*

The Indiana Supreme Court will consider the following types of error on direct appeal:

1. Structural Errors

Structural error “deprive[s] defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’”²⁴⁷ In the limited circumstances where a court finds structural error, the court automatically will reverse the conviction and/or sentence. The issues identified by the United States Supreme Court as structural error include a biased trial judge,²⁴⁸ complete denial of criminal defense counsel,²⁴⁹ denial of access to criminal defense counsel during an

²³⁹ IND. CODE 35-50-2-9(j) (2006).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² IND. R. APP. P. 9(A)(1).

²⁴³ IND. R. APP. P. 46(A)-(B).

²⁴⁴ Although Rule 52(A) of the Indiana Rules of Appellate Procedure allow parties to request oral argument, which may be granted in the discretion of the appellate court, oral arguments are routinely scheduled in all direct appeals of capital cases.

²⁴⁵ *See Bieghler v. State*, 690 N.E.2d 188, 193-96 (Ind. 1997).

²⁴⁶ *See Smith v. State*, 686 N.E.2d 1264, 1274 (Ind. 1997).

²⁴⁷ *Neder v. United States*, 527 U.S. 1, 8-9 (1999). Structural error stands in contrast to trial error, which is defined as error that occurs “during the presentation of the case to the jury” and may be “quantitatively assessed in the context of other evidence presented.” *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991).

²⁴⁸ *See Turney v. Ohio*, 273 U.S. 510, 522-23 (1927).

²⁴⁹ *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

overnight trial recess,²⁵⁰ denial of self-representation in criminal cases,²⁵¹ defective reasonable doubt jury instructions,²⁵² exclusion of jurors of the defendant's race from a grand jury,²⁵³ erroneously excusing a juror because of his views on capital punishment,²⁵⁴ and denial of a public criminal trial.²⁵⁵

2. Errors Properly Preserved in the Trial Court and Raised and/or Argued in the Indiana Court of Appeals and Indiana Supreme Court

The Indiana Supreme Court and Indiana Court of Appeals will review claims that were properly preserved at trial for error.²⁵⁶ When making an objection at trial, the specific grounds for the objection must be stated, and a failure to make a specific objection to error at trial may be treated as a waiver on appeal.²⁵⁷ Similarly, the failure to advance a cogent argument on appeal²⁵⁸ or to explain the separate analysis under the Indiana Constitution²⁵⁹ will also result in forfeiture of a claim.

Procedural default is discretionary,²⁶⁰ however, and the Indiana Supreme Court appears less likely to apply it in death penalty cases. As one of the Supreme Court justices recently wrote, “[b]ecause of the finality of the sentence, both defense counsel and the reviewing court endeavor to be particularly thorough and comprehensive. Courts are also inclined to address more claims on the merits and to be somewhat more hesitant to apply procedural forfeiture.”²⁶¹ Put another way, the Court has explained that “[f]inality and fairness are both important goals. When faced with an apparent conflict between them, this Court unhesitatingly chooses the latter.”²⁶²

Even when an error is preserved at trial, the appellate court will subject non-structural errors to a harmless error analysis. Violations of the United States Constitution will result in reversal unless the State can prove “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”²⁶³ Errors in the admission of evidence or other non-constitutional errors “are to be disregarded as harmless error unless they affect the substantial rights of a party.”²⁶⁴ In a landmark case on harmless error, the Indiana Supreme Court explained that “the undergirding concept remains consistent: an error will be found harmless if its probable impact on the jury, in light of all of the

²⁵⁰ *Geders v. United States*, 425 U.S. 80, 88-89 (1976).

²⁵¹ *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n.8 (1984).

²⁵² *Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993).

²⁵³ *Vasquez v. Hillery*, 474 U.S. 254, 262-63 (1986).

²⁵⁴ *Gray v. Mississippi*, 481 U.S. 648, 659 (1987).

²⁵⁵ *Waller v. Georgia*, 467 U.S. 39, 50 n.9 (1984).

²⁵⁶ *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000).

²⁵⁷ *Mullins v. State*, 646 N.E.2d 40, 44 (Ind. 1995).

²⁵⁸ *Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006).

²⁵⁹ *Dye v. State*, 717 N.E.2d 5, 11 n.2 (Ind. 1999).

²⁶⁰ *See generally* *Bunch v. State*, 778 N.E.2d 1285, 1287 (Ind. 2002).

²⁶¹ Hon. Brent E. Dickson, *Effects of Capital Punishment on the Justice System: Reflections of a State Supreme Court Justice*, 89 JUDICATURE 278, 279 (2006).

²⁶² *Huffman v. State*, 643 N.E.2d 899, 901 (Ind. 1994).

²⁶³ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²⁶⁴ *Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995) (citing IND. R. TRIAL P. 61).

evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.”²⁶⁵

3. Fundamental Errors

On direct appeal the Indiana Supreme Court also will review claims that were not preserved in the trial court, but will do so under a far more difficult standard:

The doctrine of fundamental error permits an appellate court to avoid the ordinary rules of appellate procedure in order to address a claim of error not raised in the trial court but which claims a deprivation of fundamental due process. To be “fundamental error” it must constitute a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and appear clearly and prospectively. This means that irremediable prejudice to a defendant's fundamental right to a fair trial must be immediately apparent in the disputed evidence or argument.²⁶⁶

B. Review of a Defendant's Death Sentence

Two state constitutional provisions are especially pertinent to the review of sentences in Indiana. Article I, Section 16 requires that “[a]ll penalties shall be proportioned to the nature of the offense.”²⁶⁷ Article VII, Section 4 gives the Court the power to “review and revise the sentence imposed.”²⁶⁸ This provision has been implemented through Appellate Rule 7(B), which provides that the “Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”²⁶⁹ To help facilitate appellate review, the Court has imposed fairly stringent requirements on the trial court at sentencing that:

are more stringent in capital cases than in non-capital sentencing situations. The trial court's statement of reasons (i) must identify each mitigating and aggravating circumstance found, (ii) must include the specific facts and reasons which lead the court to find the existence of each such circumstance, (iii) must articulate that the mitigating and aggravating circumstances have been evaluated and balanced in

²⁶⁵ *Id.* at 1142.

²⁶⁶ *Allen v. State*, 686 N.E.2d 760, 776 n.13 (Ind. 1997).

²⁶⁷ IND CONST. ART. 7 § 16.

²⁶⁸ IND CONST. ART. 7 § 4.

²⁶⁹ This language is considerably more favorable to defendants than the pre-2003 language of the Rule that would not permit a revision unless the sentence imposed was “manifestly unreasonable in light of the nature of the offense and the character of the offender.” IND. R. APP. P. 17(B). The Court explained this standard as “not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so.” *Prowell v. State*, 687 N.E.2d 563, 568 (Ind. 1997). In reviewing a death sentence, the Court noted that “these harsh requirements stand more as guideposts for our appellate review than as immovable pillars supporting a sentence decision.” *Id.* (internal quotation marks omitted).

determination of the sentence, and (iv) must set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime.²⁷⁰

C. Disposition of Appeal in the Indiana Supreme Court

In reviewing the conviction and sentence, the Indiana Supreme Court may affirm the conviction and/or death sentence, overturn the conviction, set the death sentence aside and send the case back to the trial court to correct any errors, or set the death sentence aside and send the case back to the trial court with orders to sentence the defendant to a term of years or life in prison without parole.²⁷¹

D. Discretionary Review by the United States Supreme Court

If the Indiana Supreme Court affirms the appellant's conviction and sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Indiana Supreme Court's decision affirming appellant's conviction and sentence.²⁷² The United States Supreme Court may either deny or accept appellant's case for review.²⁷³ If the United States Supreme Court accepts the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence or conviction, or overturn both the conviction and sentence.²⁷⁴

²⁷⁰ *Harrison v. State*, 644 N.E.2d 1243, 1262 (Ind. 1995). The continued viability of this requirement is not certain since the 2002 amendment to the death penalty statute, which now requires "[i]f the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly." IND. CODE § 35-50-2-9(e) (2006). For example, in one case decided under the amended statute, Justices Boehm and Sullivan agreed that "appellate review of a [death] sentence imposed by jury is appropriate," Justice Dickson expressed the view that this should only occur in "rare, exceptional cases," and Chief Justice Shepard concluded that "the legislature has placed the question of appropriateness in the hands of juries." *Pruitt v. State*, 834 N.E.2d 90, 122-26 (Ind. 2005). Justice Rucker dissented on other grounds and, therefore, expressed no view on this issue.

²⁷¹ IND. R. APP. P. 66(C).

²⁷² 28 U.S.C. § 1257(a) (2006); U.S. SUP. CT. R. 13(1).

²⁷³ U.S. SUP. CT. R. 16.

²⁷⁴ 28 U.S.C. § 2106 (2006).

II. ANALYSIS

A. Recommendation #1

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

The Indiana Supreme Court has made clear that the Indiana Constitution authorizes “independent appellate review” of a sentence, even when “the trial court has been meticulous in following the proper procedure in imposing a sentence.”²⁷⁵ Based on the state constitutional power to review and revise sentences and the appellate rule that provides for revision of “inappropriate” sentences when “certain broad conditions are satisfied,”²⁷⁶ the Court frequently revises sentences in non-capital cases.²⁷⁷

The Indiana Supreme Court has acknowledged that “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”²⁷⁸ To achieve that goal, the Court applies a number of principles in sentencing cases. For example, the court has held that maximum sentences should generally be reserved for worst offenses and the worst offenders.²⁷⁹ The court has also assigned significant mitigating weight to circumstances such as a defendant’s plea of guilty and acceptance of responsibility,²⁸⁰ long-standing and severe mental illness,²⁸¹ and a lack of significant criminal history.²⁸² In applying these principles to non-capital cases, the Court has reduced many sentences, oftentimes after engaging in a detailed review and comparison of similar cases.²⁸³ These principles are seldom cited or applied in capital cases. Defendants who have pleaded guilty,²⁸⁴ suffer from severe mental illness,²⁸⁵ and have no criminal history²⁸⁶ have all had their death sentences upheld on appeal.

²⁷⁵ Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006).

²⁷⁶ See generally Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

²⁷⁷ See, e.g., Duncan v. State, 857 N.E.2d 955, 960 (Ind. 2006); Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006); Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004); Serino v. State, 798 N.E.2d 852, 856 (Ind. 2003).

²⁷⁸ Serino, 798 N.E.2d at 854.

²⁷⁹ Buchanan v. State, 767 N.E.2d 967, 974 (Ind. 2002).

²⁸⁰ Francis, 817 N.E.2d at 237-38.

²⁸¹ Archer v. State, 689 N.E.2d 678, 685, n.8 (Ind. 1997)

²⁸² Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

²⁸³ See, e.g., Serino, 798 N.E.2d at 857-58; Carter v. State, 711 N.E.2d 835, 841-43 (Ind. 1999).

²⁸⁴ Moore v. State, 771 N.E.2d 46, 49 (Ind. 2002).

²⁸⁵ Baird v. State, 604 N.E.2d 1170, 1181-82 (Ind. 1992) (finding mental illness entitled to “some mitigating weight” but upholding death sentences).

²⁸⁶ *Id.* at 1182; see also Dye v. State, 717 N.E.2d 5, 22 (Ind. 1999).

The Court long explained that it “automatically reviews every death sentence and applies a level of scrutiny more intensive than for other criminal penalties,”²⁸⁷ but the Court’s review of capital cases seems less searching and has resulted in very few reductions of death sentences.²⁸⁸ The Court encourages appellate counsel to make comparative proportionality arguments,²⁸⁹ but has expressly declined to hold that it must engage in proportionality review.²⁹⁰ The Court has generally not engaged in a detailed comparison of the facts of a case to previous cases in which death was imposed or could have been imposed. For example, in a death penalty case involving the murder of a man during a robbery, the Court noted that appellate counsel had cited several cases where “the death penalty was not sought when a killing occurred in the commission of a robbery” before concluding “it is not at all difficult to distinguish the facts in this case from the facts in many other robbery cases where the death penalty was not imposed.”²⁹¹ No cases were cited in support of this.²⁹² In another case, the Court simply concluded that a death sentence was “proportionate not only to the nature of the offenses and the character of the defendant, but also to the sentences approved for capital murder defendants in other Indiana cases”²⁹³ but cited only one case—with no explanation—as support. The case cited includes a string citation to eleven cases, again with no explanation of the specific similarities between them.²⁹⁴ Moreover, at the time of that opinion, some of the defendants in the cited cases were no longer on death row.²⁹⁵ Since that time only two have been executed, one remains on death row, but eight have had their sentences reduced to a term of imprisonment.²⁹⁶

Although many capital cases include similar aggravators, such as multiple murders or the killing of a law enforcement officer, the facts of each offense are unique and the background of each defendant varies considerably. In a case involving a defendant who killed his wife while on an eight-hour furlough from prison, the Indiana Supreme Court simply noted it would not “reverse a death penalty sentence for failure to find a mitigator unless the evidence leads only to a conclusion opposite to the one reached by the trial court” before concluding “that the aggravators and mitigators were fully considered by the trial court and jury in reaching the death penalty sentence.”²⁹⁷ A dissenting justice, however, detailed more specific information about the offense and the defendant,

²⁸⁷ *Bivins v. State*, 642 N.E.2d 928, 948 (Ind. 1994).

²⁸⁸ *Cf. Saylor v. State*, 808 N.E.2d 646, 651 (Ind. 2003) (vacating a death sentence based on the constitutional review and revise power based on a legislative change that no longer allowed jury overrides).

²⁸⁹ *See, e.g., Stevens v. State*, 691 N.E.2d 412, 437-38 (Ind. 1997).

²⁹⁰ *See, e.g., Timberlake v. State*, 690 N.E.2d 243, 266 (Ind. 1997).

²⁹¹ *Burris v. State*, 642 N.E.2d 961, 967 (Ind. 1994).

²⁹² The court did observe that the defendant had “planned to kill his victim and deliberately executed the victim during the robbery,” but this is only part of the equation of a detailed consideration of the nature of the offense and the characteristics of the defendant. *Id.*

²⁹³ *Williams v. State*, 669 N.E.2d 1372, 1390 (Ind. 1996).

²⁹⁴ *Bivins v. State*, 642 N.E.2d 928, 959 (Ind. 1994).

²⁹⁵ *See, e.g., James v. State*, 613 N.E.2d 15 (Ind. 1993); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990).

²⁹⁶ Clark County Prosecuting Attorney, *The Death Penalty, Indiana Death Row 1977-2006*, available at <http://www.clarkprosecutor.org/html/death/rowold.htm> (last visited Feb. 6, 2007).

²⁹⁷ *Matheney v. State*, 583 N.E.2d 1202, 1209 (Ind. 1992).

concluding he could find no “difference between the weight of the lone aggravating circumstance and that of the several mitigating ones.”²⁹⁸

To ensure that death is imposed against the very worst offenses and offenders, we urge the Indiana Supreme Court to employ at least the same searching and thoughtful review it applies in non-capital cases to capital cases. Ideally, this review would consider not only other death penalty cases but also those cases in which the death penalty could have been sought or was sought and not imposed.

In sum, the Indiana Supreme Court only occasionally compares a death sentence to other death sentences—and never compares it to cases in which the death penalty was sought but not imposed or cases in which the death penalty could have been sought. This is particularly ironic considering the extensive and often comparative review in non-capital cases. The State of Indiana fails to meet the requirements of Recommendation #1.

Based on this information, the Indiana Death Penalty Assessment Team recommends that:

- (1) The State of Indiana collect data on all potentially death-eligible murder cases. At a minimum, data should be collected regarding each county’s sentencing information. Relevant information on all death-eligible cases should be made available to the Indiana Court of Appeals and Indiana Supreme Court for use in ensuring proportionality; and
- (2) To ensure that death is imposed against the very worst offenses and offenders, the Indiana Supreme Court employ at least the same searching and thoughtful sentencing review it applies in non-capital cases to capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

²⁹⁸ *Id.* at 1211 (DeBruler, J., dissenting).

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; claims based on unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, United States Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage

frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings do not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims—even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

I. FACTUAL DISCUSSION

A. Overview of State Post-Conviction Proceedings

Rule 1 of the Indiana Rules of Procedure for Post-Conviction Remedies (Rule 1) governs all state post-conviction proceedings, including those initiated by death-row inmates.¹

1. The Filing of a Post-Conviction Petition

Any person who has been convicted of, or sentenced for, a crime by an Indiana court may petition the trial court for relief on the following grounds:

- (1) His/her conviction and/or sentence was in violation of the Constitution of the United States or the constitution or laws of Indiana;
- (2) The court was without jurisdiction to impose sentence;
- (3) The sentence exceeds the maximum authorized by law, or is otherwise erroneous;
- (4) There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) His/her sentence has expired, his/her probation, parole or conditional release was unlawfully revoked, or s/he is otherwise unlawfully held in custody or other restraint; or
- (6) The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.²

The petition must be filed³ and decided in the trial court in which the petitioner was convicted and sentenced to death.⁴ The petition must be made under oath and the petitioner must verify (1) the correctness of the petition, (2) the authenticity of all documents and exhibits attached to the petition, and (3) the fact that s/he has included every known ground for relief available.⁵ The petition should substantially comply with

¹ Rule 1 “comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence and it shall be used exclusively in place of them.” IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(b). This Rule, however, does not suspend the writ of *habeas corpus*. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(c).

² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a)(1)-(6). The fifth ground upon which a post-conviction motion may be made is not applicable to capital post-conviction proceedings.

³ In capital cases, the clerk of court must deliver a copy of the petition to the prosecuting attorney of that judicial circuit and to the Attorney General. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 2.

⁴ *Id.* If a petition is filed in another court or if the petitioner applies for a writ of *habeas corpus* that attacks the validity of his/her conviction or sentence in the court having geographical jurisdiction over the inmate, it shall be transferred to the court where the conviction occurred. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(c).

⁵ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 3(b).

the standard form that is included as an appendix to Rule 1.⁶ The petitioner may amend his/her petition as a matter of right no later than sixty days prior to the date of the evidentiary hearing, and at anytime thereafter with the permission of the court.⁷

2. Time Limit for Filing a Post-Conviction Petition

Rule 1 explicitly allows any person whose conviction and sentence have become final on direct appeal to institute post-conviction proceedings “at any time.”⁸ Despite allowing post-conviction petitions to be filed “at any time,” a capital petitioner must follow a strict timeline for instituting the post-conviction process. Specifically, within thirty days following completion of the individual’s direct appeal, the State Public Defender or private counsel retained by the inmate must enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request that the Indiana Supreme Court extend the stay of execution of the death sentence.⁹

When the request to extend the stay is received, the Indiana Supreme Court will direct the trial court to submit a case management schedule for approval.¹⁰ The petitioner is required to file his/her signed petition “by the date set forth in the case management schedule.”¹¹

The court has the authority to adjust the time for filing amendments to the petition or the state’s response, order further pleadings or motions, or extend the time for filing any pleading.¹² At any time before the court enters a judgment on the post-conviction petition, it may grant leave for the inmate to withdraw the petition.¹³

After the petition is filed, the Attorney General has thirty days to file a response to the petition stating the reasons, if any, why the petitioner’s requested relief should be denied.¹⁴

3. Appointment of Post-Conviction Counsel

Post-conviction petitioners have the right to retain private counsel at his/her own expense to pursue his/her post-conviction claims.¹⁵ However, indigent post-conviction

⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 3(a), app. If the inmate cannot obtain a copy of this standard form, it must be made available without charge to the inmate by the Public Defender’s Office. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 3(a). The Public Defender’s Office is also responsible for ensuring that this standard form is available in every penal institution in Indiana. *Id.*

⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(c).

⁸ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a).

⁹ IND. R. CRIM. P. 24(H). A copy of the appearance and notice of intent to file a petition for post-conviction relief must be served by counsel on the Supreme Court Administrator. *Id.*

¹⁰ *Id.*

¹¹ *Corcoran v. State*, 827 N.E.2d 542, 545 (Ind. 2005).

¹² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(a).

¹³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(c).

¹⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(a).

¹⁵ If the petitioner’s private counsel properly withdraws and s/he is indigent, the petitioner may then proceed pro se *in forma pauperis*. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(e). In such an

petitioners, including those under a sentence of death, receive access to counsel at the public's expense in connection with such post-conviction claims.¹⁶ In order for the petitioner to obtain appointed counsel, s/he must attach an affidavit of indigency to his/her post-conviction petition.¹⁷ As a general matter, if the petitioner requests representation and the post-conviction court finds that the petitioner is indigent and incarcerated in the Indiana Department of Corrections, the petitioner will be permitted to proceed *in forma pauperis* and his/her petition will be forwarded by the Clerk of Court to the State Public Defender's office.¹⁸ In capital cases, retained private counsel or the State Public Defender must enter an appearance in the trial court within thirty days of the denial of rehearing on direct appeal and advise that court of the intent to file a petition for post-conviction relief.¹⁹

The State Public Defender may represent the post-conviction petitioner in the trial court and on appeal if the State Public Defender determines that the petition is meritorious and in the interest of justice.²⁰ After conferring with the petitioner and ascertaining all available grounds for relief, the appointed State Public Defender may amend the petition, if necessary, to include any grounds for relief not already alleged by the petitioner in the original petition.²¹

As a general matter, the Public Defender may refuse representation in any case, before or after a hearing is held, where the conviction or sentence being challenged has no present penal consequences or where the petition is not meritorious or in the interest of justice.²² In order to do so, the Public Defender must file with the court a notice of withdrawal of appearance and certify that s/he has (1) consulted with the petitioner regarding all grounds for relief, including those that were alleged in the original petition or otherwise, (2) conducted an appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, and (3) provided the petitioner with reasons for the withdrawal.²³ In capital cases, however, Criminal Rule 24(H) seems to compel that counsel be appointed early in the process. Even in cases in which a defendant has been opposed to pursuing post-conviction relief, the State Public Defender has filed a

instance, the court may order the State Public Defender to represent the indigent incarcerated petitioner if the court makes a preliminary finding that the petition is meritorious and in the interest of justice. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(e); *see infra* notes 16-19 and accompanying text. If the State Public Defender filed an appearance, counsel is provided sixty days to respond to the state's answer to the petition. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(f). If the pleadings conclusively show that the petitioner is entitled to no relief, the court may deny the petition without further proceedings. *Id.*

¹⁶ IND. CODE § 33-40-1-2 (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9; *see also* Graves v. State, 823 N.E.2d 1193, 1195 (Ind. 2005) (noting that indigent inmates in Indiana prisons have had access to post-conviction counsel at the state's expense since 1945).

¹⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 2.

¹⁸ *Id.*

¹⁹ IND. R. CRIM. P. 24(H).

²⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(a).

²¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(c).

²² *Id.*

²³ *Id.*

petition and pursued relief on behalf of a defendant whose competency to waive collateral review was in question.²⁴

The petitioner may hire his/her own private counsel or proceed *pro se in forma pauperis*.²⁵ The court is not required to appoint counsel for the petitioner other than the State Public Defender.²⁶

4. Contents of Petition

The standard form for post-conviction relief requires that the petitioner allege all available grounds for post-conviction relief and specific facts that support those grounds for relief.²⁷ A conclusory allegation that a constitutional right has been violated, without more, is not sufficient to warrant an evidentiary hearing.²⁸

5. Types of Claims Usually Raised in a Post-Conviction Petition

Claims of ineffective assistance of trial and appellate counsel form the bulk of claims in post-conviction proceedings.

a. Ineffective Assistance of Trial Counsel

In order to make a legally sufficient claim of ineffective assistance of trial counsel, the petitioner first must show his/her counsel's deficient performance by demonstrating that his/her trial counsel's performance "fell below an objective standard of reasonableness" to such a degree that by making such serious errors, counsel was "not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment."²⁹ The petitioner next must demonstrate the prejudicial effect of trial counsel's deficient performance by

²⁴ Corcoran v. State, 827 N.E.2d 542 (Ind. 2005).

²⁵ If the petitioner decides to proceed *pro se*, the court need not order the petitioner to be present, unless an evidentiary hearing is necessary for a "full and fair determination of the issues." IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(b). If the *pro se* petitioner requests the court to issue subpoenas for witnesses at the evidentiary hearing, the petitioner must state the specific reason the witness' testimony is necessary and the substance of such testimony. *Id.* If the court finds the potential testimony relevant and probative, it will issue the subpoena. *Id.* If the court finds, however, that the potential testimony is not relevant and probative, it must make a finding on the record refusing to issue the subpoena. *Id.* Indigent petitioners are entitled to the production of guilty plea and sentencing transcripts at the state's expense, prior to the hearing, if the petition is not summarily dismissed. *Id.* If the indigent petitioner appeals the denial or dismissal of his/her post-conviction petition, s/he is also entitled to a record of the post-conviction proceeding at the State's expense. *Id.*

²⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(a).

²⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1 app. (questions 8 and 9).

²⁸ Harding v. State, 545 N.E.2d 14, 16 (Ind. Ct. App. 1989) (holding that the petitioner's conclusory allegation that he was denied effective assistance of counsel on appeal is inadequate to create an issue of material fact requiring an evidentiary hearing); *see also* Harrison v. State, 585 N.E.2d 662, 663 n.3 (Ind. Ct. App. 3d Dist. 1992).

²⁹ Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Woods v. State, 701 N.E.2d 1208, 1211 (Ind. 1998).

proving that a reasonable probability exists that, but for the trial counsel's deficient performance, the result of the proceeding would have been different.³⁰

Generally, prior to 1998, where the deficient performance of trial counsel was "clearly known and available" to the petitioner at the time of his/her direct appeal, such a claim of ineffective assistance of trial counsel had to be raised during direct appeal or it would be waived for the purposes of post-conviction review.³¹ However, the Indiana Supreme Court has since expressed a clear preference that most claims of ineffective assistance of counsel be litigated in post-conviction relief proceedings.³² Thus, even if the petitioner was aware of his/her trial counsel's deficient performance at the time of his/her direct appeal, s/he would not be precluded from raising an ineffective assistance of counsel claim if resolution of this claim required more than a simple review of the trial record and required further development of the record through a post-conviction evidentiary hearing.³³

b. Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel are cognizable in a Rule 1 petition for post-conviction relief. The standard applied to claims of ineffective assistance of appellate counsel is the same as the standard applied to claims involving the effectiveness of trial counsel as described above.³⁴

c. Ineffective Assistance of Previous Post-Conviction Counsel

Although post-conviction petitioners, including those under a sentence of death, receive access to counsel at the public's expense in connection with their post-conviction claims,³⁵ they do not have a state or federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.³⁶ Thus, a claim that counsel was ineffective in a previous post-conviction proceeding is not a valid basis for relief in a successive Rule 1 post-conviction petition.³⁷ In order for the petitioner to obtain relief

³⁰ *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.*; *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

³¹ *Woods*, 701 N.E.2d at 1213-14.

³² *Id.* at 1219 ("For the reasons outlined, a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.").

³³ *Id.* at 1214.

³⁴ *Fisher v. State*, 810 N.E.2d 674, 676-77 (Ind. 2004).

³⁵ IND. CODE § 33-40-1-2 (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9; *see also* *Graves v. State*, 823 N.E.2d 1193, 1195 (Ind. 2005) (noting that indigent inmates in Indiana prisons have had access to post-conviction counsel at the state's expense since 1945).

³⁶ *Graves*, 823 N.E.2d at 1196. The *Graves* court noted that neither the Sixth Amendment of the United States Constitution nor Article 1, Section 13 of the Indiana Constitution guarantee the right to post-conviction counsel or the effective assistance of post-conviction counsel, making the two-pronged *Strickland* test inapplicable to claims of error by previous post-conviction counsel. *Id.*; *see also* *Matheney v. State*, 834 N.E.2d 658, 663 (Ind. 2005).

³⁷ *Id.* (citing *Baum v. State*, 533 N.E.2d 1200, 1200-1201 (Ind. 1989) (holding that the claim that counsel in a previous post-conviction proceeding was ineffective was not a "cognizable ground[] for post-conviction relief" and to recognize such a claim would sanction the abuse of the post-conviction remedy).

from a previous post-conviction counsel's performance, s/he must not merely claim that his/her counsel in the prior post-conviction proceeding was inadequate or ineffective, but s/he must allege that previous post-conviction "[c]ounsel, in essence, abandoned his[/her] client and did not present any evidence in support of his[/her] client's claim."³⁸

6. Summary Disposition of a Post-Conviction Petition without an Evidentiary Hearing

The court may summarily dispose of a petition if it determines that (1) the petition is precluded pursuant to section 8 of Rule 1,³⁹ or (2) upon a motion by the state, it is demonstrated that no genuine issue of material fact or law appears to exist upon the face of the record⁴⁰ which would entitle the petitioner to post-conviction relief.⁴¹ The court may summarily dispose of the petition within ninety days of its filing.⁴²

7. The Post-Conviction Evidentiary Hearing

The court may grant a motion to summarily dispose of a post-conviction petition "when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact."⁴³ If an issue of material fact is raised, the court must hold an evidentiary hearing.⁴⁴ The evidentiary hearing must be held as soon as is reasonably possible.⁴⁵ In death penalty cases, however, a date for the evidentiary hearing must be set within ninety days after the filing of the post-conviction petition.⁴⁶ Such a hearing must be held without a jury and all rules and statutes applicable to civil proceedings, including pre-trial and discovery procedures, must be used.⁴⁷ The court may receive affidavits, depositions, oral testimony, or other evidence and may, in its discretion, order the petitioner to be present for the hearing.⁴⁸ The petitioner has the burden of proving his/her claims for relief by a preponderance of the evidence.⁴⁹

8. Decisions on Post-Conviction Petitions after an Evidentiary Hearing

³⁸ *Waters v. State*, 574 N.E.2d 911, 912 (Ind. 2004); *Baum*, 533 N.E.2d at 1200-01.

³⁹ *See infra* notes 59-69 and accompanying text.

⁴⁰ The record includes, but is not limited to, "pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted." IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g).

⁴¹ *Id.*

⁴² IND. CODE § 35-50-2-9(i) (2006).

⁴³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g).

⁴⁴ *Id.* The court may also order oral arguments to resolve issues of law. *Id.*

⁴⁵ *Id.*

⁴⁶ IND. CODE § 35-50-2-9(i) (2006). If a court does not, within the ninety-day period, set the date to hold the evidentiary hearing, the court's failure to set the hearing date cannot be a basis for additional post-conviction relief. *Id.*

⁴⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 5.

⁴⁸ *Id.*

⁴⁹ *Id.*

The court must issue an order on the petition making specific written findings of fact and conclusions of law relating to each material issue presented within ninety days of the conclusion of the evidentiary hearing.⁵⁰ If the court finds in favor of the petitioner, its order must address (1) any modification to the petitioner’s conviction or sentence; (2) whether any further procedures, such as arraignment, retrial, custody, bail, discharge, correction of sentence, are warranted; and (3) any other matters that may be necessary and proper.⁵¹

9. Appealing Decisions on Post-Conviction Petitions

The court’s order on a post-conviction petition is a final judgment and is appealable as a matter of right by either party.⁵² The Indiana Supreme Court entertains appeals in capital post-conviction proceedings.⁵³ In order to prevail on appeal from the denial of post-conviction relief, the petitioner must establish that “the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.”⁵⁴ The reviewing court may consider only the evidence considered by the post-conviction court and the reasonable inferences supporting the judgment of the post-conviction court.⁵⁵ Furthermore, while the reviewing court will not defer to the post-conviction court’s legal conclusions, it must accept the post-conviction court’s factual findings unless they are clearly erroneous.⁵⁶ Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.⁵⁷

If the Indiana Supreme Court affirms the lower court decision, the petitioner may file a request for *certiorari* with the United States Supreme Court.⁵⁸ If the U.S. Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

B. Procedural Restrictions on Post-Conviction Petitions

A petitioner will be precluded from receiving relief on post-conviction claims:

- (1) Which were raised at trial or on appeal and finally adjudicated against the petitioner;⁵⁹ or

⁵⁰ IND. CODE § 35-50-2-9(i) (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6.

⁵¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6.

⁵² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6, 7.

⁵³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 7.

⁵⁴ *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001).

⁵⁵ *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999).

⁵⁶ *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004).

⁵⁷ *Allen v. State*, 749 N.E. 2d 1158, 1171 (Ind. 2001); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

⁵⁸ 28 U.S.C. § 1257 (2004).

⁵⁹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8; *see also* *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004); *Schiro v. State*, 533 N.E.2d 1201, 1204-05 (Ind. 1989) (noting that an issue which is raised and determined adverse to the petitioner at trial or direct appeal is “*res judicata*,” and precluded in post-conviction).

- (2) Which were not, but could have been raised at trial or on appeal and were knowingly, voluntarily and intelligently waived.⁶⁰

Additionally, the petitioner may not file a second or successive⁶¹ post-conviction petition as a matter of right. The petitioner must first request permission from the Indiana Supreme Court to file a second or successive petition.⁶² The Indiana Supreme Court will authorize the filing of a second or successive petition if the petitioner demonstrates a reasonable possibility that s/he is entitled to post-conviction relief.⁶³ If the Indiana Supreme Court authorizes the second or successive petition, the petitioner must file it in the same court, with the same judge presiding if available, where his/her first petition for post-conviction relief was adjudicated.⁶⁴ Although not specifically delineated in the court rules, the Indiana Supreme Court has developed a standard practice of allowing for the filing of a final request to file a successive post-conviction petition within approximately forty-five days after the denial of *certiorari* in federal habeas corpus proceedings.⁶⁵

Authorization to file a second or successive petition is not an adjudication on the merits and the post-conviction court may still summarily dispose of the successive petition, without an evidentiary hearing, where:

- (1) The claims raised were already raised and adjudicated against the petitioner in a previous post-conviction proceeding;⁶⁶

⁶⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8; *see also* Connor v. State, 711 N.E.2d 1238, 1246 (Ind. 1999) (holding that a claim that the prosecution withheld evidence, which was known to the petitioner at the time of trial and appeal, but not raised, is considered waived for the purposes of post-conviction review); Clay v. State, 533 N.E.2d 1270, 1273 (Ind. Ct. App. 1989) (holding that where a post-conviction petitioner brings a petition following direct appeal, allegations of error asserted may not be raised without demonstrating that the claim was unascertainable or unavailable at the time of trial or direct appeal).

⁶¹ Successive petitions are those petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment of conviction and sentence. *See* Matheny v. State, 834 N.E.2d 658, 661 (Ind. 2005).

⁶² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(a); *see also* Connor v. State, 829 N.E.2d 21, 24 (Tenn. 2005). This request must comply with the form found in the appendix of Rule 1 and must be sent, with the proposed successive petition, to the Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(a).

⁶³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(b). To make this determination, the court may consider applicable law, the petition itself, and materials from the petitioner's previous appellate and post-conviction proceedings, including the record, briefs, court decisions, and any other materials the court deems relevant. *Id.* A petitioner will not be able to establish a reasonable possibility that s/he is entitled to post-conviction relief where s/he merely alleges grounds for relief that are not different from those that were earlier decided on the merits or if the only grounds alleged, even if different, should have been alleged in an earlier proceeding. IND. R. OF P. FOR POST-CONVICTION REMEDIES 1 app.

⁶⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(c).

⁶⁵ *See, e.g.*, Bieghler v. State, 34S00-05-11-SD-679 (petition filed November 28, 2005 after *certiorari* was denied on October 11, 2005); Timberlake v. State, 49S00-0606-SD-235 (petition filed June 28, 2006, after *certiorari* was denied on May 1, 2006). The docket entries for these and all Indiana appellate cases may be accessed at <http://hostpub.courts.state.in.us/HostPublisher/ISC3RUS/ISC2menu.jsp>.

⁶⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8; *see also* Arthur v. State, 663 N.E.2d 529, 531-32 (Ind. 1996) (holding that where an issue has been raised and fully litigated in the first petition for post-

- (2) The claims raised were not but could have been raised in a previous post-conviction proceeding, and they were knowingly, voluntarily and intelligently waived;⁶⁷ or
- (3) The claims are otherwise precluded in the post-conviction proceeding.⁶⁸

The court may grant relief on a precluded claim in a successive petition if it finds that there was sufficient reason the claim was not asserted in the first petition or that it was inadequately raised in the original petition.⁶⁹

1. Newly Discovered Evidence Exception to a Procedural Bar

Newly discovered evidence claims may be alleged in a post-conviction petition. Any capital petitioner seeking to present new evidence challenging his/her guilt or the appropriateness of a death sentence, when brought after s/he has already completed state post-conviction review proceedings, must be treated as a Successive Petition for Post-Conviction Relief under section 12 of Rule 1.⁷⁰ The petitioner may file this written petition seeking to present new evidence with the Indiana Supreme Court, so long as s/he serves notice on the attorney general.⁷¹ The Indiana Supreme Court then will determine, either with or without a hearing, whether the petitioner has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence.⁷² The Indiana Supreme Court may, if necessary, remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the petitioner's conviction and/or death sentence.⁷³ The Court may not make a determination in the petitioner's favor or make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general an opportunity to be heard.⁷⁴

In order for evidence to be “newly discovered,” the petitioner must demonstrate that:

- (1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing;
- (2) The facts are material and relevant;
- (3) The facts are not merely cumulative to other facts that were known;
- (4) The facts do not merely amount to impeachment evidence;
- (5) The facts are not privileged or incompetent;
- (6) Due diligence was exercised to discover these facts in time for trial;

conviction relief, Rule 1 does not allow the petitioner to obtain a second review of that claim in a successive petition).

⁶⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8. Thus, all grounds for relief available to the petitioner must be raised in his/her first petition. *Id.*

⁶⁸ *See supra* notes 59-60 and accompanying text.

⁶⁹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

⁷⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(a).

⁷¹ IND. CODE § 35-50-2-9(k) (2006).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

- (7) The new evidence is worthy of credit;
- (8) The new evidence can be produced upon retrial of the case; and
- (9) The new evidence will probably produce a different result at retrial.⁷⁵

Substantive claims of error under the Indiana or United States Constitutions, such as *Brady v. Maryland*⁷⁶ claims or juror misconduct claims, are likely allowable in a post-conviction motion as claims of constitutional error under section 1(a)(1) of Rule 1 provided that the claims are not procedurally barred and the petition itself is filed within the legal time limits.⁷⁷

2. Fundamental Error Exception to a Waiver of a Claim

In addition to the exception for newly discovered evidence, a litigant may overcome a procedural bar, *i.e.* waiver of a claim, by alleging that the asserted error constituted “fundamental error.” In order for an error to be “fundamental,” the asserted error must be a blatant violation of basic and elementary principles of due process, and the harm or potential for harm cannot be denied.⁷⁸

Before 1985, fundamental error could be raised at any time, including during post-conviction proceedings.⁷⁹ Currently, however, the application of the fundamental error exception is much more limited. While a litigant may invoke the fundamental error exception to the contemporaneous objection rule on direct appeal, claims of fundamental error in post-conviction proceedings are limited to those already available pursuant to section 1(a) of Rule 1.⁸⁰ Specifically, “[d]eprivation of the Sixth Amendment right to effective assistance of counsel, or . . . an issue demonstrably unavailable to the petitioner at the time of his[her] trial and direct appeal” are appropriate fundamental error issues for consideration in post-conviction proceedings.⁸¹

Thus, a claim of fundamental error is usually only available on direct appeal.⁸²

C. *Review of Error*

If a post-conviction court finds error, it may deny the post-conviction petition on the ground that the error was harmless.

⁷⁵ Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006).

⁷⁶ Brady v. Maryland, 373 U.S. 83 (1963) (holding that the suppression by prosecution of evidence favorable to an accused, upon request, violates due process, where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution).

⁷⁷ See, e.g., Dye v. State, 784 N.E.2d 469 (Ind. 2003) (reversing murder convictions and death sentence because of juror misconduct discovered after trial).

⁷⁸ Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985) (citing Terry v. State, 465 N.E.2d 1085, 1087 (Ind. 1984) (overruled on other grounds)); Canaan v. State, 683 N.E.2d 227, 229 (Ind. 1997).

⁷⁹ Bailey, 472 N.E.2d at 1263.

⁸⁰ Canaan, 683 N.E.2d at 235 n.6 (Ind. 1997) (citing Bailey, 472 N.E.2d at 1263).

⁸¹ Bailey, 472 N.E.2d at 1263.

⁸² McCorker v. State, 797 N.E.2d 257, 263 n.5 (Ind. 2003) (citing Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002)).

Generally, for errors involving a petitioner’s constitutional rights, the error is not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.⁸³ The state generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.⁸⁴ However, certain claims of constitutional error, such as ineffective assistance of counsel claims and *Brady*⁸⁵ claims, place the burden on the petitioner to demonstrate that s/he was prejudiced by the constitutional error.

For example, if the petitioner raises a claim of ineffective assistance of counsel, s/he must demonstrate a “reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding,⁸⁶ rather than the State bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the State failed to disclose favorable evidence and this failure was unknown to the petitioner on direct appeal—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.⁸⁷

D. Retroactivity of Rules

A new rule of criminal procedure applies only to those cases on direct review or not yet final, and would not be applicable to those cases “which have become final before the new rule was announced.”⁸⁸ Thus, new rules of criminal procedure are not retroactively applied in collateral post-conviction proceedings unless (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;⁸⁹ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures that . . . are implicit in the concept of ordered liberty” and whose non-application would seriously diminish the “likelihood of an accurate conviction.”⁹⁰

⁸³ *Foust v. State*, 489 N.E.2d 39, 41 (Ind. 1986) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

⁸⁴ *Chapman*, 386 U.S. at 23-24.

⁸⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁸⁶ *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

⁸⁷ *Bowlds v. State*, 834 N.E.2d 669, 674 (Ind. Ct. App. 2005) (citing *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)).

⁸⁸ *Daniels v. State*, 561 N.E.2d 487, 488-89 (Ind. 1990) (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

⁸⁹ *Saylor v. State*, 808 N.E.2d 646, 649 (Ind. 2004).

⁹⁰ *Id.*

II. ANALYSIS

A. Recommendation #1

All postconviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.

Numerous aspects of Indiana law governing post-conviction proceedings do in fact perpetuate the adequate development and judicial consideration of all post-conviction claims. For example, (1) Indiana law requires an automatic stay of execution upon a request by the petitioner attached to the post-conviction petition, and (2) Indiana law provides a right to counsel for all post-conviction petitioners to assist in the presentation and litigation of post-conviction claims.

Stay of Execution

Within thirty days following completion of the individual's direct appeal, his/her counsel must enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request the Indiana Supreme Court to extend the stay of execution of the death sentence.⁹¹ When the request to extend the stay is received, the Indiana Supreme Court will grant the stay and direct the trial court to submit a case management schedule for approval.⁹² Within thirty days of the completion of the petitioner's post-conviction appeal, the Indiana Supreme Court then will enter an order setting the execution date.⁹³ The petitioner's counsel bears the burden of notifying the Indiana Supreme Court Administrator of any action filed with or decision rendered by a federal court that relates to the death-sentenced petitioner in order to facilitate any further stays of execution.⁹⁴

Thus, it appears that Indiana law does require, upon request, the Indiana Supreme Court to stay an execution during the pendency of post-conviction proceedings to allow the petitioner to fully develop grounds for post-conviction relief and permit the court the ability to consider those grounds.

⁹¹ IND. R. CRIM. P. 24(H). A copy of the appearance and notice of intent to file a petition for post-conviction relief must be served by counsel on the Supreme Court Administrator. *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Post-Conviction Counsel

Post-conviction petitioners, including those under a sentence of death, may receive access to state-funded counsel by the State Public Defender in connection with their post-conviction claims.⁹⁵ After conferring with the petitioner, and ascertaining all available grounds for relief, the appointed State Public Defender (or retained private counsel) may amend the post-conviction petition, if necessary, to include any grounds for relief not alleged by the petitioner in the original petition.⁹⁶ Although the petitioner does not receive counsel immediately following the completion of his/her direct appeal to assist in filing a complete and comprehensive post-conviction petition, counsel and petitioner do have an opportunity to work together to fully develop all available claims for relief and amend the petition to include all such claims.

We commend the State of Indiana for facilitating the full development and judicial consideration of post-conviction claims in the aforementioned ways.⁹⁷ Numerous aspects of Indiana law, however, still restrict the adequate development and judicial consideration of grounds for post-conviction relief. For example, Indiana law (1) does not specify a finite amount of time to file a post-conviction petition after one's conviction and sentence become final and leaves the decision for setting a time for filing to the discretion of the post-conviction judge; (2) allows the post-conviction judge to summarily deny the petition without an evidentiary hearing; and (3) permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own.

Filing Deadlines and the Post-Conviction Evidentiary Hearing

A death-row petitioner does not have a specified time after his/her conviction and sentence become final on direct appeal to file his/her post-conviction petition.⁹⁸ Specifically, the petitioner's counsel must, among other things, enter an appearance in the trial court and advise the trial court of the intent to petition for post-conviction relief within thirty days following completion of the individual's direct appeal.⁹⁹ The Indiana Supreme Court then will direct the trial court to submit a case management schedule for approval.¹⁰⁰ The petitioner then must file his/her signed petition "by the date set forth in the case management schedule."¹⁰¹ The petitioner may amend his/her petition as a matter of right no later than sixty days prior to the date of the evidentiary hearing, and at

⁹⁵ IND. CODE § 33-40-1-2 (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9; *see also* *Graves v. State*, 823 N.E.2d 1193, 1195 (Ind. 2005) (noting that indigent inmates in Indiana prisons have had access to post-conviction counsel at the state's expense since 1945).

⁹⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(c); *see also* IND. R. CRIM. P. 24(H) (providing for the appointment of counsel within thirty days of the denial of rehearing on direct appeal).

⁹⁷ We are especially impressed with the funding, resources, and staffing for capital cases in the Public Defender's office. *See generally* *Daniels v. State*, 741 N.E.2d 1177, 1194 n.20 (Ind. 2001) (summarizing the evolution of the staffing).

⁹⁸ IND. R. CRIM. P. 24(H).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Corcoran v. State*, 827 N.E.2d 542, 545 (Ind. 2005).

anytime thereafter with the permission of the court.¹⁰² Strict adherence to the case management schedule usually results in the resolution of post-conviction proceedings in the trial court in approximately eighteen months.¹⁰³

There are some advantages to not having a finite time for filing a post-conviction petition, such as providing the post-conviction judge the discretion and flexibility to give more complex cases a greater amount of time to develop the grounds for relief before filing. In practice, however, such discretion is difficult to exercise in this manner because there is a limited amount of time available in the case management schedule for the filing of a capital post-conviction petition.

Post-conviction courts in Indiana can summarily dispose of any petition without an evidentiary hearing if it determines that (1) no genuine issue of material fact or law appears to exist upon the face of the record¹⁰⁴ which would entitle the petitioner to post-conviction relief;¹⁰⁵ (2) the claims alleged in the petition were raised and reviewed at trial or appeal or could have been raised at trial or appeal, but were not;¹⁰⁶ (3) the claims alleged in the petition were raised and reviewed in a previous post-conviction proceeding or could have been, but were not, raised in a previous post-conviction proceeding;¹⁰⁷ or (4) the petition is untimely filed. The court need hold an evidentiary hearing only if the allegations in the post-conviction petition raise an issue of material fact.¹⁰⁸

Given the multiple ways the court may summarily dispose of a petition without first holding an evidentiary hearing,¹⁰⁹ it is imperative that post-conviction petitioners be given adequate time to fully develop their claims to avoid such disposal on procedural grounds. It is unclear whether the unspecified time period for filing a post-conviction petition provides adequate time for all death-sentenced inmates to fully develop viable claims and file legally sufficient petitions. We note that non-capital post-conviction petitioners are given an unlimited time to file their first post-conviction petition.¹¹⁰ To expedite the post-conviction process for death-row inmates by giving them less time to file a post-conviction petition while permitting non-capital inmates to file post-conviction

¹⁰² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(c).

¹⁰³ INDIANA SUPREME COURT, INDIANA CAPITAL CASES (2005).

¹⁰⁴ The record includes, but is not limited to, “pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted.” IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g).

¹⁰⁵ *Id.*

¹⁰⁶ *See supra* notes 59-60 and accompanying text.

¹⁰⁷ *See supra* notes 66-67 and accompanying text.

¹⁰⁸ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g). The court may also order oral arguments to resolve issues of law. *Id.*

¹⁰⁹ We note that of the eighteen Indiana capital cases that were pending federal review in 2005, all were granted an evidentiary hearing during Indiana post-conviction proceedings. INDIANA SUPREME COURT, INDIANA CAPITAL CASES (2005).

¹¹⁰ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a). *But see generally* Williams v. State, 716 N.E.2d 897, 901-02 (discussing the doctrine of laches).

petition's "at any time,"¹¹¹ seems to discount the complexity of a capital case and the gravity of the death sentence.¹¹²

Wholesale Adoption of Proposed Orders

Within ninety days of the conclusion of the evidentiary hearing, the court must issue an order on the petition making specific written findings of fact and conclusions of law relating to each material issue presented.¹¹³ In preparation for rendering the order, the court "shall allow and may require" proposed findings of fact and conclusions of law from the parties.¹¹⁴ There have been grounds for appeal from the denial of a post-conviction petition based on the post-conviction court's apparent wholesale adoption of the State's proposed findings of fact and conclusions of law in the order. In one such case, the Indiana Supreme Court held that, while not encouraged, the practice of a judge adopting a party's proposed findings of fact and conclusions of law in a post-conviction proceeding is not prohibited—at least where the findings and conclusions adopted by the court were not "clearly erroneous."¹¹⁵ Despite concerns of judicial economy, a court's wholesale adoption or copying of either party's proposed findings of fact and conclusions of law undermines the judge's duty to exercise independent judgment in deciding these complex cases, which should require careful consideration of the evidence and applicable law before rendering findings of fact and conclusions of law in the written order.

Conclusion

We commend the State of Indiana for providing a mandatory stay of execution during the duration of state post-conviction proceedings and providing state-funded counsel, both of which allow the petitioner a greater ability to fully develop his/her claims in order to have them fully considered by the court. There are other aspects of the Indiana post-conviction laws, however, which serve to potentially inhibit the full development and judicial consideration of claims by (1) giving an unspecified time for filing post-conviction petitions; (2) allowing for the disposal of alleged claims without an evidentiary hearing, to give full judicial consideration to those claims; and (3) permitting the wholesale adoption of a party's proposed findings and conclusions. Thus, the State of

¹¹¹ *Id.*

¹¹² Capital post-conviction proceedings are generally more complex, contain more grounds for relief, and require much more extensive investigation relative to non-capital post-conviction petitions, due to the addition of a sentencing hearing, which provides a second layer of potential ineffective assistance of counsel claims. See Renee Thibodeau, *Efficiency v. Justice: Giarratano and the Capital Petitioner's Right to a "Meaningful" Postconviction Process*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 403 (1994) (discussing that in addition to the complexity and time constraints associated with state post-conviction, the death-sentenced inmate drafting his/her post-conviction petition also must deal with preparing to die).

¹¹³ IND. CODE § 35-50-2-9(i) (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 6.

¹¹⁴ IND. R. TRIAL P. 52(C).

¹¹⁵ *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001). The court in *Prowell* found that it is "not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party," because "trial courts . . . are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning." *Id.* at 708. The court recognized that the need to keep the trial court's docket moving was, properly, a high priority. *Id.* at 709.

Indiana’s post-conviction framework only partially complies with the requirements of Recommendation #1.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the Indiana Supreme Court allow petitioners to raise free-standing claims of error or even fundamental errors in a post-conviction proceeding. Significant claims of error in death penalty cases should be allowed to be raised during a post-conviction proceeding unless they have been knowingly and voluntarily waived by the defendant.

B. Recommendation #2

The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

Rule 1 provides that “all rules and statutes applicable in civil proceedings including . . . discovery procedures are available” to the petitioner.¹¹⁶ Thus, it appears that Indiana Trial Procedure Rules (Trial Rules) 26 through 37, to the extent that they are substantively applicable, control post-conviction discovery.¹¹⁷ Trial Rule 26 provides that the petitioner may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter of the post-conviction proceeding, including the “existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.”¹¹⁸ Additionally, the petitioner may discover, among other things:

- (1) Documents and tangible things prepared by the state in anticipation of litigation at trial or post-conviction, if the petitioner can show that s/he has substantial need for the materials in preparation of his/her post-conviction petition and that s/he is unable to obtain these materials without undue hardship;¹¹⁹
- (2) The subject matter on which the state’s experts are expected to testify at the evidentiary hearing, the substance of the facts and opinions to which the state’s experts expect to testify, and a summary of the grounds for each opinion;¹²⁰ and
- (3) The facts and known opinions of a state expert that has been retained or employed in anticipation of litigation, but is not expected to testify at the evidentiary hearing if the petitioner can show exceptional circumstances

¹¹⁶ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 5.

¹¹⁷ IND. R. TRIAL P. 26-37. Despite the unequivocal language of Rule 1, the Indiana Supreme Court has generally considered the applicability of the Trial Rules to post-conviction proceedings on a case-by-case basis. *See Roche v. State*, 690 N.E.2d 1115, 1133 n.22 (Ind. 1997) (noting that the court has expressly found certain Trial Rules applicable to post-conviction proceedings). The *Roche* court did not find that Trial Rules 26 through 37 dealing with discovery apply to post-conviction proceedings, but rather assumed this fact in order to determine the merits of the petitioner’s claim that the trial court abused its discretion by denying his motion for post-conviction discovery. *Id.* at 1133.

¹¹⁸ IND. R. TRIAL P. 26(B)(1).

¹¹⁹ IND. R. TRIAL P. 26(B)(3), 34(A)(1).

¹²⁰ IND. R. TRIAL P. 26(B)(4)(a).

under which is it impractical for the petitioner to obtain those facts or opinions by other means.¹²¹

Trial Rule 26 states that the petitioner may obtain the discovery in the following forms:¹²²

- (1) Depositions upon oral examination¹²³ or written questions;¹²⁴
- (2) Written interrogatories;¹²⁵
- (3) Production of documents or things;¹²⁶
- (4) Physical and mental examination;¹²⁷ and
- (5) Requests for admission.¹²⁸

These methods of discovery may be used in any sequence, provided they are not employed to cause delay¹²⁹ or as a “fishing expedition” to develop unknown claims for relief.¹³⁰ Thus, the post-conviction petitioner may not request the prosecutor’s whole file¹³¹ or an “extraordinary number of documents and amount of information from that file”¹³² in order to determine whether a claim for relief, such as the prosecutor withholding exculpatory materials, exists.

Provided that the petitioner has made reasonable efforts to reach an agreement with the state concerning post-conviction discovery, s/he may file a motion to compel discovery with the post-conviction court if the state has refused to comply with the petitioner’s discovery request.¹³³ The post-conviction court has the discretion to deny a petitioner’s discovery motion if it fails to comply with the requirements of Trial Rule 26.¹³⁴ The Indiana Supreme Court will overturn a denial of a capital petitioner’s post-conviction discovery motion only upon finding that the trial court abused its discretion.¹³⁵ Such an abuse of discretion can be shown if the trial court’s decision was against the logic and effect of the facts and circumstances before the court.¹³⁶

The extensive discovery procedures contained in the Indiana Trial Procedure Rules appear to govern post-conviction discovery, are likely sufficient to allow the petitioner to effectively present his/her claims, and may be considered “full discovery.” We did not

¹²¹ IND. R. TRIAL P. 26(B)(4)(b).

¹²² IND. R. TRIAL P. 26(A).

¹²³ IND. R. TRIAL P. 30.

¹²⁴ IND. R. TRIAL P. 31.

¹²⁵ IND. R. TRIAL P. 33.

¹²⁶ IND. R. TRIAL P. 34.

¹²⁷ IND. R. TRIAL P. 35.

¹²⁸ IND. R. TRIAL P. 36.

¹²⁹ IND. R. TRIAL P. 26(D).

¹³⁰ *See Bahm v. State*, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003).

¹³¹ *See Roche v. State*, 690 N.E.2d 1115, 1133 (Ind. 1997)

¹³² *See Bahm*, 789 N.E.2d at 57.

¹³³ IND. R. TRIAL P. 26(F), 37(A)(2).

¹³⁴ IND. R. TRIAL P. 26(F).

¹³⁵ *Harris v. State*, 762 N.E.2d 163, 169 (Ind. Ct. App. 2002) (citing *Roche*, 690 N.E.2d at 1133).

¹³⁶ *Bahm*, 789 N.E.2d at 55 (citing *Hall v. State*, 760 N.E.2d 688, 689-90 (Ind. Ct. App. 2002)).

discover any recent incidents in which Indiana’s post-conviction courts failed to exercise their discretion to provide full and meaningful discovery through these procedures.

Based on this information, it appears that the State of Indiana is in compliance with the requirements of Recommendation #2.

C. Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

The Indiana Trial Procedure Rules do not set a specific time for discovery. In fact, a review of a number of capital post-conviction case management schedules demonstrates that (1) the post-conviction case management schedule does not appear to regularly include a specific deadline for the completion of discovery; and (2) the trial courts generally hold the post-conviction evidentiary hearing within approximately one year from the time the petitioner’s conviction and sentence become final.¹³⁷ Although one year may be sufficient time to perform full and meaningful discovery in preparation for the capital post-conviction evidentiary hearing, the post-conviction court has considerable discretion to determine the specific time for the completion of discovery and could certainly lessen that time to expedite the proceedings.

We are unable, therefore, to conclude whether the State of Indiana fully complies with the requirements of Recommendations #3.

D. Recommendation #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.

Capital petitioners may appeal the denial of their post-conviction petition as a matter of right to the Indiana Supreme Court.¹³⁸ Indiana law provides that all Indiana Supreme Court opinions must be published.¹³⁹ Thus, the Indiana Supreme Court must issue opinions that address each issue raised on appeal and fully explain the bases for the disposition of those claims.

The State of Indiana, therefore, meets the requirements of Recommendation #4.

¹³⁷ INDIANA CAPITAL CASES, *supra* note 103.

¹³⁸ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 7.

¹³⁹ IND. R. APP. P. 65(A). In non-capital post-conviction cases, the appellate court may enter “not-for-publication memorandum decisions” which may not be regarded as precedent and must not be cited in any subsequent proceedings except by the parties to the case in their efforts to establish *res judicata*, collateral estoppel, or law of the case. IND. R. APP. P. 65(A), (D). However, because the Indiana Supreme Courts entertain all capital post-conviction appeals and all of the Court’s opinions are published, this option is not available in a capital post-conviction case. IND. R. APP. P. 65(A).

E. Recommendation #5

On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.

Indiana law provides that any ground for relief, constitutional or otherwise, that was (1) not raised in the proceeding that resulted in the petitioner’s conviction or sentence (guilt phase, penalty phase, or appeal); (2) but was knowingly, voluntarily and intelligently¹⁴⁰ waived in any of those proceedings, may not be asserted in a post-conviction petition.¹⁴¹ Despite this seemingly broad language in the post-conviction rules, Indiana courts have made clear that claims known at the time of direct appeal but not raised may not be raised in a post-conviction proceeding.¹⁴² Because appellate counsel has considerable discretion in deciding which claims to waive on direct appeal,¹⁴³ many claims may not have been knowingly, voluntarily, and intelligently waived personally by the defendant.¹⁴⁴

For example, capitally-charged defendants have been required to wear stun belts in some cases, but the trial records often include scant, if any evidence, of this fact.¹⁴⁵ In fact, one trial court had a policy of requiring defendants to wear some sort of restraints, even if they had not previously exhibited any conduct to suggest restraint was necessary.¹⁴⁶ Trial counsel chose the use of a stun belt instead of shackles, and the stun belt was not challenged on direct appeal.¹⁴⁷ When post-conviction counsel sought to raise the issue, the claim was deemed waived as a free-standing claim because it was available but not raised on direct appeal.¹⁴⁸ The defendant, however, cannot be considered to have knowingly, voluntarily, and intelligently waived this claim.

Similarly, courts have refused to address free-standing claims on post-conviction that undisclosed relationships between a juror and witnesses compromised a defendant’s right

¹⁴⁰ For the purposes of Recommendations #5 and 6, we assume that the “knowing, voluntary, and intelligent” standard for waiver found in section 8 of Rule 1, is the equivalent of the knowing, understanding, and voluntary standard expressed in these Recommendations.

¹⁴¹ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

¹⁴² *See, e.g.*, Trueblood v. State, 715 N.E.2d 1242, 1248 (Ind. 1999).

¹⁴³ *See, e.g.*, Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997).

¹⁴⁴ *See generally* Timberlake v. State, 753 N.E.2d 591, 597-98 (Ind. 2001) (“As a general rule, however, most free-standing claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata.”)

¹⁴⁵ *See, e.g.*, Stevens v. State, 770 N.E.2d 739, 756-57 (Ind. 2002); Wrinkles v. State, 749 N.E.2d 1179, 1187 n.3 (Ind. 2001).

¹⁴⁶ *Wrinkles*, 749 N.E.2d at 1195.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1187. The Indiana Supreme Court instead considered the challenge as a claim of ineffective assistance of counsel, but rejected it. It concluded, “even though the trial court’s policy would not likely withstand appellate scrutiny if the issue were presented, it is apparent that at least at the time of Wrinkles’ trial, an objection to wearing restraints would not have been sustained by the trial judge even if made.” *Id.* at 1195.

to a fair trial.¹⁴⁹ The trial record contained no evidence regarding these relationships, which were not known to trial or appellate counsel, even though they had been disclosed to the trial judge.¹⁵⁰ Therefore, the defendant cannot be deemed to have personally waived this claim knowingly, voluntarily, or intelligently.¹⁵¹

Based on this information, the State of Indiana is not in compliance with the requirements of Recommendation #5.

F. Recommendation #6

When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

As noted above in Recommendation #5, Indiana courts have made clear that claims known at the time of direct appeal but not raised may not be raised in a post-conviction proceeding.¹⁵² Because appellate counsel has considerable discretion in deciding which claims to waive on direct appeal, many claims may not have been knowingly, voluntarily, and intelligently waived personally by the defendant. Moreover, Indiana does not apply any “plain error” or state court equivalent of “fundamental error” review in post-conviction proceedings.

The State of Indiana, therefore, is not in compliance with Recommendation #6.

G. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

State Post-Conviction Proceedings

Indigent post-conviction petitioners in Indiana, including those under a sentence of death, receive access to counsel at the public’s expense in connection with their state post-

¹⁴⁹ Saylor v. State, 765 N.E.2d 535, 550 (Ind. 2002).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The Indiana Supreme Court addressed this claim as one of ineffective assistance of counsel, but there are greater burdens imposed on a defendant in seeking to prove ineffective assistance than on one who seeks to raise a free-standing claim of error.

¹⁵² See, e.g., Connor v. State, 711 N.E.2d 1238, 1246 (Ind. 1999) (holding that a claim that the prosecution withheld evidence, which was known to the petitioner at the time of trial and appeal but not raised, is considered waived for the purposes of post-conviction review). Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal. Allen v. State, 749 N.E. 2d 1158, 1171 (Ind. 2001); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

conviction claims.¹⁵³ In order to comply with this statutory requirement, the State of Indiana has established the State Public Defender office to provide “legal aid at public expense for those who voluntarily seek and otherwise could not obtain the advice and assistance of a competent attorney.”¹⁵⁴ The State Public Defender represents individuals, including those sentenced to death, in post-conviction proceedings,¹⁵⁵ if:

- (1) The individual confined is in a penal facility in Indiana or committed to the Department of Correction due to a criminal conviction or delinquency adjudication; and
- (2) The individual is financially unable to employ counsel.¹⁵⁶

In addition to the State Public Defender, the office has five deputy attorneys, one mitigation specialist, and a law clerk in its capital division.¹⁵⁷ If the State Public Defender office is unable to work on the post-conviction case, because of a conflict or for any other reason, the office may contract with a private attorney.¹⁵⁸

Federal Habeas Corpus Proceedings

Unlike state post-conviction proceedings where the Indiana Public Defender Office is appointed to represent death-sentenced inmates, federal courts in Indiana exclusively use the appointment of private attorneys to represent death-sentenced inmates petitioning for *habeas corpus* relief in federal district court. According to 18 U.S.C. § 3599, indigent death-sentenced inmates must be appointed “one or more” attorneys prior to the filing of a formal, legally sufficient federal *habeas corpus* petition.¹⁵⁹

Clemency Proceedings

The State of Indiana does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency. Pursuant to federal law, however, death-sentenced inmates may have their counsel from federal *habeas corpus* proceedings appointed to represent them in clemency.¹⁶⁰

Conclusion

¹⁵³ IND. CODE § 33-40-1-2 (2006); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 9(a); *see also* *Graves v. State*, 823 N.E.2d 1193, 1195 (Ind. 2005) (noting that indigent inmates in Indiana prisons have had access to post-conviction counsel at the state’s expense since 1945).

¹⁵⁴ *State ex rel. Fulton v. Schannen*, 64 N.E.2d 798, 799 (Ind. 1946).

¹⁵⁵ *See State ex rel. Bullard v. Reeves*, 169 N.E.2d 607, 607 (Ind. 1960) (“We further point out that the statutes of this state provide a public defender for the purpose of representing a petitioner where there is a meritorious ground for appeal and the time therefor has expired.”).

¹⁵⁶ IND. CODE § 33-40-1-2(a) (2006).

¹⁵⁷ PUBLIC DEFENDER OF INDIANA: ANNUAL REPORT FISCAL YEAR 2004-2005, at 13 (2005).

¹⁵⁸ *Id.* at 2.

¹⁵⁹ 18 U.S.C. § 3599(a)(2) (2006); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹⁶⁰ *See Lowery v. Anderson*, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (“Under the conditions established in *Hill* (a non-frivolous federal habeas petition and an absence of state means for providing clemency counsel), the entitlement to appointed clemency counsel under [federal law] cannot reasonably be read so as not to include state clemency proceedings.”)

Although death-sentenced inmates receive counsel during state post-conviction, federal *habeas corpus*, and state clemency proceedings, only the appointment of the State Public Defender Office to represent indigent capital inmates in state post-conviction proceedings is similar to the representation scheme provided by the now-defunded federal capital resource centers. The State of Indiana, therefore, is only in partial compliance with Recommendation #7.

H. Recommendation #8

For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Qualifications of Post-Conviction Counsel

The State Public Defender office represents indigent individuals sentenced to death in post-conviction proceedings.¹⁶¹ The actual State Public Defender must be: (1) a resident of the State of Indiana; and (2) a practicing attorney in Indiana for at least three years.¹⁶² The Indiana Supreme Court can administer any test(s) it determines are proper to determine the adequacy of its appointment of the State Public Defender.¹⁶³ Indiana law, however, does not provide specific minimum qualifications for all attorneys at the State Public Defender Office charged with representing death-sentenced inmates in post-conviction proceedings. Nor do there appear to be similar minimum qualifications for private contract attorneys when the State Public Defender Office cannot represent a death-sentenced individual in a post-conviction matter. This lack of minimum experience requirements creates a great risk of inadequate representation for capital petitioners at the post-conviction stage—the last chance for inmates to obtain judicial relief from a conviction and/or sentence.

Compensation for Public Defender and Private Contract Attorneys

The State Public Defender Office has a Capital Division, which is staffed with five deputy State Public Defenders responsible for representing death-sentenced inmates in state post-conviction proceedings.¹⁶⁴ While these attorneys are compensated through a state-paid salary,¹⁶⁵ we were unable to ascertain whether this salary is commensurate, or even greater, than the salary paid to county public defenders handling trial and direct appellate work in capital cases. Moreover, while contract attorneys representing death-sentenced inmates during state post-conviction proceedings when the State Public

¹⁶¹ IND. CODE § 33-40-1-2(a) (2006).

¹⁶² IND. CODE § 33-40-1-1(c)(1)-(2) (2006).

¹⁶³ IND. CODE § 33-40-1-1(d) (2006).

¹⁶⁴ PUBLIC DEFENDER ANNUAL REPORT, *supra* note 157, at 13 (2005).

¹⁶⁵ IND. CODE § 33-40-1-4, -1-6 (2006).

Defender is unable to perform such representation are paid according to the “current fee schedule,”¹⁶⁶ we were unable to determine the amount of those fees or their adequacy.

Funding for Investigators and Experts

The State Public Defender officer has “funds at their disposal for mitigation specialists, DNA tests, mental health professionals, and the like” to provide legal assistance for death-sentenced prisoners in state post-conviction.¹⁶⁷ We were unable to conclude, however, the extent to which these funds are sufficient to meet the investigative needs of post-conviction counsel in providing optimum post-conviction representation.

Conclusion

We commend the State of Indiana for providing funding for certain non-lawyer services that are integral to obtaining post-conviction relief for death-sentenced inmates. We note, however, that it does not appear that the State of Indiana has any uniform minimum qualifications for post-conviction representation, even in capital cases. Based on this information, and because we were unable to ascertain (1) the adequacy of compensation for capital post-conviction attorneys, at the State Public Defender or otherwise, or (2) the sufficiency of funding for experts and investigators, the State of Indiana only partially complies with the requirements of Recommendation #8.

I. Recommendation #9

State courts should give full retroactive effect to U. S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.

Post-conviction courts in Indiana give full retroactive effect to changes in the law announced by the United States Supreme Court, but only in limited circumstances. Specifically, post-conviction courts will give retroactive effect to new rules of criminal procedure in collateral post-conviction proceedings when (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe,¹⁶⁸ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures that . . . are implicit in the concept of ordered liberty” and whose non-application would seriously diminish the “likelihood of an accurate conviction.”¹⁶⁹ All other new rules of criminal procedure, including those announced by the United States Supreme Court, will be applied retroactively only to those cases still on direct appeal.¹⁷⁰

¹⁶⁶ PUBLIC DEFENDER ANNUAL REPORT, *supra* note 157, at 2 (2005).

¹⁶⁷ Ben-Yisrayl v. Davis, 245 F. Supp. 2d 960, 965 (N.D. Ind. 2002).

¹⁶⁸ Saylor v. State, 808 N.E.2d 646, 648-49 (Ind. 2004).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Because Indiana law only gives retroactive effect to changes in the law announced by the United States Supreme Court in limited circumstances, the State of Indiana only partially complies with the requirements of Recommendation #9.

J. Recommendation #10

State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.

The Indiana Post-Conviction Rules do not allow the petitioner to file second or successive¹⁷¹ post-conviction petitions as a matter of right. The petitioner must first request permission from the Indiana Supreme Court to file a second or successive petition.¹⁷² The Supreme Court will authorize the filing of a second or successive petition if the petitioner demonstrates a reasonable possibility that s/he is entitled to post-conviction relief.¹⁷³ However, the petitioner's second or successive petition may not raise claims:

- (1) Previously raised and adjudicated against the petitioner in a previous post-conviction proceeding;¹⁷⁴
- (2) That could have been, but were not, raised in a previous post-conviction proceeding;¹⁷⁵ or
- (3) That are otherwise precluded in the post-conviction proceeding.¹⁷⁶

The court may grant relief on precluded claims in a successive petition if it finds that there was sufficient reason the claim was not asserted in the first petition or that it was inadequately raised in the original petition.¹⁷⁷ Both exceptions to the bar against successive petitions required by this Recommendation—some deficiency or omission by post-conviction counsel or an intervening court decision that changed the law subsequent

¹⁷¹ Successive petitions are those petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment of conviction and sentence.

¹⁷² IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(a). This request must comply with the form found in the appendix of Rule 1 and must be sent, with the proposed successive petition, to the Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court. *Id.*

¹⁷³ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 12(b). To make this determination, the court may consider applicable law, the petition, and materials from the petitioner's prior appellate and post-conviction proceedings, including the record, briefs, court decisions, and any other materials the court deems relevant. *Id.*

¹⁷⁴ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8; *see also* Arthur v. State, 663 N.E.2d 529, 531-32 (Ind. 1996) (holding that where an issue has been raised and fully litigated in the first petition for post-conviction relief, Rule 1 does not allow the petitioner to obtain a second review of that claim in a successive petition).

¹⁷⁵ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8. Thus all grounds for relief available to the petitioner must be raised in his/her first petition. *Id.*

¹⁷⁶ *See supra* notes 59-60 and accompanying text.

¹⁷⁷ IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 8.

to the first petition, resulting in a meritorious claim not being raised and litigated in the first petition—appear to be contemplated by these bases for relief.

Specifically, both omissions by counsel in a previous post-conviction proceeding and intervening court decisions could be considered sufficient reasons the that claim was not asserted in the first petition, thus allowing it to be raised in a second or successive petition. While deficiency by post-conviction counsel could be the cause of a claim being inadequately raised in the original petition, Indiana law does not allow a successive petitioner to raise the claim that his/her previous post-conviction counsel was ineffective.¹⁷⁸ Rather, the successive petitioner would be required to allege that his/her previous post-conviction counsel was not merely inadequate or ineffective, but that counsel effectively abandoned him/her and did not present any evidence in support of his/her claims.¹⁷⁹ Thus, a mere deficiency by counsel in a previous post-conviction proceeding could not be the basis for a successive petition.

The State of Indiana, therefore, only partially complies with the requirements of Recommendation #10. We note, however, that although not specifically delineated in the court rules, the Indiana Supreme Court has developed a standard practice permitting the filing of a final request to file a successive post-conviction petition within approximately forty-five to sixty days after the denial of *certiorari* in federal *habeas corpus* proceedings.¹⁸⁰

K. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the United States Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”¹⁸¹ The burden to show that the error was harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”¹⁸²

There is some case law in Indiana indicating that during post-conviction proceedings, errors involving a petitioner’s constitutional rights are generally not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.¹⁸³ The

¹⁷⁸ *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005).

¹⁷⁹ *Waters v. State*, 574 N.E.2d 911, 912 (Ind. 2004); *Baum v. State*, 533 N.E.2d 1200, 1200-01 (Ind. 1989).

¹⁸⁰ *See supra* note 65.

¹⁸¹ 386 U.S. 18, 24 (1967).

¹⁸² *Id.*

¹⁸³ *Foust v. State*, 489 N.E.2d 39, 41 (Ind. 1986) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

state generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.¹⁸⁴

However, in following U.S. Supreme Court precedent, certain claims of constitutional error, such as ineffective assistance of counsel and *Brady*¹⁸⁵ claims, provide an exception to the harmless error test in Indiana post-conviction proceedings by placing the burden on the petitioner to demonstrate that s/he was prejudiced by the constitutional error.

For example, if the petitioner raises a claim of ineffective assistance of counsel, s/he bears the burden of demonstrating a “reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding,¹⁸⁶ rather than the state bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the stated failed to disclose favorable evidence—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.¹⁸⁷

Because claims of ineffective assistance of counsel form the bulk of claims raised in Indiana post-conviction proceedings, it is more likely that the petitioner regularly bears the burden of proving that s/he was prejudiced by the constitutional error (failure to receive effective counsel under the Sixth Amendment to the United States Constitution), rather than the state bearing the burden of demonstrating that such an error was harmless beyond a reasonable doubt.

The State of Indiana, therefore, only partially complies with the requirements of Recommendation #11.

L. Recommendation #12

During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the State of Indiana at this time.

¹⁸⁴ *Chapman*, 386 U.S. at 24.

¹⁸⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁸⁶ *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

¹⁸⁷ *Bowlds v. State*, 834 N.E.2d 669, 674 (Ind. Ct. App. 2005) (citing *Brady*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)).

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "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."¹

Since 1972, when the United States Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through November 2005, clemency has been granted on humanitarian grounds 229 times in nineteen of the thirty-eight death penalty states and the federal government.² One hundred sixty seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the

¹ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

² See Death Penalty Information Center, Clemency, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Jan. 27, 2007).

death sentence without regard to constraints that may limit a court's or jury's decision making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION

A. Clemency Decision Makers

1. Authority of the Governor and the Indiana Parole Board

Under the Indiana Constitution, the Governor has the sole authority to “grant reprieves, commutations, and pardons”³ for all offenses, including capital crimes, except treason and impeachment.⁴

Additionally, the State Constitution authorizes the General Assembly to create a “council composed of officers of State” to provide the Governor with recommendations on pardons.⁵ This power has been conferred to the Indiana Parole Board which “make[s] pardon, clemency, reprieve, and remission recommendations to the governor.”⁶ Indiana law allows the Parole Board to:

- (1) Conduct inquiries, investigations, and reviews, and hold hearings to properly discharge the Parole Board’s functions;
- (2) Issue subpoenas, enforceable by action in circuit and superior courts, to compel any person to appear, give sworn testimony, or produce documentary evidence relating to any matter under inquiry, investigation, hearing, or review;
- (3) Administer oaths and take testimony of any person under oath;
- (4) Request from any public agency assistance, services, and information that will enable it to properly discharge its functions;
- (5) Enter premises within the Department of Correction’s control without notice, to confer with any committed person;
- (6) Adopt rules to properly discharge its functions;⁷ and
- (7) Exercise any other power necessary in discharging its duties and power.⁸

The power of the Parole Board, however, is limited to providing recommendations to the Governor; it does not have the authority to pardon or commute prisoners’ sentences.⁹

³ A “commutation” modifies the original sentence providing the inmate with a lesser punishment than originally received. *See* 22 IND. LAW ENCYCLOPEDIA § 1 (2006). A “pardon” is an act by the Governor which exempts an individual from the punishment the law imposes for the crime s/he has committed. *Id.*

⁴ IND. CONST. art. 5, § 17; *see also* Trueblood v. State, 790 N.E.2d 97, 97 (Ind. 2003) (“The exclusive power to grant clemency rests with the Governor.”); Diamond v. State, 144 N.E. 250, 250 (Ind. 1924) (“But by the Constitution of Indiana the power to grant reprieves and pardons is vested in the Governor alone.”); Butler v. State, 97 Ind. 373, 375 (Ind. 1884) (“The conclusion seems to be inevitable that in this State the Governor, under such regulations as may be provided by law, has the exclusive power to grant pardons, reprieves and commutations, and to remit fines and forfeitures.”). In cases involving treason and impeachment, the General Assembly, not the Governor, has the power to grant “a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve.” IND. CONST. art. 5, § 17.

⁵ IND. CONST. art. 5, § 17.

⁶ IND. CODE § 11-9-1-2(a)(3) (2006).

⁷ Section 4-22-2 of the Indiana Code addresses the creation of State agency rule making and procedures. *See* IND. CODE § 4-22-2-3 (2006).

⁸ IND. CODE § 11-9-1-2(b)(1)-(7) (2006).

2. Composition, Appointment, Vacancies, and Qualifications of the Indiana Parole Board

The Indiana Parole Board consists of five members, each of whom are appointed by the Governor and serve four year terms.¹⁰ The Governor designates one member of the Parole Board to serve as Chairperson.¹¹ No more than three members on the Parole Board can be from the same political party.¹² Members serve on a full-time basis and are eligible for reappointment.¹³ The Governor may remove a Parole Board member “for cause,” after the member is given notice and has an opportunity to be heard by the Governor.¹⁴

To be eligible to serve on the Parole Board, one must: (1) have a bachelor’s degree from an accredited university or college, or have ten years of law enforcement training, and (2) “have the skill, training, or experience to analyze questions of law, administration, and public policy.”¹⁵ Once appointed to the Parole Board, every new member must attend a one-week training program at the National Institute of Corrections¹⁶ during their first year on the Parole Board.¹⁷

If there is a vacancy on the Parole Board prior to the end of a member’s term, the Governor may appoint someone to serve out the remainder of the term.¹⁸ If a member is temporarily unable to serve on the Parole Board, the Governor may appoint a qualified individual to serve until the member is able to return.¹⁹

⁹ See *Gilchrist v. Overlade*, 122 N.E.2d 93, 96-97 (Ind. 1954); see also Indiana Department of Corrections, Disclaimer, at <http://www.in.gov/indcorrection/pdf/paroleboard/disclaimer.pdf> (last visited Jan. 27, 2007) (“Clemency cases are decided by the Governor following submission of a non-binding advisory recommendation by the Parole Board to either grant or to deny the request for clemency.”).

¹⁰ IND. CODE § 11-9-1-1(a) (2006).

¹¹ IND. CODE § 11-9-1-1(b) (2006).

¹² IND. CODE § 11-9-1-1(a) (2006).

¹³ IND. CODE § 11-9-1-1(a)-(b) (2006).

¹⁴ IND. CODE § 11-9-1-1(a) (2006).

¹⁵ IND. CODE § 11-9-1-1(b) (2006).

¹⁶ The National Institute of Corrections is an agency within the United States Department of Justice, Federal Bureau of Prisons. See National Institute of Corrections, About Us, at <http://nicic.org/AboutUs> (last visited Jan. 27, 2007). The Director of the Institute is appointed by the United States Attorney General. *Id.* There is also a 16-member Advisory Board appointed by the United States Attorney General that is responsible for providing policy direction to the Institute. *Id.* The National Institute of Corrections provides training, technical assistance, information services, and policy/program development assistance to federal, state, and local corrections agencies. *Id.*

¹⁷ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

¹⁸ IND. CODE § 11-9-1-1(a) (2006).

¹⁹ *Id.*

B. Clemency Petitions

The Indiana Supreme Court has stated that clemency is “a matter of grace and is not a right of the convicted felon.”²⁰ Although statutory and administrative guidelines have been adopted to provide procedures for the filing of a clemency petition.²¹ However, the Indiana legislature also has determined that the statutory and administrative guidelines do “not limit the constitutional power of the governor to grant pardons, reprieves, [or] commutations.”²² Additionally, there is “no provision in the state constitution or statutes for judicial review of the Governor’s decision concerning a clemency petition.”²³

The Indiana Parole Board has “almost absolute discretion in carrying out its duties and . . . it is not subject to the supervision or control of the Courts.”²⁴ If there is any conflict of interest, board members are responsible for identifying the conflict and disqualifying themselves from participating in the clemency process.²⁵ For example, a Parole Board member with a background as a law enforcement officer could disqualify himself/herself for a conflict of interest from the clemency process for petitioners convicted of killing or injuring police officers.²⁶

1. Eligibility and Application for Clemency

To be eligible for clemency, a petitioner must have a “clear institutional record for the year immediately preceding” consideration.²⁷ If the Parole Board decides that the petitioner is ineligible for clemency based on the petitioner’s institutional record, the petitioner can appeal and meet with a member of the Parole Board to address the decision.²⁸

An individual sentenced to death can petition for clemency once an execution date has been scheduled and the court has declined to issue a stay of execution.²⁹ If a stay of execution is issued by the court during the investigation of a clemency petition, the clemency investigation will end until another execution date has been issued and a new clemency application has been filed.³⁰

²⁰ *Misenheimer v. State*, 374 N.E.2d 523, 532 (Ind. 1978); *see also Colvin v. Bowen*, 399 N.E.2d 835, 838 (Ind. Ct. App. 1980) (“It is clear that under Indiana law no person has a legitimate claim of entitlement to clemency.”).

²¹ IND. CODE § 11-9-2-1 through -4 (2006).

²² IND. CODE § 11-9-2-3 (2006); *see also Trueblood v. State*, 790 N.E.2d 97, 97 (Ind. 2003).

²³ *Trueblood*, 790 N.E.2d at 98.

²⁴ *Murphy v. Indiana Parole Board*, 397 N.E.2d 259, 261 (Ind. 1979).

²⁵ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

²⁶ *Id.*

²⁷ IND. ADMIN. CODE tit. 220, r. 1.1-4-1(i) (2006); *see also* Indiana Petition for Clemency, State Form 1213, at <http://www.cjpf.org/clemency/IndianaApp.pdf> (last visited Jan. 27, 2007) (“No petition [for clemency] will be considered if the offender does not have a clear institutional record for twelve (12) months immediately preceding the hearing.”). A “clear institutional record” is defined as the petitioner having no major violations or fewer than two minor violations on his/her record. *See id.*

²⁸ IND. ADMIN. CODE tit. 220, r. 1.1-4-1(k) (2006).

²⁹ IND. ADMIN. CODE tit. 220, r. 1.1-4-1(d) (2006).

³⁰ *Id.*

At the same time the offender receives the necessary forms to complete his/her clemency petition, s/he also receives a “Notice of Clemency Process.”³¹ The Notice of Clemency Process informs the offender that s/he is eligible to request clemency and describes the clemency process timeline.³² This notice and the necessary forms are hand-delivered by a member of the parole staff assigned to the facility where the offender is detained.³³ A petitioner is notified when his/her petition for clemency is received by the Parole Board and is provided the date of the clemency hearing.³⁴

Upon receiving the clemency petition, the death-sentenced individual usually has one week to complete and file the petition, or to sign a waiver.³⁵ The petition must be in writing and signed by the individual sentenced to death or by someone on his/her behalf and filed with the Parole Board.³⁶ A clemency petition also should contain statements by the trial judge and the trial prosecuting attorney.³⁷ If the trial judge or the prosecuting attorney is deceased or unavailable to make a statement, their successor(s) can make a statement.³⁸ If the trial judge or the trial prosecuting attorney refuses to make a statement, their refusal is noted in the petitioner’s record.³⁹

The clemency petition also may include any relevant information, including documents from past trials, affidavits from jurors, or appellate court decisions.⁴⁰ No particular form of information or document is excluded from submission with the clemency petition,⁴¹ but, the Parole Board will only consider information and documents that are relevant to the case.⁴²

Upon receiving the petition, the Parole Board must:

- (1) Provide notice of the petition to the sentencing court; the victim of the crime for which the person was convicted or the next of kin of the victim if the victim is deceased, unless the victim has provided a written request not to be contacted; and the prosecuting attorney of the county where the person was convicted;

³¹ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

³² *Id.*

³³ *Id.*

³⁴ IND. ADMIN. CODE tit. 220, r. 1.1-4-2 (2006).

³⁵ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

³⁶ IND. CODE § 11-9-2-1 (2006). Since the clemency process used in the case of D.H. Fleenor, in which Mr. Fleenor’s attorney signed a clemency petition on his behalf despite Mr. Fleenor’s desire not to submit a petition, the Parole Board has strongly suggested that the inmate sentenced to death sign his/her own clemency petition. Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

³⁷ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(a) (2006).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁴¹ *Id.*

⁴² *Id.* Any letters from friends or family on behalf of the petitioner must be submitted to the Parole Board at least two days prior to the clemency hearing. *Id.*

- (2) Conduct an investigation, which must include the collection of records, reports and other information which are relevant to consideration of the application; and
- (3) Conduct a hearing where the applicant and other interested people are provided an opportunity to appear and present information regarding the application.⁴³

Once the clemency petition has been filed with the Parole Board, it generally takes approximately four months for the Board to review the petition in non-capital cases.⁴⁴ In capital cases, however, the procedure is somewhat expedited because of the pending execution date in fewer than thirty days.

2. Investigation by the Parole Board

The Parole Board may designate one or more of its members to conduct the required inquiry, investigation, hearing, or review before making its recommendation to the Governor.⁴⁵

A report addressing the petitioner's medical, psychological and psychiatric condition and history may be required by the Parole Board.⁴⁶ In addition, in conducting its investigation the Parole Board must consider:

- (1) The nature and circumstances of the crime for which the offender was convicted, and the offender's participation in that crime;
- (2) The offender's prior criminal record;
- (3) The offender's conduct and attitude during commitment; and
- (4) The best interests of society.⁴⁷

Furthermore, the Parole Board may, but is not required to, consider additional factors, including but not limited to:

- (1) The offender's previous social history;
- (2) The offender's medical condition and history;
- (3) The offender's psychological and psychiatric condition and history;
- (4) The offender's employment history prior to commitment;
- (5) The relationship of the offender and the victim of the crime;
- (6) The offender's economic condition and history;
- (7) The offender's previous parole or probation experience;
- (8) The attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;

⁴³ IND. CODE § 11-9-2-1-3(a) (2006).

⁴⁴ IND. ADMIN. CODE tit. 220, r. 1.1-4-2(a) (2006).

⁴⁵ IND. CODE § 11-9-1-3(a) (2006).

⁴⁶ See Indiana Petition for Clemency, State Form 1213, at 6, available at <http://www.cjpf.org/clemency/IndianaApp.pdf> (last visited Jan. 27, 2007).

⁴⁷ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(d)(1)-(4) (2006).

- (9) The attitudes and opinions of the relatives or friends of the victim; and
- (10) The attitudes and opinions of the friends and relatives of the offender.⁴⁸

The information gathered during the investigation is consolidated into a folder for each member of the Parole Board and the Governor.⁴⁹ The folder contains information addressing the petitioner, including newspaper clippings, community investigation documents, psychiatric and medical reports, letters in support of and against granting clemency, and any other information that may be relevant to the Parole Board in making its recommendation to the Governor.⁵⁰ Once the designated member(s) have completed the investigation, s/he must file “a complete record of the proceedings together with his[her] findings, conclusions, and [a] recommended decision.”⁵¹

3. Clemency Hearing

The Parole Board cannot have a meeting⁵² unless there is a quorum of at least three members.⁵³ Moreover, the Parole Board is not permitted to take any action unless at least three members are in agreement as to the appropriate course of action.⁵⁴

All meetings of the Parole Board, except executive sessions, are open to the public.⁵⁵

Hearings conducted by the Parole Board can be informal and do not have to comply with the rules of evidence.⁵⁶ Part of the Parole Board’s hearing includes an interview of the petitioner, conducted at the facility where s/he is confined.⁵⁷ A limited number of select individuals are permitted to attend Parole Board hearing sessions at the correctional facility where the petitioner is confined.⁵⁸ During the clemency hearing, any member of the Parole Board “may ask questions of the offender or make statements concerning

⁴⁸ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(e) (2006). This section of the Indiana Administrative Code also includes other factors, not included in the list above, which the Parole Board may consider in performing its investigation. The factors not included, however, do not appear to be applicable to a death-row clemency petitioner. *Id.* Additionally, factors (8)-(10) become a mandatory part of its investigation if the Board wishes to recommend that the Governor grant the clemency petition. IND. ADMIN. CODE tit. 220, r. 1.1-4-4(b) (2006).

⁴⁹ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁵⁰ *Id.*

⁵¹ IND. CODE § 11-9-1-3(b) (2006).

⁵² A “meeting” of the Parole Board occurs when: (1) public notice of the meeting has been provided, (2) at least a quorum of the members is present, and (3) the Board is considering official business or taking official action. IND. ADMIN. CODE tit. 220, r. 1.1-1-2 (2006). A meeting can be convened to conduct a hearing. *Id.*

⁵³ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(3) (2006).

⁵⁴ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(4) (2006).

⁵⁵ IND. ADMIN. CODE tit. 220, r. 1.1-2-2 (2006).

⁵⁶ IND. CODE § 11-9-2-2(b)(3) (2006).

⁵⁷ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(b) (2006).

⁵⁸ *See* Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005); *see also* IND. ADMIN. CODE tit. 220, r. 1.1-2-2(b) (2006).

him[/her].”⁵⁹ No observer of the clemency hearing may address the Parole Board without authorization nor may observers communicate with the petitioner.⁶⁰

Upon concluding its investigation and public hearing, each member of the Parole Board submits a written recommendation to the Governor addressing whether s/he believes that clemency should be granted or denied.⁶¹ This decision by the Parole Board is “based upon the record and the findings, conclusions, and recommendations,” of the designated member(s) that conducted the investigation.⁶² The Governor makes the final determination of whether to grant or deny clemency.⁶³

⁵⁹ IND. ADMIN. CODE tit. 220, r. 1.1-2-3(b) (2006).

⁶⁰ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005); *see also* IND. ADMIN CODE tit. 220, r. 1.1-2-2(b)(2)-(3) (2006).

⁶¹ IND. CODE § 11-9-2-2(b) (2006).

⁶² IND. CODE § 11-9-1-3(b) (2006).

⁶³ IND. CONST. art. 5, § 17.

II. ANALYSIS

A. Recommendation #1

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.

During the clemency process, the Parole Board presumes that the petitioner is guilty of the crime and does not believe that it is the Board's responsibility to retry the petitioner.⁶⁴ Instead, the Parole Board uses the clemency process to consider the fairness of the sentencing decision.⁶⁵

As part of this process, the Parole Board may "conduct inquiries, investigations, and reviews and hold hearings to properly discharge its functions."⁶⁶ When it does exercise its discretion to conduct an investigation, the Parole Board must look into:

- (1) The nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime;
- (2) The offender's prior criminal record;
- (3) The offender's conduct and attitude during incarceration; and
- (4) The best interests of society.⁶⁷

In addition, the Parole Board may, but is not required to, consider additional factors including, but not limited to:

- (1) The offender's previous social history;
- (2) The offender's medical condition and history;
- (3) The offender's psychological and psychiatric condition and history;
- (4) The offender's employment history prior to incarceration;
- (5) The relationship of the offender and the victim of the crime;
- (6) The offender's economic condition and history;
- (7) The offender's previous parole or probation experience;
- (8) The attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;
- (9) The attitudes and opinions of the relatives or friends of the victim; and
- (10) The attitudes and opinions of the friends and relatives of the offender.⁶⁸

⁶⁴ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁶⁵ *Id.*

⁶⁶ IND. CODE § 11-9-1-2(b)(1) (2006); *see also* Colvin v. Bowen, 399 N.E.2d 835, 840 (Ind. Ct. App. 1980) ("Finally the Board is not mandated to conduct a hearing even though it is empowered to hold one and to subpoena witnesses.").

⁶⁷ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(d) (2006).

⁶⁸ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(e) (2006). Factors (8)-(10) become a mandatory part of the its investigation if the Board wishes to recommend that the Governor grant the clemency petition. IND. ADMIN. CODE tit. 220, r. 1.1-4-4(b) (2006).

A report addressing the petitioner’s medical, psychological, and psychiatric condition and history also may be required by the Parole Board.⁶⁹

The information gathered during the investigation is consolidated into a folder for each member of the Parole Board and the Governor.⁷⁰ The folder contains information addressing the petitioner, including newspaper clippings, community investigation documents, psychiatric and medical reports, letters in support of and against granting clemency, and any other information that may be relevant.⁷¹ In making its recommendation to the Governor, the Parole Board must make its final decision “based upon the record and the findings, conclusions, and recommendations.”⁷²

Under Indiana law, despite the Parole Board’s role in investigating cases and making recommendations, the Governor has the sole discretion to grant or deny a petition for clemency.⁷³ While it may be inferred that the Governor considers the findings of the Parole Board’s investigation as part of his/her clemency decision-making process, nothing requires it. In practice, however, it appears that at least some governors have considered this information and, if circumstances require, conducted further investigation. Jon Laramore, counsel for Governors Frank O’Bannon and Joe Kernan, reported that these two Governors personally reviewed each clemency petition, including all supporting documents⁷⁴ and the Governors’ staff sometimes conducted further investigation, personally spoke with the petitioner, and spoke with survivors, victims, or other individuals involved in the case.⁷⁵ Similarly, in the case of Gregory Scott Johnson, current Governor Mitch Daniels called physicians and transplant specialists to consider their input.⁷⁶

It is clear that the Parole Board presumes that a petitioner for clemency is guilty of the crime and that the clemency process does not, as a matter of course, constitute an independent consideration of the facts of the case. The Parole Board nevertheless conducts an investigation, and the Governor is provided the information from this investigation.⁷⁷ Despite the somewhat narrow scope of the Parole Board’s investigation, recent Governors have demonstrated a commitment to a thorough investigation of many facets of death penalty cases. The State of Indiana, therefore, is in partial compliance with Recommendation #1.

⁶⁹ See Indiana Petition for Clemency, State Form 1213, at 6, available at <http://www.cjpf.org/clemency/IndianaApp.pdf> (last visited Jan. 27, 2007).

⁷⁰ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁷¹ *Id.*

⁷² IND. CODE § 11-9-1-3(b) (2006).

⁷³ IND. CONST. art. 5, § 17.

⁷⁴ Interview by Doug Cummins with Jon Laramore, Counsel, Indiana Governors Frank O’Bannon and Joe Kernan (April 14, 2006).

⁷⁵ *Id.*

⁷⁶ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁷⁷ As noted below, the Governor may—and has—granted clemency in the absence of an application to and investigation by the Parole Board. See *infra* note 121.

B. Recommendation #2

The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.

This recommendation requires the Governor and the Parole Board to consider “all factors” which may lead them to conclude that a death sentence is not warranted. “All factors” include, but are not limited to the following:

- (1) Constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court rulings;
- (2) Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) Lingering doubts of guilt (as discussed in Recommendation #4);
- (4) Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) Inmates’ mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) Inmates’ age at the time of the offense (as discussed in Recommendation #4).⁷⁸

According to Earl Coleman, Staff Attorney for the Parole Board, the Parole Board assesses all relevant information on an individual and unbiased basis.⁷⁹ By statute and rule, however, the Parole Board only is required to consider the following factors when it conducts its investigation and makes its recommendation to the Governor about whether to grant or deny clemency:

- (1) The nature and circumstances of the crime for which the offender is committed, and the offender’s participation in the crime;
- (2) The offender’s prior criminal record;
- (3) The offender’s conduct and attitude during commitment; and
- (4) The best interests of society.⁸⁰

The Board must also investigate the “attitudes and opinions of the community in which the crime occurred,” including those of the friends and relatives of the victim and the

⁷⁸ American Bar Association, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

⁷⁹ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁸⁰ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(d) (2006).

friends and relatives of the petitioner, before the Board may make a recommendation that the Governor grant clemency.⁸¹

Furthermore, although discretionary, the Parole Board may, but is not required to consider:

- (1) The offender's age at the time of committing the offense and his/her age and level of maturity at the time of the clemency appearance;
- (2) The offender's medical condition and history;
- (3) The offender's psychological and psychiatric condition and history;⁸²

A number of these factors are consistent with the factors delineated in Recommendation #2. Despite the fact that the Parole Board is directed to consider a list of factors and is given an additional list of factors it may consider, they are not binding on the Governor. Regardless, according to Jon Laramore, Counsel for Indiana Governors Frank O'Bannon and Joe Kernan, both of these Governors personally reviewed each clemency petition, including all supporting documents.⁸³ In addition, the Governors' staff also might conduct a further investigation, personally speak with the petitioner, and speak with survivors, victims, or other individuals involved in the case.⁸⁴

A review of Indiana's past clemency decisions indicates that the Parole Board and the Governor have previously considered at least some of the delineated factors. Between 1977, when Indiana reinstated the death penalty, and 2005, which is the last time a death-row inmate received clemency in Indiana, seventeen clemency petitions have been filed on behalf of death-row inmates⁸⁵ and the Governor has commuted the death sentences of three.⁸⁶

When Governor Joseph Kernan granted Darnell Williams' petition for clemency in 2004, he based his decision on his belief that it would be unfair to execute Mr. Williams when his co-defendant received a life sentence.⁸⁷

⁸¹ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(b) (2006).

⁸² IND. ADMIN. CODE tit. 220, r. 1.1-4-4(e)(4), (5), (6) (2006).

⁸³ Interview by Doug Cummins with Jon Laramore, Counsel, Indiana Governors Frank O'Bannon and Joe Kernan (April 14, 2006).

⁸⁴ *Id.* For example, when considering the clemency petition of Gregory Scott Johnson, Governor Mitch Daniels contacted physicians and transplant specialists for advice. Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

⁸⁵ Interview by Doug Cummins with Earl Coleman, Staff Attorney for the Indiana Parole Board (June 7, 2005); Associated Press, *Indiana Executes Killer of Three*, Jul. 27, 2005, available at <http://msnbc.msn.com/id/8719807/> (last visited Feb. 7, 2007); Indiana Department of Corrections, Parole Board Hearing Archives, available at <http://www.in.gov/indcorrection/archives/paroleboard.htm> (last visited Feb. 7, 2007).

⁸⁶ See Death Penalty Information Center, Clemency, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Jan. 27, 2007). The three inmates who were granted clemency include: Darnell Williams (in 2004 by former Governor Joe Kernan), Michael Daniels (in 2005 by former Governor Joe Kernan), and Arthur Baird II (in 2005 by current Governor Mitch Daniels). *Id.*

⁸⁷ Death Penalty Information Center, Clemency News and Developments, at <http://www.deathpenaltyinfo.org/article.php?did=2054> (last visited Jan. 27, 2007).

In granting Michael Daniels' petition for clemency in 2005, Governor Kernan stated that he:

commuted the death sentence of Daniels to life imprisonment without parole because of doubts about Daniels' personal responsibility for the crime and the quality of legal process leading to his death sentence. Evidence had emerged about Daniels' mental status and about whether he was the triggerman in the underlying murder.⁸⁸

An article in the *Indianapolis Star* further explained the Governor's decision to grant clemency: "Kernan wrote that clemency may be appropriate where there is credible evidence suggesting a miscarriage of justice, or when there is a defect in the judicial process 'that would erode our confidence in the integrity of those proceedings.'"⁸⁹

In granting Arthur Baird's clemency in 2005, Governor Mitch Daniels stated that: "To me, it suffices to note that, had the sentence of life without parole been available in 1987, the jury and the State would have imposed it with the support of the victims' families."⁹⁰ The Governor also indicated that Mr. Baird's mental illness was a factor in his decision to grant clemency:

Courts recognized Mr. Baird as suffering from mental illness at the time he committed the murders, and Indiana Supreme Court Justice Ted Boehm recently wrote that Mr. Baird is "insane in the ordinary sense of the word." It is difficult to find reasons not to agree.⁹¹

While previous decisions granting clemency do not serve as precedent *per se* and are not necessarily indicative of current or future decision-making, it is clear that in the past, the Parole Board and various Governors have considered at least some of the factors delineated by Recommendation #2. Still, the Parole Board is required to consider only a small number of the recommended factors when assessing an inmate's case for clemency, and the Governor is not required to consider any of them. It appears that the Governor, if not the Board, routinely considers many of the factors delineated. The State of Indiana, therefore, is in partial compliance with Recommendation #2.

C. Recommendation #3

⁸⁸ Death Penalty Information Center, Clemency, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Jan. 27, 2007).

⁸⁹ Richard D. Walton, *Kernan Commutes Man's Death Sentence; Governor Reduces Penalty for '78 Murder, Criticizes State's System of Trying Capital Cases*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.

⁹⁰ Exec. Order No. 05-23 (Ind. 2005), available at http://www.in.gov/gov/media/eo/EO_05-23_Clemency_Arthur_Baird_II.pdf (last visited Jan. 27, 2007); see also, *Governor Spares Life of Convicted Killer*, INDIANAPOLIS STAR (Aug. 29, 2005), available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/20050829/NEWS01/50829006>.

⁹¹ Exec. Order No. 05-23 (Ind. 2005), available at http://www.in.gov/gov/media/eo/EO_05-23_Clemency_Arthur_Baird_II.pdf (last visited Jan. 27, 2007); see also *Governor Spares Life of Convicted Killer*, INDIANAPOLIS STAR, Aug. 29, 2005.

Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographical disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.

Recommendation #4

Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.

Recommendation #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

As discussed in Recommendation #2, the Parole Board must take into consideration specific factors when assessing a death-sentenced inmate's eligibility for clemency, including:

- (1) The nature and circumstances of the crime for which the offender is committed, and the offender's participation in the crime;
- (2) The offender's prior criminal record;
- (3) The offender's conduct and attitude during incarceration; and
- (4) The best interests of society.⁹²

Although discretionary, the Parole Board also may consider:

- (1) The offender's age at the time of committing the offense and his/her age and level of maturity at the time of the clemency appearance;
- (2) The offender's medical condition and history;
- (3) The offender's psychological and psychiatric condition and history.⁹³

The information that the Parole Board is required to consider, along with the factors it may but does not have to consider, does not appear to be relevant to Recommendations #3, but is relevant to Recommendations #4 and 5. This information includes the offender's conduct and attitude during incarceration, which is directly relevant to the inmate's possible rehabilitation or performance of significant positive acts while on death row, as well as an inmate's possible mental retardation, mental illness, or mental competency. Furthermore, the Parole Board may consider information that is relevant to Recommendation #4 by requesting or requiring that a report addressing the petitioner's medical, psychological and psychiatric condition and history be provided to the Parole

⁹² IND. ADMIN. CODE tit. 220, r. 1.1-4-4(d)(1)-(4) (2006).

⁹³ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(e)(4)-(6) (2006).

Board⁹⁴ or by considering the offender's psychological and psychiatric condition and history as a discretionary factor in making its clemency recommendation to the Governor.

Although past gubernatorial and Parole Board decisions are not necessarily indicators of current or future decision-making, in the three cases in which the Governor has commuted an inmate's sentence of death, the Governor did consider the inmates' mental health, as well as lingering doubts about guilt,⁹⁵ the quality of the legal process,⁹⁶ and the previous unavailability of the life without parole sentencing option.⁹⁷

Although the Board is required to consider information relevant to Recommendation #5 and may consider information relevant to Recommendation #4, we were unable to obtain information to assess whether the Parole Board and/or the Governor consider the factors addressed in Recommendation #3. Governor Daniels' decision to grant clemency to Arthur Baird II was based largely on Baird's mental illness, and mental status was also one of the factors that weighed in Governor Kernan's clemency grant to Michael Daniels. We hope that mental illness—as well as the many other factors addressed in Recommendations #3 through #5—are considered by future Governors and Parole Boards. For the time being, however, the State of Indiana is only in partial compliance with Recommendations #3 through #5.

D. Recommendation #6

In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the recommendations in the Defense Services Section.

The State of Indiana does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency.

Despite this, the federal courts have said that the attorneys who were appointed to represent a death row inmate in federal *habeas corpus* proceedings may petition the federal court to appoint them to represent the inmate in clemency proceedings.⁹⁸ If *habeas* counsel provides clemency representation, the attorney may submit a bill for compensation to the United States Court of Appeals for the Seventh Circuit for compensation.⁹⁹

⁹⁴ See Indiana Petition for Clemency, State Form 1213, at 6, at <http://www.cjpf.org/clemency/IndianaApp.pdf> (last visited Jan. 27, 2007).

⁹⁵ Death Penalty Information Center, *Clemency News and Developments*, at <http://www.deathpenaltyinfo.org/article.php?did=2054> (last visited Jan. 27, 2007).

⁹⁶ Death Penalty Information Center, *Clemency*, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Jan. 27, 2007).

⁹⁷ Exec. Order No. 05-23 (2005), available at http://www.in.gov/gov/media/eo/EO_05-23_Clemency_Arthur_Baird_II.pdf (last visited Jan. 27, 2007); see also *Governor Spares Life of Convicted Killer*, INDIANAPOLIS STAR, Aug. 29, 2005.

⁹⁸ 18 U.S.C. 3599(e) (2006); see also *Lowery v. Anderson*, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (finding that the entitlement to appointed clemency counsel under [federal law] cannot reasonably be read so as not to include state clemency proceedings.)

⁹⁹ *Lowery*, 138 F. Supp. 2d at 1123.

While clemency counsel may be appointed under federal law, Indiana law makes no provision for this representation. Accordingly, the State of Indiana is not in compliance with Recommendation #6.

E. Recommendation #7

Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

The State of Indiana does not have any laws, rules, procedures, standards, or guidelines entitling a death-row inmate to counsel in clemency proceedings, much less to compensation or access to investigative and expert resources.

In addition, it does not appear that counsel (or the inmate, if unrepresented) is provided sufficient time to prepare a petition for clemency. Upon being provided the forms necessary to petition for clemency, the inmate is given approximately one week to file the petition or to sign a waiver.¹⁰⁰ When completing the clemency petition form, the petitioner may include any relevant information, including documents from past trials, affidavits from jurors, or appellate court decisions.¹⁰¹ There are no particular forms of information or forms of documents that are excluded from being filed with the clemency petition.¹⁰²

Accordingly, the State of Indiana is not in compliance with Recommendation #7.

F. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

All clemency hearings of the Parole Board are “public meetings and any person may attend and observe the proceedings.”¹⁰³ Meetings of the Parole Board at correctional facilities also may be attended by the public, subject to any institutional policies or regulations that restrict admission.¹⁰⁴ Individuals observing Parole Board meetings may use cameras and other recording devices to record the session.¹⁰⁵ During a clemency hearing, anyone who desires to address the Parole Board, including the petitioner, may do so by sending a signed letter to the Parole Board or by scheduling a conference with one

¹⁰⁰ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(5) (2006).

¹⁰⁴ *Id.*

¹⁰⁵ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(6) (2006).

or more Parole Board members.¹⁰⁶ In fact, the Parole Board must make “[a]n investigation of the attitudes and opinions of the community in which the crime occurred” before submitting their recommendation that the Governor grant clemency.¹⁰⁷

After conducting the public hearing, each member of the Parole Board must write a letter to the Governor with his/her individual clemency recommendation.¹⁰⁸ The Governor reviews the letters prepared by each member of the Parole Board and a file prepared by his/her own staff and the staff of the Parole Board.¹⁰⁹ Yet, any recommendation by the Parole Board is not binding on the Governor and the Governor can issue his/her decision before receiving the Parole Board’s recommendation.¹¹⁰ The Governor’s clemency decision process is not conducted in public. Moreover, the Governor merely appoints Parole Board members,¹¹¹ but does not personally preside at or even attend Parole Board clemency hearings.

Because the Governor does not preside over the Parole Board’s public clemency proceedings, and the Governor’s clemency decision-making process is not public, the State of Indiana is only in partial compliance with the requirements of Recommendation #8.

G. Recommendation #9

If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.

The State of Indiana does not have any laws, rules, procedures, standards or guidelines requiring that the entire Parole Board or the Governor meet with the petitioning inmate. Instead, the Parole Board may decide to have an in-person meeting with the death row inmate.¹¹² This interview with the inmate is open to the public.¹¹³ Furthermore, the Parole Board affords all death-row inmates the opportunity to appear in-person at the clemency hearing.¹¹⁴

On the other hand, the Governor, as the clemency decision-maker, is not required to meet with the petitioning inmate. During the decision-making process, the Governor personally reviews all petitions for clemency, supporting documents, and makes a public

¹⁰⁶ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(7) (2006).

¹⁰⁷ IND. ADMIN. CODE tit. 220, r. 1.1-4-4(b) (2006).

¹⁰⁸ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ IND. CODE § 11-9-1-1(a) (2006).

¹¹² Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005); *see also* IND. ADMIN CODE tit. 220, r. 1.1-2-2(b) (2006).

¹¹³ IND. ADMIN. CODE tit. 220, r. 1.1-2-2(a)(5) (2006).

¹¹⁴ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005); *see also* IND. ADMIN CODE tit. 220, r. 1.1-2-2(b) (2006).

statement addressing the decision to grant or deny clemency.¹¹⁵ The Governor's staff also may conduct an investigation of the petitioner's case, although this does not usually involve meeting personally with the petitioner.¹¹⁶

Although the Governor's Office is not mandated to meet in-person with a death-row inmate, the Parole Board may decide to have an in-person meeting with the death-row inmate during its investigation and affords all death-row inmates an opportunity to plead their case at the clemency hearing. The State of Indiana, therefore, is in partial compliance with Recommendation #9.

H. Recommendation #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

Indiana law requires that Parole Board members have at least a bachelor's degree or ten years of law enforcement experience, and "have the skill, training, or experience to analyze questions of law, administration, and public policy."¹¹⁷ In addition, new Parole Board members are required to complete a one-week training program at the National Institute of Corrections within their first year of service.¹¹⁸

The State of Indiana does not have any laws, rules, procedures, standards, or guidelines, however, requiring the Parole Board or the Governor to encourage the education of the public concerning the nature of clemency powers or the limitations of the judicial system's ability to grant relief under circumstances that may warrant clemency.

Based on this information, the State of Indiana is in partial compliance with Recommendation #10.

I. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

¹¹⁵ Interview by Doug Cummins with Jon Laramore, Counsel, Indiana Governors Frank O'Bannon and Joe Kernan (April 14, 2006).

¹¹⁶ *Id.*

¹¹⁷ IND. CODE § 11-9-1-1(b) (2006).

¹¹⁸ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005); *see also, supra* note 16 and accompanying text. The content of this course is unclear, although it offers a "Leadership Development – State Parole Systems" training program that "provides new parole board member orientation, training for experienced parole board members, assistance to professional staff (e.g., executive directors and hearing officers), and a meeting for parole authority chairs." National Institute of Correction, Technical Assistance, Information, and Training for Adult Corrections Service Plan October 1, 2006 – September 30, 2007, National Institutes of Correction (August 2006) (on file with author).

A decision to grant or deny clemency rests solely with the Governor.¹¹⁹ The Parole Board, after conducting an investigation and holding public hearings, makes a non-binding clemency recommendation to the Governor,¹²⁰ but the Governor does not have to follow the recommendation and, in fact, can make a clemency decision even before s/he receives the Parole Board recommendation.¹²¹

The Governor appoints Parole Board members to serve four-year terms.¹²² The fact that no more than three members of the Parole Board can be from the same political party¹²³ potentially serves to insulate members from some of the possible political considerations. In addition, the fact that Parole Board members can be removed only for cause¹²⁴ also partially insulates the Parole Board from political considerations.

The State of Indiana has taken steps to ensure that the clemency process, specifically the appointment of Parole Board members by the Governor, is non-political. Although every decision made by a Governor could be influenced in some way by political considerations and have political ramifications, the recent grants of clemency by Governor Kernan and Governor Daniels were not greeted with any type of political criticism.¹²⁵ The State of Indiana, therefore, is in compliance with Recommendation #11.

¹¹⁹ IND. CONST. art. 5, § 17.

¹²⁰ IND. CODE § 11-9-1-2(a)(3) (2006).

¹²¹ Interview by Doug Cummins with Earl Coleman, Staff Attorney, Indiana Parole Board (June 7, 2005). In the case of Michael Daniels, Governor Joe Kernan granted clemency before receiving a recommendation from the Indiana Parole Board. Interview with Jon Laramore, Counsel, Indiana Governors Frank O'Bannon and Joe Kernan (April 14, 2006).

¹²² IND. CODE § 11-9-1-1(a) (2006).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See, e.g.,* Kevin Corcoran, *Daniels Spares Mentally Ill Killer; Man who was to die this week will spend life in prison; debate on issue likely to grow*, INDIANAPOLIS STAR, Aug. 30, 2005, at 1A; Richard D. Walton, *Kernan Commutes Man's Death Sentence; Governor Reduces Penalty for '78 Murder, Criticizes State's System of Trying Capital Cases*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.¹ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision-making. Jury instructions that are poorly written and conveyed serve only to confuse jurors instead of communicating in an understandable way.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of “life without parole” does not ensure that the offender will remain in prison for the rest of his/her life. There is a danger that jurors may vote to impose a death sentence because they erroneously believe that the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment.

¹ Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. *Promulgation of Standard Jury Instructions and Revisions to the Instructions As Requested by the Parties*

The Criminal Instructions Committee of the Indiana Judges Association created the “Indiana Pattern Jury Instructions, Capital Case and Life Without Parole Instructions and Verdict Forms” (“pattern jury instructions”).² While writing the pattern jury instructions, the instructions were shared with the judicial and Bench-Bar conferences, members of the prosecution and defense bars, and were published on the Internet for review and suggestions.³

It is the “preferred practice” of the courts to use the Indiana pattern jury instructions.⁴ However, the instructions only serve as a guide for judges and counsel and have not been adopted by the Indiana Supreme Court “as correct instructions in every circumstance.”⁵

In each capital case, the State and defense are permitted to help tailor the standard instructions or design new instructions by submitting a written request for the judge to instruct the jury on certain aspects of the law.⁶ Written jury instruction requests may be submitted to the judge before argument or at the close of the evidence.⁷ Each party is limited to requesting ten instructions, unless the court permits more upon a demonstration of good cause.⁸ When deciding whether to use a requested instruction, the court will consider whether:

- (1) The instruction correctly states the law;
- (2) Evidence exists in the record to support giving the instruction; and
- (3) The substance of the instruction is covered by other instructions which are given.⁹

The judge then will inform the parties of his/her decision on the request and the instructions that will be given to the jury.¹⁰ Once the court has instructed the jury, the jurors will retire to determine the defendant’s punishment.

² IND. PATTERN JURY INSTRUCTIONS – CRIMINAL FORWARD (Mathew Bender, 2004).

³ *Id.*

⁴ *See, e.g.*, *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. App. 2005) (“As a preliminary matter, we must note that the preferred practice is to use the pattern jury instructions.”); *see also* *Cochrane v. Lovett*, 337 N.E.2d 565, 570 n.6 (Ind. 1975).

⁵ *Bane v. State*, 587 N.E.2d 97, 101 n.1 (Ind. 1992).

⁶ IND. R. TRIAL P. 51(C) (“At the close of the evidence and before argument each party may file written requests that the court instruct the jury on the law as set forth in the requests.”); *see also* IND. CODE § 35-37-2-2(6) (2006) (requests for jury instructions must be: (1) in writing, (2) numbered, (3) have a cover sheet, and be (4) delivered to the court.).

⁷ IND. R. TRIAL P. 51(C).

⁸ IND. R. TRIAL P. 51(D).

⁹ *Gravens*, 836 N.E.2d at 493; *Guyton v. State*, 771 N.E.2d 1141, 1144 (Ind. 2002).

¹⁰ IND. R. TRIAL P. 51 (C).

B. Capital Felonies in Indiana and the Applicable Pattern Jury Instructions

In the State of Indiana, the following offenses constitute murder which, when accompanied by an aggravating circumstance, can be punishable by death:

- (1) Knowingly or intentionally killing another human being;
- (2) Killing another human being while committing or attempting to commit arson, burglary, child molesting, consumer product tampering, criminal deviate conduct, kidnapping, rape, robbery, human trafficking, promotion of human trafficking, sexual trafficking of minor, or carjacking;
- (3) Killing another human being while committing or attempting to commit dealing in or manufacturing cocaine or a narcotic drug, dealing in or manufacturing methamphetamine, dealing in the opiates, opiate derivatives, hallucinogenic substances, depressants, and stimulants designated as Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V controlled substances;
- (4) Knowingly or intentionally killing a fetus that has attained viability.¹¹

A person convicted of murder may be sentenced pursuant to section 35-50-2-9 of the Indiana Code. Section 35-50-2-9 contains the exclusive list of aggravating circumstances and the non-exclusive list of mitigating circumstances¹² that may be considered in capital murder cases, as well as the procedures for determining the defendant's sentence.¹³ Indiana pattern jury instructions 15.01 through 15.14 provide the jury charges for capital sentencing in a murder case where death or life in prison without parole is sought.¹⁴

C. The Pattern Jury Instructions and Case Law Interpretations of the Instructions

After the jury finds the defendant guilty of murder in the guilt/innocence phase of the trial, the jury must reconvene for a separate sentencing proceeding.¹⁵ The following discussion provides an overview of current pattern jury instructions. This overview is followed by an in-depth discussion of certain portions of the pattern jury instructions, combined with a discussion of the interpretation and application of the jury instructions.

1. Preliminary Instructions

Preliminary jury instructions are given at the beginning of the penalty phase. The preliminary pattern jury instructions begin by recommending that the judge remind the jury of the outcome of the guilt/innocence phase of the trial, inform it of the punishment being sought, and identify the aggravating factors that the State alleged in the Charging

¹¹ IND. CODE § 35-42-1-1 (2006).

¹² IND. PATTERN JURY INSTRUCTIONS § 15.14(b) (2004) (“The law allows you [jury] to consider both statutory and non-statutory mitigating circumstances.”).

¹³ IND. CODE § 35-50-2-9 (2006).

¹⁴ IND. PATTERN JURY INSTRUCTIONS § 15.01-15.14 (2004).

¹⁵ IND. CODE § 35-50-2-9-(d) (2006).

Information.¹⁶ A jury may only consider those aggravating circumstance(s) “specifically charged by the State of Indiana in the Charging Information.”¹⁷

The pattern jury instructions explain that, in order for the jury to recommend a death sentence, the jury must unanimously find that:

- (1) The State has “proven beyond a reasonable doubt that at least one of the charged aggravating circumstance(s) exists,” and
- (2) “[A]ny mitigating circumstance(s) that exist are outweighed by the charged and proven aggravating circumstance(s).”¹⁸

In determining whether at least one charged aggravating circumstance exists beyond a reasonable doubt,¹⁹ the pattern jury instructions explain that all jurors must find the existence of at least one statutory aggravating circumstance for the defendant to be sentenced to death.²⁰ The pattern jury instructions, which define a mitigating circumstance as “anything about the defendant and/or the offense which any one of you [the jury] believes should be taken into account in tending to support a sentence less than life imprisonment without parole or death,”²¹ state that mitigating circumstances must be proven by a preponderance of the evidence.²²

In addition, the preliminary instructions stress the importance of the jury’s decision by notifying the jury that its sentencing “recommendation is an important part of the sentencing process.”²³ The pattern jury instructions also state that “[t]he judge must follow [the jury’s] sentencing decision,”²⁴ despite the fact that the Indiana Code provides that the jury “recommend” to the judge a death sentence, life without parole, or neither.²⁵

¹⁶ IND. PATTERN JURY INSTRUCTIONS § 15.01 (2004).

¹⁷ *Id.* at § 15.03.

¹⁸ IND. PATTERN JURY INSTRUCTIONS § 15.07 (2004). The comment accompanying this pattern jury instruction states that “[t]he Committee considered the language in *Ring v. Arizona*, 536 U.S. 534, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that suggests that the burden of proof is on the State to prove that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. However, since our statute does not require such a burden, and since at the time of printing this supplement there were not any Indiana cases that required such proof, the Committee did not recommend that this burden be included. If the issue is raised by the defense, and you want an appeal proof instruction, you should consider including the burden of proof beyond a reasonable doubt in the weighing instruction. Please make sure you are current on the status of the case law at the time you give this instruction, and alter it accordingly. The Committees’ concerns with adding the language from *Ring v. Arizona* are that Indiana’s statutory scheme is not the same as Arizona’s and that *Ring* does not specifically hold that a statute is unconstitutional if the beyond a reasonable doubt burden is not required.” IND. PATTERN JURY INSTRUCTIONS § 15.07 cmt. (2004). *See also* *Lowery v. Anderson*, 69 F. Supp. 2d 1078, 1099 (S.D. Ind. 1999) (“Indiana law puts the burden of proof on the prosecutor and requires the jury to determine whether the aggravating circumstances outweigh the mitigating circumstances.”).

¹⁹ *Id.* at § 15.02.

²⁰ IND. PATTERN JURY INSTRUCTIONS §§ 15.02, 15.03 (2004).

²¹ IND. PATTERN JURY INSTRUCTIONS § 15.06 (2004).

²² IND. PATTERN JURY INSTRUCTIONS § 15.05 (2004).

²³ IND. PATTERN JURY INSTRUCTIONS § 15.08.

²⁴ *Id.*

²⁵ IND. CODE § 35-50-2-9(e) (2006); *see also* *Pruitt v. State*, 834 N.E.2d 90, 113 (Ind. 2005).

In fact, only if the jury is unable to reach a recommendation is the judge permitted to decide the defendant's sentence.²⁶ The trial judge can not increase the defendant's sentence to death if the jury recommends against a death sentence at the conclusion of the penalty phase.²⁷

The comments to Pattern Instruction No. 15.08 address this inconsistency by stating that:

“[t]he Committee recommends that you do not instruct the jury that if they are unable to reach a sentencing recommendation that they will be discharged and the sentencing will proceed as if the hearing had been to the court alone. The concern with such an instruction is that the jury may use this instruction to diminish the role of the jury in the sentencing process. The Committee recommends that, if the jury asks the judge during deliberations what will happen if they are unable to agree to a recommendation, you instruct them how the case will proceed.”²⁸

2. Final Instructions

After the State and defense have presented their sentencing arguments, but before the jury has begun its deliberations, the court will provide additional instructions to the jury (“final instructions”). “Final instructions...are designed to inform the jury on all relevant legal principles.”²⁹

The final pattern jury instructions begin by explaining that the jury is to consider the instructions as a whole and not to single out individual instructions to the exclusion of others.³⁰ In addition, the pattern jury instructions explain that in fulfilling the jury's duty, it must decide the law and facts of the case, and “apply the law as you actually find it and ... not ...disregard it for any reason.”³¹

The pattern instructions remind the jury that before it may make its sentencing recommendation, it must unanimously find that the State has proven the existence of at least one of the alleged aggravating circumstances beyond a reasonable doubt.³² If an aggravating factor is unanimously found to exist beyond a reasonable doubt, the jury must then consider the mitigating circumstances and weigh the aggravating circumstances against the mitigating circumstances.³³ The jury may only recommend a sentence of death or life without parole if it unanimously finds that the aggravating circumstance(s) outweighs any the mitigating circumstances.³⁴ “Even if [the jury] unanimously find[s] that the State has met its burden of proof as to both the existence of

²⁶ See *Pruitt*, 834 N.E.2d at 113.

²⁷ See *State v. Barker*, 809 N.E.2d 312, 316-17 (Ind. 2004).

²⁸ IND. PATTERN JURY INSTRUCTIONS § 15.08 cmt. (2004).

²⁹ *Warren v. State*, 725 N.E.2d 828, 836 (Ind. 2000)

³⁰ IND. PATTERN JURY INSTRUCTIONS § 15.10 (2004).

³¹ IND. PATTERN JURY INSTRUCTIONS § 15.11 (2004).

³² IND. PATTERN JURY INSTRUCTIONS § 15.12 (2004).

³³ IND. PATTERN JURY INSTRUCTIONS § 15.13 (2004).

³⁴ *Id.*

at least one charged aggravating circumstance and as to the aggravating circumstance(s) outweighing the mitigating circumstance(s), the law allows [the jury] to recommend that the judge impose a term of years instead of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole].”³⁵

The pattern instructions continue by suggesting that the judge again provide any necessary definitional instructions³⁶ and then provides a discussion of mitigating circumstances.³⁷ After explaining mitigating circumstance, the pattern instructions detail the jury’s weighing process.³⁸

The pattern instructions go on to remind the jury of the defendants’ crime(s) and explains that if the jury sentences the defendant to a term of years, any murder and felony murder counts will merge for sentencing and the defendant will receive a fixed term between forty-five and sixty-five years.³⁹ The pattern jury instructions also explain the sentencing process for any other convictions the defendant received during the guilt/innocence phase of the trial, and discusses the Governor’s reprieve, commutation, and pardon powers.⁴⁰

The pattern jury instructions continue on to remind jurors that they may consider all the evidence introduced in either phase of the trial, the requirement that the state prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance in order to sentence the defendant to life in prison or death, and the process of weighing aggravating and mitigating circumstances.⁴¹

The pattern jury instructions end by explaining that each juror must agree before the jury may return a verdict and explains that they should consult with one another and try to agree on a verdict.⁴²

3. Aggravating Circumstances in a Murder Case

³⁵ *Id.* The comment accompanying this pattern jury instruction states that “[t]he Committee considered the language in *Ring v. Arizona*, 536 U.S. 534, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that suggests that the burden of proof is on the State to prove that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. However, since our statute does not require such a burden, and since at the time of printing this supplement there were not any Indiana cases that required such proof, the Committee did not recommend that this burden be included. If the issue is raised by the defense, and you want an appeal proof instruction, you should consider including the burden of proof beyond a reasonable doubt in the weighing instruction. Please make sure you are current on the status of the case law at the time you give this instruction, and alter it accordingly. The Committees’ concerns with adding the language from *Ring v. Arizona* are that Indiana’s statutory scheme is not the same as Arizona’s and that *Ring* does not specifically hold that a statute is unconstitutional if the beyond a reasonable doubt burden is not required.” IND. PATTERN JURY INSTRUCTIONS § 15.13 cmt (2004).

³⁶ IND. PATTERN JURY INSTRUCTIONS § 15.14 (2004).

³⁷ IND. PATTERN JURY INSTRUCTIONS § 15.14(a)-(c) (2004).

³⁸ IND. PATTERN JURY INSTRUCTIONS § 15.14(d) (2004).

³⁹ IND. PATTERN JURY INSTRUCTIONS § 15.14(e)-(h) (2004).

⁴⁰ *Id.*

⁴¹ IND. PATTERN JURY INSTRUCTIONS § 15.14(i) (2004).

⁴² *Id.*

a. Pattern Jury Instructions

Both the preliminary and final pattern jury instructions discuss aggravating circumstances.

The pattern instructions direct the jury to consider only those statutory aggravating circumstances that are “set forth in the Charging Information.”⁴³ The statutory aggravating circumstances that are listed in the Indiana Code and can be included in the Charging Information are:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit: arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, robbery, carjacking, criminal gang activity, dealing in cocaine or a narcotic drug;
- (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property;
- (3) The defendant committed the murder by lying in wait;
- (4) The defendant who committed the murder was hired to kill;
- (5) The defendant committed the murder by hiring another person to kill;
- (6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either: the victim was acting in the course of duty; or the murder was motivated by an act the victim performed while acting in the course of duty;
- (7) The defendant has been convicted of another murder;
- (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder;
- (9) The defendant was: under the custody of the department of correction; under the custody of a county sheriff; on probation after receiving a sentence for the commission of a felony; or on parole; at the time the murder was committed;
- (10) The defendant dismembered the victim;

⁴³ IND. PATTERN JURY INSTRUCTIONS §§ 15.03, 15.12 (2004) (“You are not permitted to consider any circumstances as weighing in favor of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] other than those [aggravating circumstances] specifically charged by the State in the Charging Information.”); *see also* IND. CODE § 35-50-2-9(a) (2006) (“In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.”).

A “Charging Instrument” is designed to inform the accused of the accusations against them so that a defense can be prepared and to prevent double jeopardy if a subsequent prosecution is pursued. *See Jones v. State*, 766 N.E.2d 1258, 1262 (Ind. Ct. App. 2002). The Instrument must be in writing and contain: (1) the title of the action and the name of the court, (2) name of the offense, (3) citation to the statutory provision, (4) nature and elements of the offense charged, (5) date of the offense, (6) time of the offense if time is of the essence, (7) place of the offense, and (8) name of the defendant. IND. CODE § 35-34-1-2 (2006); Marla Clark, 25 IND. LAW ENCYCLOPEDIA §27 (2006). Additionally, the Charging Instrument must be signed, contain the names of the material witnesses, and be stated in plain and concise language. *Id.*

- (11) The defendant burned, mutilated, or tortured the victim while the victim was alive;
 - (12) The victim of the murder was less than twelve (12) years of age;
 - (13) The victim was the victim of any of the following offenses for which the defendant was convicted: battery as a Class D or class C felony under the Indiana Code, kidnapping, criminal confinement, a sex crime as defined under the Indiana Code;
 - (14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying;
 - (15) The defendant committed the murder by intentionally discharging a firearm: into an inhabited dwelling; or from a vehicle;
 - (16) The victim of the murderer was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability;⁴⁴
- b. Burden of Proof and Case Law Interpretation of Unanimity of Finding as to Statutory Aggravating Circumstances
 - i. Burden of Proof for Aggravating Circumstances

Indiana law requires that a jury unanimously find that the State has proved beyond a reasonable doubt one of the charged, statutory aggravating circumstances.⁴⁵ The Indiana pattern jury instructions suggest, but do not require, that the judge instruct the jury on the definition of reasonable doubt.⁴⁶ The pattern instruction on reasonable doubt provides:

The burden is upon the State to prove beyond a reasonable doubt that the Defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt. But it does not mean that a Defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt, after you have weighed and considered all the evidence.

⁴⁴ IND. CODE § 35-50-2-9(b)(1)-(16) (2006); *see also* IND. PATTERN JURY INSTRUCTIONS § 15.02 (2004).

⁴⁵ *See* *Wishart v. State*, 693 N.E.2d 23, 54 (Ind. 1998) (“We have previously held that the jury may recommend the death penalty only if it unanimously finds beyond a reasonable doubt the existence of at least one charged aggravator.”); *Bivins v. State*, 642 N.E.2d 928, 957 (Ind. 1994); *see also* IND. CODE § 35-50-2-9 (2006) (“The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt . . .”).

⁴⁶ IND. PATTERN JURY INSTRUCTIONS §§ 15.04, 15.14 (2004).

A Defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the Defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.

If you find that there is a reasonable doubt that the Defendant is guilty of the crimes(s), you must give the Defendant the benefit of that doubt and find the Defendant not guilty of the crime under consideration.⁴⁷

ii. Unanimity Requirement for Finding Aggravating Circumstances

The pattern jury instructions include an instruction for the judge to inform the jury that it must be unanimous in its finding that at least one of the aggravating circumstances provided in the Charging Instrument exists before recommending a death sentence.⁴⁸ If the jury is unable to reach a unanimous decision, it must recommend against a death sentence.⁴⁹ However, under the Indiana Code, if the jury is unable to reach a sentencing recommendation after “reasonable deliberations,” the judge can dismiss the jury and impose a death sentence if the State proved at least one aggravating circumstance beyond a reasonable doubt.⁵⁰

c. Requirements That Aggravating Circumstances Be Set Forth in Writing

The Indiana Code and the Indiana pattern jury instructions do not require the jury to make specific written findings regarding the presence or absence of aggravating circumstances.⁵¹ Instead, the jury is provided a verdict form for each aggravating circumstance charged by the State, and each form must be signed by the jury if there is unanimous agreement that it exists.⁵² The trial judge must submit written findings “adequate for review” on the finding of any aggravating circumstance(s). In the written sentencing determination, the judge must:

⁴⁷ IND. PATTERN JURY INSTRUCTIONS § 1.15 (2004). *But see* Winegeart v. State, 665 N.E.2d 893, 902 (Ind. 1996) (recommending, by a 3-2 vote, an instruction that follows the federal pattern instruction).

⁴⁸ IND. PATTERN JURY INSTRUCTIONS §§ 15.07, 15.14(i) (2004) (“Any findings you enter in a verdict form must be unanimous.”).

⁴⁹ IND. PATTERN JURY INSTRUCTIONS § 15.12 (2004).

⁵⁰ IND. CODE § 35-50-2-9(f)-(g) (2006). The Indiana Supreme Court has held that such a sentencing scheme is “not inconsistent with the requirements for unanimous jury decisions announced by the United States Supreme Court in *Ring v. Arizona* and *Apprendi v. New Jersey*.” *Holmes v. State*, 820 N.E.2d 136, 138 (Ind. 2005) (citations omitted).

⁵¹ *See* *Burris v. State*, 465 N.E.2d 171, 190 (Ind. 1984) (“We do not feel that the jury must return written findings when returning its recommendation.”).

⁵² IND. PATTERN JURY INSTRUCTIONS § 15.12 (2004).

- (1) Identify each aggravating and mitigating circumstance found;
- (2) Include the specific facts and reasons which lead the court to find the existence of each circumstance;
- (3) Articulate that the mitigating and aggravating circumstances have been balanced in determining the sentence; and
- (4) Set forth an explanation that the sentence is appropriate punishment for the offender and the crime.⁵³

4. Mitigating Circumstances in a Sentencing Hearing

a. Pattern Jury Instructions

Both the preliminary and final pattern jury instructions discuss mitigating circumstances.

The Indiana pattern jury instructions state that if the jury unanimously finds that “at least one charged aggravating circumstance has been proven beyond a reasonable doubt, you must consider the mitigating circumstance(s) and then weigh the aggravating circumstance(s) against the mitigating circumstance(s).”⁵⁴ The Indiana pattern jury instructions define mitigating circumstances as:

Anything about the defendant and/or the offense which any of you believes should be taken into account in tending to support a sentence less than [life imprisonment without parole] or [death or life imprisonment without parole]. Mitigating circumstances are not being offered as an excuse or justification for the crime you have found that the defendant committed. Instead, they are circumstances relating to the defendant’s age, character, education, environment, mental state, life and background, and/or any aspect of the offense itself and the defendant’s involvement in it, which any one of you believes weighs against a sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

Mitigating circumstances are different than aggravating circumstances in a number of ways. First, mitigating circumstances need not be proven beyond a reasonable doubt like aggravating circumstances must be. Second, your finding that any mitigating circumstance exists does not have to be unanimous. Each juror must consider and weigh any mitigating facts he or she finds to exist without regard to whether other jurors agree with that determination. Lastly, unlike aggravating circumstances, there are no limits on what facts any of you may find as mitigating. Mitigating

⁵³ *Losch v. State*, 834 N.E.2d 1012, 1014 (Ind. 2005). Two members of the Indiana Supreme Court have expressed the view that a trial court override the jury’s recommendation for death if the aggravating circumstance was not supported by sufficient evidence. *Helsley v. State*, 809 N.E.2d 292, 306-08 (Ind. 2004) (Boehm, J., concurring, joined by Rucker, J.) (citing IND. R. TRIAL P. 59(J)(7)).

⁵⁴ IND. PATTERN JURY INSTRUCTIONS § 15.13 (2004).

circumstances may be established by any evidence introduced in the first or second phase of the trial by the State or the defense.⁵⁵

Mitigating circumstances are “not...offered as an excuse or justification for the crime.”⁵⁶

The mitigating circumstances listed in section 35-50-2-9 of the Indiana Code include:

- (1) The defendant has no significant history of prior criminal conduct;
- (2) The defendant was under the influence of extreme mental and emotional disturbance when the murder was committed;
- (3) The victim was a participant in or consented to the defendant’s conduct;
- (4) The defendant was an accomplice in a murder committed by another person, and the defendant’s participation was relatively minor;
- (5) The defendant acted under the substantial domination of another person;
- (6) The defendant’s capacity to appreciate the criminality of the defendant’s conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication;
- (7) The defendant was less than eighteen (18) years of age at the time the murder was committed;
- (8) Any other circumstance appropriate for consideration.⁵⁷

This list is not exhaustive, as the eighth statutory mitigating circumstance acts as a catch-all provision,⁵⁸ and the Indiana Supreme Court has considered other non-statutory mitigating circumstances.

b. Case Law Interpretation and Use of the Term Mitigating Circumstances

The United States Constitution requires the sentencing judge and jury to consider as mitigation any aspect of the defendant’s character or record and any of the circumstances of the offense which the defendant offers as a basis for a sentence less than death,⁵⁹ regardless of whether it is enumerated in section 35-50-2-9 of the Indiana Code. In fact, the United State Supreme Court and Indiana Supreme Court have ascribed the relevance of mitigation evidence to society’s belief that a defendant’s criminal actions can be attributed to “a disadvantaged background, or emotional and mental problems” which renders the individual less culpable than others for his/her actions.⁶⁰ Therefore, a

⁵⁵ IND. PATTERN JURY INSTRUCTIONS §§ 15.06, 15.14(c) (2004).

⁵⁶ IND. PATTERN JURY INSTRUCTIONS § 15.06(2004).

⁵⁷ IND. CODE § 35-50-2-9(c) (2006).

⁵⁸ IND. CODE § 35-50-2-9(c)(8) (2006); *see also* Hough v. State, 690 N.E.2d 267, 276 (Ind. 1997) (The statute permits the jury to “consider as mitigating any circumstances that it feels are appropriate.”). *See also* IND. PATTERN JURY INSTRUCTIONS § 15.14(b) (2004) (“The law allows you to consider both statutory and non-statutory mitigating circumstances.”).

⁵⁹ Lockett v. Ohio, 438 U.S.586, 604-05 (1978).

⁶⁰ Penry v. Lynaugh, 492 U.S. 302, 319 (1989); *see also* Rondon v. State, 711 N.E.2d 506, 521 (Ind. 1999).

number of non-statutory mitigating circumstances have been considered in Indiana, including:

- (1) The defendant's childhood and family;⁶¹
- (2) The defendant has a history of alcohol abuse;⁶²
- (3) The defendant has a family that will be affected by his death;⁶³
- (4) The defendant has good behavior and has done well in the structured environment of prison;⁶⁴
- (5) The defendant would likely die in prison if given a 60 year sentence;⁶⁵
- (6) A co-defendant received disproportionate treatment for his/her participation in the crime;⁶⁶
- (7) The defendant's age;⁶⁷
- (8) The defendant admitted guilt throughout the legal process;⁶⁸ and
- (9) The defendant has a psychiatric disorder not rising to the level of a statutory mitigating circumstance.⁶⁹

c. Case Law Interpretation Regarding the Unanimity of Mitigation Findings

Each juror is not required to find that the same mitigating circumstances exist⁷⁰ and is instructed to weigh the mitigating circumstances s/he believes have been established by the evidence, regardless of whether other jurors believe that those same mitigating circumstances have been established.⁷¹

d. Residual Doubt as a Mitigating Circumstance

The Indiana Supreme Court has ruled that "residual doubt" can be introduced by defendant's counsel as a non-statutory mitigating circumstance at any time during the

⁶¹ *Timberlake v. State*, 690 N.E.2d 243, 266-67 (Ind. 1997) (noting that defendant's father was an alcoholic and defendant was brought up in dysfunctional family); *Lowery v. State*, 547 N.E.2d 1046, 1059 (Ind. 1989) (defendant had turbulent childhood).

⁶² *Timberlake*, 690 N.E.2d at 266.

⁶³ *Id.*

⁶⁴ *Id.*; *Corcoran v. State*, 774 N.E.2d 495, 500 (Ind. 2002) (good behavior of defendant in jail prior to sentencing); *Walter v. State*, 727 N.E.2d 443, 448 (Ind. 2000).

⁶⁵ *Timberlake*, 690 N.E.2d at 266-67.

⁶⁶ *Lowery*, 547 N.E.2d at 1059.

⁶⁷ *Id.* (defendant was 23 years of age at time of crime); *Corcoran*, 774 N.E.2d at 500 (Ind. 2002) (defendant was 22 years of age at time of crime); *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001) (Defendant was 40 days from his 18th birthday); *see also Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999) ("There are cunning children and there are naïve adults.").

⁶⁸ *Corcoran*, 774 N.E.2d at 500.

⁶⁹ *Evans v. State*, 598 N.E.2d 516, 519 (Ind. 1992).

⁷⁰ *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 439-44 (1990); *Overstreet v. State*, 783 N.E.2d 1140, 1164 (Ind. Ct. App. 2003); *Hough v. State*, 690 N.E.2d 267, 274 (Ind. 1997).

⁷¹ *Id.*; *see also Mills*, 486 N.E.2d at 376 ("On the other hand, if the jury understood that it should mark "no" when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were prevented from considering 'factors which may call for a less severe penalty,' and petitioner's sentence cannot stand.") (citation omitted).

guilt/innocence and/or penalty phase of the trial.⁷² Residual doubt refers to the situation when there still may be a measure of doubt addressing the defendant's guilt, despite the fact that a jury found the defendant guilty beyond a reasonable doubt.⁷³ Although residual doubt can be argued to the jury, the Indiana Supreme Court has held that a "capital defendant has no constitutional entitlement to a residual doubt instruction."⁷⁴

5. Availability and Definitions of the Sentencing Options

a. Pattern Jury Instructions

During the guilt/innocence phase of the trial, the jury should not be instructed on sentencing options that could be imposed other than death.⁷⁵ Instructions by the judge addressing possible alternative sentences are only permitted in the penalty phase of the trial, after the defendant has been found guilty.⁷⁶

The pattern jury instructions define "life imprisonment without the possibility of parole" as "not ever be[ing] eligible for parole or any form of credit time," and spending "the rest of his life in prison."⁷⁷ In fact, the Indiana Supreme Court held, in response to a jury question addressing whether the defendant would be eligible for parole if given a life sentence, that it is "proper" for the court to inform the jury "of the consequences of a prison sentence as well as of the consequences of a death sentence."⁷⁸ Such an instruction should be given by the judge only after the jury's question has been approved by defense counsel, however.⁷⁹

6. Form of Instructions

Before reading the instructions to the jury, the court is required to provide the jurors with a written, numbered copy of the instructions.⁸⁰ The jury charge should be signed by the judge if the prosecutor, defendant, or defense counsel requests such a signature.⁸¹ There are three prerequisites, however, that must be satisfied before a jury can bring the written jury instructions into the jury room for deliberations, including that:

- (1) The trial court must first read the jury instructions to the jury in open court;

⁷² *Miller v. State*, 702 N.E.2d 1053, 1069-70 (Ind. 1998).

⁷³ *Id.* at 1069.

⁷⁴ *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003).

⁷⁵ *Wishart v. State*, 484 N.E.2d 949, 953 (Ind. 1985) ("In a death penalty case, the jury has a limited function to recommend whether or not capital punishment is appropriate in its opinion and after having found the defendant guilty of murder.").

⁷⁶ *Burris v. State*, 465 N.E.2d 171, 188 (Ind. 1984).

⁷⁷ IND. PATTERN JURY INSTRUCTIONS § 15.14(g) (2004).

⁷⁸ *Brewer v. State*, 417 N.E.2d 889, 909 (Ind. 1981).

⁷⁹ *Burris*, 465 N.E.2d at 189.

⁸⁰ IND. JURY R. 26; IND. CODE § 35-37-2-2(5) (2006).

⁸¹ *Id.*

- (2) The instructions must be “cleansed” of any extraneous markings or notes which may indicate which party tendered the instructions; and
- (3) The court must send all of the instructions to the jury room.⁸²

7. Victim Impact Evidence

In *Payne v. Tennessee*,⁸³ the United States Supreme Court ruled that the admission of victim impact evidence is not unconstitutional.⁸⁴ In response, the Indiana Supreme Court determined that victim impact evidence is admissible if the “present case hinges upon its relevance to the death penalty statute’s aggravating and mitigating circumstances.”⁸⁵ Even if the victim impact statement exceeds the scope of relevance of the statutory aggravating and mitigating circumstances raised in the case, the court only will reverse the defendant’s sentence if it is determined that the statements had a substantial influence upon the jury’s verdict.⁸⁶ When addressing the admissibility of victim impact statement(s), the court considers the statements’ juxtaposition with evidence of the charged aggravating circumstances; whether the trial court provided limiting instructions to the jury addressing the statements; and whether the victim impact statements were emphasized in the State’s argument to the jury.⁸⁷ The length of the victim statements also is considered by the court.⁸⁸

Further, section 35-50-2-9 of the Indiana Code permits “a representative of the victim’s family and friends” to present “a statement regarding the impact of the crime on family and friends” after the court pronounces the sentence.⁸⁹ These statements may be oral or written and are given in the presence of the defendant.⁹⁰

8. Additional Instructions After Jury Deliberations Have Begun

a. Pattern Jury Instructions

The United States Supreme Court, in *Allen v. United States*,⁹¹ authorizes judges to provide additional instructions to jurors after judges have rendered the main charge to the jury and jury deliberations have begun.⁹² The Court provides the following instruction, which is known as the *Allen* charge:

⁸² See WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 22.9 (2006); see also *Mitchell v. State*, 535 N.E.2d 498, 501 (Ind. 1989); *Wood v. State*, 512 N.E.2d 1094, 1097 (Ind. 1987).

⁸³ *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁸⁴ *Id.* at 827.

⁸⁵ *Bivins v. State*, 642 N.E.2d 928, 957 (Ind. 1994); *Lambert v. State*, 675 N.E.2d 1060, 1064 (Ind. 1996).

⁸⁶ *Lambert*, 675 N.E.2d at 1065.

⁸⁷ *Id.* at 1064.

⁸⁸ See *Harrison v. State*, 644 N.E.2d 1243, 1261 (Ind. 1995); see also *Bivins*, 642 N.E.2d at 957 (victim impact statement comprised 12 lines of the trial transcript).

⁸⁹ IND. CODE § 35-50-2-9(e) (2006).

⁹⁰ *Id.*

⁹¹ *Allen v. United States*, 164 U.S. 492, 501 (1896).

⁹² *Id.*

[I]n substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.⁹³

The Indiana Supreme Court, in *Lewis v. State*,⁹⁴ has cautioned trial courts against providing *Allen*-type charges. In fact, the Court has stated that “[a]ttempts to revise and construct an ‘*Allen*’-type charge that would give the hoped-for aid to the jury and yet not make the cure worse than the disease by improperly influencing the jury, have created problems through the years in all jurisdictions.”⁹⁵ Accordingly, the *Lewis* court instructed the trial courts that the “proper procedure is for the court to call the jury back into open court in the presence of all of the parties and their counsel, if they desire to be there, and to reread all instructions given to them prior to their deliberations, without emphasis on any of them and without further comment.”⁹⁶ Additionally, the comment to Indiana pattern jury instruction number 15.08 recommends that the judge not inform the jury that the defendant’s sentencing will proceed as if the hearing had been in front of the judge alone if the jury is unable to reach a decision on sentencing.⁹⁷ Instead, the judge should instruct the jury “how the case will proceed” if the jury is unable to reach a decision.⁹⁸

However, the Indiana courts have recognized an exception to the *Lewis* rule, that allows the judge to clarify a jury’s question on legal principles, in which the judge’s additional instruction is not provided because the “jury was deadlocked, but that they did not understand their task.”⁹⁹

⁹³ *Id.*

⁹⁴ *Lewis v. State*, 424 N.E.2d 107 (Ind. 1981).

⁹⁵ *Lewis*, 424 N.E.2d at 110.

⁹⁶ *Id.* at 111; *see also* *Mosley v. State*, 660 N.E.2d 589, 591 (Ind. App. 1996); WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 22.10 (2006); IND. PATTERN JURY INSTRUCTIONS § 15.14(j) (2004) (the court is often “not allowed to answer your [jury’s] questions, except by re-reading all of the jury instructions”).

⁹⁷ IND. PATTERN JURY INSTRUCTIONS § 15.08 (2004).

⁹⁸ *Id.*

⁹⁹ *Taylor v. State*, 677 N.E.2d 56, 63 (Ind. App. 1997).

II. ANALYSIS

A. Recommendation #1

Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.

Judge Jane Magnus-Stinson, Chair of the Criminal Instructions Committee of the Indiana Judges Association from 1998-2002, approached the Committee about rewriting the Indiana pattern jury instructions to “provide more clear and direct guidance to jurors as they undertake to apply the law in the cases on which they deliberate.”¹⁰⁰ To achieve this goal, the Committee shared the proposed instructions with judicial and Bench-Bar conferences, members of the prosecution and defense bars, and published them on the Internet.¹⁰¹ The revised instructions were published in 2003. It does not appear that the state is monitoring the extent to which jurors understand the jury instructions.

Because linguists, social scientists, psychologists, and jurors were not consulted in revising the jury instructions and because to the best of our knowledge there is no effort being made to monitor the extent to which jurors understand these revised instructions, the State of Indiana is not in compliance with Recommendation #1.

B. Recommendation #2

Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

The Indiana Jury Rules require that the judge provide jurors with a copy of written instructions before the judge reads the instructions.¹⁰² Jurors also are permitted to bring the instructions into the jury room during deliberations so long as the following three prerequisites are met:

- (1) The trial court must first read the jury instructions to the jury in open court;
- (2) The instructions must be “cleansed” of any extraneous markings or notes which may indicate which party tendered the instructions; and
- (3) The court must send all of the instructions to the jury room.¹⁰³

¹⁰⁰ IND. PATTERN JURY INSTRUCTIONS – CRIMINAL FOREWORD (Matthew Bender, 2004).

¹⁰¹ *Id.*

¹⁰² IND. JURY R. 26.

¹⁰³ See WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 22.9 (2006); see also Mitchell v. State, 535 N.E.2d 498, 501 (Ind. 1989); Wood v. State, 512 N.E.2d 1094, 1097 (Ind. 1987).

The State of Indiana, therefore, is in compliance with Recommendation #2.

C. Recommendation #3

Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.

Capital jurors commonly have difficulty understanding jury instructions.¹⁰⁴ This can be attributed to a number of factors, including, but not limited to the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.¹⁰⁵ Given that jurors have difficulty understanding jury instructions, judges must respond meaningfully to jurors' requests for clarification of the instructions to ensure juror comprehension of the applicable law.

Indiana courts have the discretion to respond to a juror's request for clarification of legal principles,¹⁰⁶ but jury questions addressing other issues should not be responded to directly. Instead, under long-standing precedent, the judge may re-read all of the jury instructions in open court, avoiding emphasis on any particular provision.¹⁰⁷ More recently, Indiana has adopted Jury Rules, effective January 1, 2003, one of which provides:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.¹⁰⁸

Moreover, a judge does not need to define words used in the jury instructions if the "terms are in common use and are such as can be understood by a person of ordinary

¹⁰⁴ Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

¹⁰⁵ James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169-70 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

¹⁰⁶ See *Taylor v. State*, 677 N.E.2d 56, 63 (Ind. App. 1997).

¹⁰⁷ See *Lewis v. State*, 424 N.E.2d 107, 110 (Ind. 1981).; *Mosley v. State*, 660 N.E.2d 589, 591 (Ind. App. 1996); see also IND. PATTERN JURY INSTRUCTIONS § 15.14(j) (2004).

¹⁰⁸ IND. JURY R. 28.

intelligence.”¹⁰⁹ This principle has been used by the Indiana courts when declining to define words such as “mitigation.”¹¹⁰ Despite the belief that this term is in general use and understood by a person of normal intelligence, the Capital Jury Project reports that 52.6 percent of interviewed Indiana capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the case;¹¹¹ 71.4 percent did not understand that they did not need to be unanimous in finding the existence of mitigation circumstances;¹¹² and 58.2 percent believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.¹¹³ These figures demonstrate that Indiana jurors clearly are confused about “mitigation” – the scope, the number of jurors needed to support findings of mitigation, and the applicable burden of proof for finding mitigating factors.

Similarly, despite the fact that “future dangerousness” is not a statutory aggravating circumstance,¹¹⁴ the Indiana pattern jury instructions make clear that the only aggravating circumstances that the jury may consider are those in the State’s Charging Instrument,¹¹⁵ and case law expressly prohibits consideration of future dangerousness as a non-statutory aggravating factor,¹¹⁶ 36.6 percent of interviewed Indiana capital jurors believe that if they find the defendant to be a future danger to society, they are required by law to sentence him/her to death.¹¹⁷

Despite the clear need for trial courts to make efforts to clarify juror confusion, we have been unable to determine whether courts are responding meaningfully to juror questions in practice. Consequently, we are unable to determine whether the State of Indiana meets Recommendation #3.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the State of Indiana redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature.

D. Recommendation #4

Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit

¹⁰⁹ McNary v. State, 428 N.E.2d 1248, 1252 (Ind. 1981).

¹¹⁰ See Roche v. State, 690 N.E.2d 1115, 1128 (Ind. 1997).

¹¹¹ See William J. Bowers & Wanda D. Foglia. *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL 51, 68 (2003). This statistic is troubling in light of the United States Supreme Court’s decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), that “[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating circumstances.” *Id.* at 608.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ IND. CODE § 35-50-2-9(b)(1)-(16) (2006).

¹¹⁵ IND. PATTERN JURY INSTRUCTIONS § 15.03 (2004).

¹¹⁶ See Wisehart v. State, 693 N.E.2d 23, 60 (Ind. 1998) (“a death sentence is imposed for what the defendant has done, not what he or she might do”).

¹¹⁷ Bowers & Foglia, *supra* note 111, at 72.

parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request.

Alternative Punishments

Section 35-50-2-9 of the Indiana Code provides that “[t]he court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency.”¹¹⁸ The Indiana pattern jury instructions 15.14(e) reflect the statutory requirement to inform the jury of the statutory penalties that can imposed on the defendant.¹¹⁹ Moreover, the pattern jury instructions recommend that the judge explain that a sentence of life imprisonment without parole means that the defendant “will not ever be eligible for parole or any form of credit time, and will spend the rest of his life in prison.”¹²⁰ It is also proper for the court to address alternative penalties for the defendant if the jury requests such instruction and defendant's counsel approves of the instruction.¹²¹ Additionally, the pattern jury instructions go on to explain clemency:

The Governor of Indiana has the power, under the Indiana Constitution, to grant a reprieve, commutation, or pardon to a person convicted and sentenced for murder. A pardon completely eliminates a conviction and sentence. A commutation reduces the sentence, for example by changing a death sentence to one for life without parole or for a term of imprisonment. A reprieve is a temporary postponement of the execution of a sentence. The Indiana Constitution leaves it entirely up to the discretion of the Governor when and how to use this power.¹²²

Parole and Parole Practice Evidence

After a thorough review of Indiana law, we were unable to determine whether the court, upon a request by the defendant, permitted parole officials or other knowledgeable

¹¹⁸ IND. CODE § 35-50-2-9(d) (2006); *see also* State v. Alcorn, 638 N.E.2d 1242, 1244 (Ind. 1994) (the court is required in a death penalty case to instruct the jury addressing the “range of statutory penalties for murder and allows the jury to recommend life imprisonment without parole as a sentence”).

¹¹⁹ IND. PATTERN JURY INSTRUCTIONS § 15.14(e) (2004) (providing that a fixed number of years sentence, between 45 years and 65 years, if the jury does not impose life imprisonment without parole or death); *see also id.* at § 15.14(f) (describing that a defendant can earn credit for good behavior if serving a fixed year sentence); *Id.* at § 15.14(g) (defining life imprisonment without parole); *Id.* at § 15.14(h) (describing power of Governor to grant reprieve, commutation, or pardon to a person convicted and sentenced for murder).

¹²⁰ IND. PATTERN JURY INSTRUCTIONS § 15.14(g) (2004).

¹²¹ *See* Burris v. State, 465 N.E.2d 171, 189 (Ind. 1984).

¹²² IND. PATTERN JURY INSTRUCTIONS § 15.14(h) (2004).

witnesses to testify about parole practices in the state to clarify jurors' understanding of "life without the possibility of parole," nor were we able to identify any instances of such evidence being admitted in a capital sentencing proceeding.

Data compiled by the Capital Jury Project from interviews of jurors in capital trials that took place before the institution of life without the possibility of parole as the only alternative sentencing option demonstrates that Indiana capital jurors' median estimate of the time served by capital murderers in Indiana not sentenced to death before release from prison is twenty years.¹²³ This figure underscores the importance of allowing judges to explain the available alternative punishments in order to aid jury comprehension of the sentencing options. This seems especially important in light of comments on a popular website of an Indiana prosecutor regarding life imprisonment: "Considering that a defendant sentenced to 'life imprisonment' across the country actually serves on the average less than 8 years in prison, it is a good bet that 'life without parole' will not have the meaning intended as years go by."¹²⁴

While the pattern jury instructions direct judges to provide clear jury instructions on alternative punishments, we do not know whether judges in the State of Indiana permit parole officers or other knowledgeable witness to testify about parole practices in the State, the State of Indiana is, at a minimum, in partial compliance with Recommendation #4.

E. Recommendation #5

Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.

Indiana law does not require a jury instruction stating that the jury may impose a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt. A review of Indiana case law also does not reveal any instances in which this instruction was used by the courts.

The State of Indiana, therefore, is not in compliance with Recommendation #5.

F. Recommendation #6

Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should implement the provision of Model Penal Code Section 210.6(1)(f),¹²⁵ under which residual

¹²³ Bowers & Foglia, *supra* note 111, at 82.

¹²⁴ See Clark County Prosecuting Attorney, The Death Penalty, A Message From the Prosecuting Attorney, at <http://www.clarkprosecutor.org/html/death/death.htm> (last visited Jan. 21, 2007).

¹²⁵ Section 210.6(1) of the Model Penal Code states as follows:

doubt concerning the defendant's guilt would, by law, require a sentence less than death.

The State of Indiana fails to meet the requirements of Recommendation #6. In *Franklin v. Lynaugh*,¹²⁶ the United State Supreme Court rejected a capital defendant's claim that he had a right to a jury instruction addressing "residual doubt." Similarly, the Indiana courts also have rejected a defendant's right to a jury instruction addressing "residual doubt."¹²⁷ Instead, residual doubt is an issue that defendant's counsel can raise during the guilt/innocence and penalty phases of the defendant's trial as a non-statutory mitigating circumstance, but it is not required to be given as a jury instruction.¹²⁸

G. Recommendation #7

In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.

Indiana is a weighing state, requiring the jury to assess whether aggravating circumstance(s) outweigh the mitigating circumstance(s).¹²⁹ The State of Indiana does not require that the jury be instructed on the appropriate method of weighing the evidence in favor of or against a death sentence. In fact, the Indiana sentencing statute for the death penalty "provides no guidance" as to the weighing process that is to be used in capital cases.¹³⁰ Instead, the Indiana pattern jury instructions suggest that each juror

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See MODEL PENAL CODE § 210.6(1); see also James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-13 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

¹²⁶ 487 U.S. 164 (1988).

¹²⁷ See *Overstreet v. State*, 783 N.E.2d 1140, 1162-63 (Ind. 2003).

¹²⁸ See *Miller v. State*, 702 N.E.2d 1053, 1069-70 (Ind. 1998) ("The failure to argue 'residual doubt' does not constitute ineffective assistance of counsel.");

¹²⁹ IND. CODE § 35-50-2-9(l) (2006); see also IND. PATTERN JURY INSTRUCTIONS § 15.13 (2004).

¹³⁰ *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004).

“should use [his/her] individual judgment to determine if the State has proven that the aggravating circumstance(s) outweigh any mitigating circumstance(s). This is a weighing and balancing process for each individual juror.”¹³¹

The Indiana Supreme Court has stated that section 35-50-2-9 of the Indiana Code, which provides that to sentence a defendant to death, the jury must unanimously find beyond a reasonable doubt that at least one of the aggravating circumstances exists and that the mitigating circumstance(s) do not outweigh the aggravating circumstances, has been determined to provide sufficient guidance for the jury addressing the weighing process.¹³² Despite this, the Indiana Supreme Court has counseled the Indiana courts to provide an additional instruction to the jury that the state death penalty statute “involves the *weighing*, rather than the *counting*” of aggravating factors.¹³³

Although the pattern jury instructions do not include a discussion of weighing instead of counting, the Indiana Supreme Court recommends that this instruction be given. Therefore, the State of Indiana is in partial compliance with Recommendation #7.

¹³¹ IND. PATTERN JURY INSTRUCTIONS § 15.14(d) (2004); *see also* IND. CODE § 35-50-2-9(h)(2) (2006).

¹³² *See Hough v. State*, 690 N.E.2d 267, 274 (Ind. 1997); *Fleenor v. State*, 514 N.E.2d 80, 91 (Ind. 1987).

¹³³ *Stevens v. State*, 691 N.E.2d 412, 434 (Ind. 1997).

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, in some states, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case, but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION

A. *Selection of Judicial Candidates and Judges*

1. Election of Circuit and Superior Court Judges

In the State of Indiana, most Circuit and Superior court judges are elected to six-year terms in popular elections.¹ However, in Lake County and St. Joseph County Superior court judges are chosen from a list of nominees that are selected by a judicial nominating committee and appointed by the Governor for six-year terms.² In Vanderburgh County, Superior court judges are elected in non-partisan elections every six years,³ and in Allen County, Superior court judges run for election on a separate ballot without a party designation.⁴ To be eligible to be elected as a Superior court judge in Indiana, the individual must be: (1) a resident of the county in which the court is located; (2) less than seventy years of age at the time s/he takes office; and (3) admitted to practice law in Indiana.⁵

If a judicial vacancy occurs before the term has expired, the Governor appoints a replacement.⁶ The replacement will remain in the judicial office until: (1) the end of the unexpired term; or (2) a qualified successor is elected in the next general election, whichever occurs first.⁷

2. Judicial Nomination Commission

The Indiana constitution provides for a Judicial Nomination Commission (“the Commission”), which is responsible for nominating judicial candidates for the Indiana Supreme Court and Indiana Court of Appeals.⁸ When there is a judicial vacancy on the

¹ IND. CONST. art. 7, § 7; IND. CODE § 33-29-1-3 (2006).

² IND. CODE § 33-33-45-41 (2006) (describing judicial appointment process in Lake county); IND. CODE § 33-33-71-40 (2006) (describing judicial appointment process in St. Joseph county).

³ IND. CODE § 33-33-82-31(a) (2006).

⁴ IND. CODE § 33-33-2-9(a) (2006).

⁵ IND. CODE § 33-29-1-3 (2006).

⁶ IND. CONST. art. 5, § 18; *see also* Case v. State, 5 Ind. 1, 1 (Ind. 1854).

⁷ IND. CODE § 3-13-6-1(e) (2006); *see also* Sammons v. Conrad, 740 N.E.2d 114, 116 (Ind. 2000).

⁸ IND. CONST. art. 7, § 9. St. Joseph and Lake Counties also have Judicial Nominating Commission created by statute. IND. CODE § 33-33-71-30(a) (2006) ; IND. CODE § 33-33-45-28(a) (2006). The St. Joseph Commission has seven members and upon creation of the St. Joseph Commission, the Chief Justice of the Indiana Supreme Court must appoint a Justice of the Supreme Court or a judge of the Court of Appeals to serve as chairperson until a successor is chosen. *Id.* Three attorneys residing in St. Joseph are elected by the lawyers residing in St. Joseph to serve on the Commission. *Id.* Three non-attorneys comprise the rest of the Commission. *Id.* Not more than two of the non-attorney members and four members of the total Commission can belong to the same political party. *Id.*

Lake County’s Judicial Nominating Commission consists of nine members. IND. CODE § 33-33-45-28(a) (2006). The Chief Justice of the Indiana Supreme Court, a Justice of the Indiana Supreme Court, or a judge on the Court of Appeals selected by the Chief Justice is the chairperson of the Commission. *Id.* Attorneys residing in Lake County elect four Lake County attorneys to be Commission members, at least one of whom must be a minority, two of whom must be women, and two of whom must be men. IND. CODE § 33-

Indiana Supreme Court or Court of Appeals, the Commission will submit the names of the three most qualified candidates to the Governor.⁹ When determining the qualifications of a judicial candidate, each Commission member must, in writing, consider:

- (1) The candidate's legal education, including law schools attended and education after law school, and any academic honors and awards received;
- (2) The candidate's legal writings, including legislative draftings, legal briefs, and contributions to legal journals and periodicals;
- (3) The candidate's reputation in the practice of law, as evaluated by attorneys and judges with whom the candidate has had professional contact, and the type of legal practice, including experience and reputation as a trial lawyer and/or trial judge;
- (4) The candidate's physical condition, including general health, stamina, vigor, and age;
- (5) The candidate's financial interests, including any interest that might conflict with the performance of judicial responsibilities;
- (6) The candidate's public service activities, including writings and speeches concerning public affairs and contemporary problems and efforts and achievements in improving the administration of justice; and
- (7) Any other pertinent information that the commission feels is important in selecting the most highly qualified individuals for judicial office.¹⁰

If the Governor fails to select a candidate to fill the judicial vacancy within sixty days of receiving the names from the Commission, the Chief Justice of the Indiana Supreme Court will select a candidate from the list of Commission nominees.¹¹

The Commission consists of seven members.¹² The Commission Chair is either the Chief Justice of the Indiana Supreme Court or another Indiana Supreme Court Justice who is designated by the Chief Justice.¹³ Three members of the Commission are attorneys elected by members of the Indiana bar¹⁴ and the Governor appoints three non-

33-45-28(b)(1)-(3) (2006). The Lake County Board of Commissioners appoints four non-attorney members to serve on the Commission as well. IND. CODE § 33-33-45-28(c) (2006). Each of the three county commissioners will appoint one non-attorney member who is a resident of the appointing Commissioner's district. IND. CODE § 33-33-45-28(c)(1) (2006). The fourth non-attorney Commission member is appointed by a majority vote of the Lake County commissioners. IND. CODE § 33-33-45-28(c)(2) (2006). At least one non-attorney member must be a minority, two must be women, and two must be men. IND. CODE § 33-33-45-28(c)(3)-(5) (2006). No more than two of the non-attorney members may be from the same political party. IND. CODE § 33-33-45-28(c)(6) (2006).

⁹ IND. CODE § 33-27-3-2(a) (2006).

¹⁰ *Id.*

¹¹ IND. CODE § 33-27-3-4(a) (2006).

¹² IND. CONST. art. 7, § 9.

¹³ *Id.*

¹⁴ *Id.*; IND. CODE § 33-27-1-2 (2006). For purposes of electing the attorney members to the Commission, the State is divided into the First, Second, and Third districts of the Court of Appeals. IND. CODE § 33-27-2-2(a) (2006). The electors of each district nominate a resident who is an attorney of their district to be a

attorney members to the Commission.¹⁵ Each attorney and non-attorney Commissioner serves a three year term¹⁶ and attorney and non-attorney Commissioners are not eligible for reappointment or re-election at the expiration of their term.¹⁷ Additionally, no member of the Commission other than the Commission Chair is permitted to hold a salaried public office.¹⁸

3. Appointment to Fill Vacancies on the Indiana Supreme Court and Court of Appeals

Under the Indiana Constitution, the Governor has the authority to fill judicial vacancies.¹⁹ When there is a vacancy on the Indiana Supreme Court or the Court of Appeals, the “Governor, without regard to political affiliation, fills the vacancy from a list of three nominees presented to him[her] by the judicial nominating commission.”²⁰ If it is known that a judicial vacancy will occur in the future, the Commission will submit the names of three potential replacements to the Governor within sixty days of receiving notice of the upcoming vacancy.²¹ To be eligible for nomination to the Indiana Supreme Court or Court of Appeals, the nominee must be: (1) a resident of the district; (2) a citizen of the United States; and (3) admitted to practice law in the State for at least ten years, or have served as a judge on the circuit, superior, or criminal court of the State for at least five years.²² If the Governor does not fill the vacancy within sixty days of receiving the list of nominees, the Chief Justice of the Indiana Supreme Court will select the individual to fill the vacancy.²³

a. Retention Elections

Newly-appointed Indiana Supreme Court Justices and Court of Appeals Judges serve two years from the time of the appointment until the next general election, when they are subject to retention elections.²⁴ If a new Justice or Court of Appeals judge succeeds in

member on the Commission. IND. CODE § 33-27-2-2(c) (2006). Qualified electors must be attorneys in good standing to practice law in Indiana. IND. CODE § 33-27-2-2(b) (2006).

¹⁵ IND. CONST. art. 7, § 9; IND. CODE § 33-27-1-5 (2006). The Governor appoints one non-attorney member from each of the First, Second, and Third Districts of the Court of Appeals. IND. CODE § 33-27-2-1(a) (2006). The appointed non-attorney must reside in the court of appeals district from which they were appointed. IND. CODE § 33-27-2-1(d) (2006).

¹⁶ IND. CODE §§ 33-27-2-1(c), 33-27-2-2(c) (2006).

¹⁷ IND. CODE § 33-27-2-5 (2006). However, an attorney or non-attorney Commissioner who has been appointed or elected to fill a vacancy on the Commission for less than one year is eligible upon the expiration of that term for a succeeding term. *Id.*

¹⁸ IND. CONST. art. 7, § 9

¹⁹ IND. CONST. art. 5, § 18; *see also* Case v. State, 5 Ind. 1, 1 (Ind. 1854) (holding that “[t]he constitution provides that when, at any time, a vacancy shall have occurred in the office of judge of any court, the Governor shall fill the vacancy by appointment, which shall expire when a successor shall have been elected and qualified”).

²⁰ IND. CONST. art. 7, § 10; IND. CODE § 33-27-3-1(d) (2006).

²¹ IND. CODE § 33-27-3-1(d) (2006).

²² IND. CONST. art. 7, § 10.

²³ *Id.*

²⁴ IND. CONST. art. 7, § 11. The Chief Justice of the Indiana Supreme Court is selected by the Judicial Nominating Commission. *See* 24 GEORGE T. PATTON, INDIANA PRACTICE SERIES: APPELLATE PROCEDURE

the retention election, s/he will serve a ten year term.²⁵ The entire State electorate may vote on whether to retain a Supreme Court Justice;²⁶ however, only the electorate of the district in which a Court of Appeals judge serves may participate in his/her retention election.²⁷

Superior court judges in Lake County and St. Joseph County also are subject to retention elections. If there is a judicial vacancy in Lake County or St. Joseph County, the Governor will fill the vacancy with a candidate selected from a list provided by the Judicial Nominating Committee.²⁸ The newly-appointed judge serves a two year period until the next general election²⁹ and, if the judge is retained in that election, s/he will serve a six year term.³⁰ If a superior court judge in Lake or St. Joseph County loses his/her retention election, the judicial position becomes vacant on the January 1 following the loss and the position will be filled by a gubernatorial appointment.³¹

4. Appointment of Judges to Fill Vacancies on Trial Courts

A vacancy caused by death, resignation, creation of a new judicial circuit, or any other cause that leaves a publicly elected judicial position open, can be filled with a Gubernatorial judicial appointment.³² If the vacancy is caused by the death of a judge, the Governor cannot appoint a successor until the Governor receives official notice of the death.³³ The gubernatorial appointment of a judge expires at the end of the unexpired term or when a successor is elected and qualified at the next general election, whichever occurs first.³⁴

B. Conduct of Judicial Candidates and Judges

1. Commission on Judicial Qualifications (“CJQ”)

The Indiana Constitution provides for a Commission on Judicial Qualifications (CJQ).³⁵ The CJQ receives and investigates complaints against all judicial officers and

§ 1.3 (3rd ed. 2006). The Chief Justice serves five years before being subjected to a retention election by the JNC. *Id.*

²⁵ IND. CONST. art. 7, § 11..

²⁶ *Id.*

²⁷ *Id.*

²⁸ IND. CODE § 33-33-45-41 (2006) (appointing Lake County Superior Court judges.); IND. CODE § 33-33-71-42 (2006) (appointing St. Joseph County Superior Court judges).

²⁹ IND. CODE § 33-33-45-41(a) (2006); IND. CODE § 33-33-71-42(a) (2006).

³⁰ IND. CODE § 33-33-45-41(b) (2006); IND. CODE § 33-33-71-42(b) (2006).

³¹ IND. CODE § 33-33-45-42(d) (2006); IND. CODE § 33-33-71-43(e) (2006).

³² IND. CONST. art. 5, § 18.

³³ IND. CODE § 3-13-6-1(e) (2006). An individual providing notice to the Governor addressing the death of a judge must: (1) state in the notice the information that causes the person to believe the judge has died; and (2) certify under the penalty of perjury, that to the best of the person’s knowledge and belief, the information stated is true. IND. CODE § 5-8-6-3(b) (2006).

³⁴ IND. CONST. art. 5, § 18; IND. CODE § 3-13-6-1(e)(1)-(2) (2006); *see also* Sammons v. Conrad, 740 N.E.2d 114, 116 (Ind. 2000).

³⁵ IND. CONST. art. 7, § 9.

recommends the appropriate discipline to the Indiana Supreme Court.³⁶ A judge or judicial candidate can be disciplined, as appropriate, in the following ways: removal, retirement, suspension, discipline as an attorney, limitations or conditions on the performance of judicial duties; private or public reprimand or censure, fine, assessment of reasonable costs and expenses; or any combination of these sanctions.³⁷ The CJQ also may retire a judge involuntarily “when a physical or mental disability seriously interferes with the performance of judicial duties.”³⁸

The CJQ is composed of the same seven members who serve on the Judicial Nominating Commission:

- (1) The head of the Commission is either the Chief Justice of the Indiana Supreme Court or a Justice of the Indiana Supreme Court selected by the Chief Justice;
- (2) Three attorney members who each reside in a different judicial circuit, are members of the Indiana Bar, and are elected by members in good standing of the Indiana Bar; and
- (3) Three non-attorneys members who are appointed by the Governor.³⁹

2. Conduct of Judicial Candidates, Including Incumbent Judges, During Judicial Elections

a. General Rules of Conduct

The Indiana Code of Judicial Conduct prohibits judges from “making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court.”⁴⁰

Canon 5 specifically prohibits judicial candidates, including incumbent judges running in retention elections, from:

³⁶ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § I(B) (2006)

³⁷ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § IV (2006). The Indiana Supreme Court retains sole authority to sanction judicial officers. IND. CONST. art. 7, § 4.

³⁸ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § III (B) (2006).

³⁹ IND. CONST. art. 7, § 9.

⁴⁰ IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d). In accordance with the United States Supreme Court’s decision in *Minnesota Republican Party v. White*, 536 U.S. 765 (2002), the Indiana Commission on Judicial Qualifications has acknowledged that judicial “candidates are permitted under the first amendment to state their general views about disputed social and legal issues.” Ind. Commission on Judicial Qualifications, Preliminary Advisory Opinions, #1-02, at 2, *available at* <http://www.ai.org/judiciary/judqual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007). However, in instances in which the judicial candidate “makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous ‘tough on crime’ statement, or broad statements relating to the candidate’s position on disputed social and legal issues, the candidate incurs the risk of violating the ‘commitment’ clause and/or the ‘promises’ clause.” *Id.* at 3. Even if the judicial candidate’s statements do not violate these canons of judicial conduct, a judicial candidate’s statements about disputed social and legal issues could “invite future recusal requests, or even mandate recusal on future cases.” *Id.*

- (1) Acting as a leader or holding office in a political organization;
- (2) Publicly endorsing or publicly opposing another candidate for public office;
- (3) Making speeches on behalf of a political organization;
- (4) Attending a gathering of a political organization;
- (5) Soliciting funds for, paying an assessment, slating fees or other mandatory political payment to, or making a contribution to, a political organization or candidate, or purchasing tickets for political party dinners or other functions; or
- (6) Permitting the judge's employees and officials subject to the judge's direction and control to be candidates for or hold positions as officers of a political party's central committee or to be candidates for or hold non-judicial partisan elective offices.⁴¹

b. Additional Rules of Conduct for Candidates Seeking Judicial Office by Public Election

Judicial candidates also must not:

- (1) Make pledges or promises of conduct in office other than the faithful and impartial performance of the office;
- (2) Make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
- (3) Knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.⁴²

However, a federal district court recently enjoined enforcement of the “pledges and promises clause,” #1 above, and the “commitments clause,” #2 above, of Canon 5A(3)(d). The Court held that these clauses violate the First Amendment, as they are both under-inclusive and overbroad, as well as unconstitutionally vague.⁴³

Competing judicial candidates for publicly-elected judicial office, including incumbent judges, cannot “personally solicit or accept campaign contributions or personally solicit publicly stated support.”⁴⁴ Candidates may, however, establish committees to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his/her candidacy from any person or corporation authorized by law.⁴⁵ A candidate may not use or permit the use of campaign contributions for anyone's private benefit.⁴⁶

⁴¹ IND. CODE OF JUD. CONDUCT, CANON 5A(1).

⁴² IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d).

⁴³ *Ind. Right to Life, Inc. v. Shepard*, No. 4:04-CV-0071, at 18-21, 2006 U.S. Dist. LEXIS (N.D. Ind. Nov. 14, 2006). See *infra* note 102 and accompanying text.

⁴⁴ IND. CODE OF JUD. CONDUCT, CANON 5C(2).

⁴⁵ *Id.*

⁴⁶ *Id.*

Judicial candidates, including incumbent judges, who are involved in an election or reelection, are permitted to:

- (1) Attend a gathering or political organization and purchase a ticket for the gathering for the judge and the judge's guest;
- (2) Identify himself/herself as a member of a political party;
- (3) Voluntarily contribute to a political organization;
- (4) Speak to gatherings on his/her own beliefs;
- (5) Appear in newspaper, television and other media advertisements supporting his/her candidacy;
- (6) Distribute pamphlets and other promotional campaign literature supporting his/her candidacy;
- (7) Publicly endorse and attend gatherings for other candidates in the same public election in which the judge or judicial candidate is running and may purchase tickets for the judge and the judge's guest for the purpose of attending the gathering.⁴⁷

A judicial candidate, including an incumbent judge running in a retention election, may respond to personal attacks or attacks on the candidate's record, so long as the response does not violate the Canon requirements listed above.⁴⁸ In addition, incumbent judges seeking reelection must not engage in any political activity except on behalf of measures to improve the law, the legal system or the administration of justice.⁴⁹

c. Additional Rules of Conduct for Candidates Seeking Appointment to Judicial or Other Governmental Office or Standing for Retention

A candidate seeking appointment to judicial office or a judge seeking other governmental office may not solicit or accept any funds, directly or indirectly, to support his/her candidacy⁵⁰ or engage in any political activity to secure an appointment, except that the candidate may:

- (1) Communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;
- (2) Seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals; and
- (3) Provide to the nominating commission, selection body, endorsees, or other individuals information as to his/her qualifications for the office.⁵¹

⁴⁷ IND. CODE OF JUD. CONDUCT, CANON 5C(1).

⁴⁸ IND. CODE OF JUD. CONDUCT, CANON 5A(3)(e).

⁴⁹ IND. CODE OF JUD. CONDUCT, CANON 5E. A judge's participation in public events is generally "not considered political activity, such as: speaking to a service club or other recognized non-partisan organization on topics relating to measures to improve the law, the legal system or the administration of justice; making presentations or giving awards to individuals or organizations; or, riding in parades or taking part in ceremonies with public officials." IND. CODE OF JUD. CONDUCT, CANON 5E cmt.

⁵⁰ IND. CODE OF JUD. CONDUCT, CANON 5B(1).

⁵¹ IND. CODE OF JUD. CONDUCT, CANON 5B(2)(a)(i-iii).

A person who is not a member of the judiciary, but is a candidate for appointment to judicial office by merit selection may not (1) retain an office in a political organization, (2) attend political events, or (3) continue to pay ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.⁵²

An incumbent judge who is a candidate for retention and has received active opposition to his/her candidacy can campaign in response to the opposition and may solicit support and campaign funds by:

- (1) Attending a gathering of a political organization and purchasing tickets for the gathering for the judge and the judge's guest;
- (2) Identifying him/her as a member of a political party;
- (3) Voluntarily contributing to a political organization;
- (4) Speaking to gatherings on his/her own behalf;
- (5) Appearing in newspapers, television and other media advertisements supporting his/her candidacy;
- (6) Distributing pamphlets and other promotional campaign literature supporting his/her candidacy; and
- (7) Publicly endorsing and attending gatherings for other candidates in the same public election in which the judge or judicial candidate is running and may purchase tickets for the judge and the judge's guest for the purpose of attending the gathering.⁵³

Judges running in a retention election, however, are prohibited from:

- (1) Acting as a leader or holding office in a political organization;
- (2) Publicly endorsing or opposing another candidate for public office;
- (3) Making speeches on behalf of political organizations;
- (4) Attending a gathering of a political organization;
- (5) Soliciting funds for, paying an assessment, slating a fee or other mandatory political payment to, or making a contribution to, a political organization or candidate, or purchasing tickets for political dinners or other functions; or
- (6) Permitting the judge's employees and officials subject to the judge's direction and control to be candidates or hold positions as officers in a political party's central committee or to be candidates for or hold non-judicial partisan elective offices.⁵⁴

3. Conduct of Sitting Judges

a. Judicial Duties in General

⁵² IND. CODE OF JUD. CONDUCT, CANON 5B(2)(b)(i-iii).

⁵³ IND. CODE OF JUD. CONDUCT, CANON 5D.

⁵⁴ IND. CODE OF JUD. CONDUCT, CANON 5A(1).

Canon 3 of the Code of Judicial Conduct outlines the rules of conduct for sitting judges, including but not limited to the following:

- (1) A judge must hear and decide matters assigned to the judge, except those in which disqualification is required;⁵⁵
- (2) A judge must be faithful to the law and maintain professional competence in it. The judge will not be swayed by partisan interests, public clamor, or fear of criticism;⁵⁶
- (3) A judge must require order and decorum in the proceedings before them;⁵⁷
- (4) A judge will be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals with in an official capacity, and will require similar conduct of lawyers, staff, court officials, and others subject to the judge's direction and control;⁵⁸
- (5) A judge is required to perform his/her judicial duties without bias or prejudice. The judge will not, by words or conduct, demonstrate bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors;⁵⁹
- (6) A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment;⁶⁰
- (7) A judge will require lawyers in proceedings before him/her to refrain from using words or conduct that demonstrate bias or prejudice based upon race, sex, religion, national origin, personal characteristics or status, against parties, witnesses, counsel, or others;⁶¹
- (8) A judge will permit every person who has an interest in the legal proceeding, or that person's lawyer, the opportunity to be heard. The judge must not initiate, permit, or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding;⁶²

⁵⁵ IND. CODE OF JUD. CONDUCT, CANON 3B(1).

⁵⁶ IND. CODE OF JUD. CONDUCT, CANON 3B(2).

⁵⁷ IND. CODE OF JUD. CONDUCT, CANON 3B(3).

⁵⁸ IND. CODE OF JUD. CONDUCT, CANON 3B(4).

⁵⁹ IND. CODE OF JUD. CONDUCT, CANON 3B(5).

⁶⁰ IND. CODE OF JUD. CONDUCT, CANON 3B(6).

⁶¹ IND. CODE OF JUD. CONDUCT, CANON 3B(7).

⁶² There are several exceptions to this rule, including:

- (1) *Ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized where circumstances require, except when:
 - a. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communications; and
 - b. the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communications and allows an opportunity to respond.
- (2) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person

- (9) A judge will dispose of all judicial matters fairly, promptly, and efficiently;⁶³
- (10) While a proceeding is pending or impending in any court, a judge will not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing;⁶⁴
- (11) A judge must not criticize jurors for their verdict other than in a court order or judicial opinion, but may express appreciation to jurors for their service to the judicial system and the community;⁶⁵
- (12) A judge will not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity;⁶⁶ and
- (13) A judge will prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent to the courtroom during sessions of court or recesses between sessions.⁶⁷

b. Judicial Impartiality

A judge must maintain impartiality when presiding over any legal proceeding.⁶⁸ A judge must recuse himself/herself from presiding over the proceeding in instances where s/he is unable to be impartial or where his/her impartiality may be reasonably questioned, including, but not limited to the following circumstances:

- (1) Instances in which the judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
- (3) The judge knows that s/he individually or as a fiduciary or the judge's spouse, child or parent has an economic interest in the subject matter in

consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

- (3) A judge can consult with court personnel and others whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges;
- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge;
- (5) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

IND. CODE OF JUD. CONDUCT, CANON 3B(8).

⁶³ IND. CODE OF JUD. CONDUCT, CANON 3B(9).

⁶⁴ IND. CODE OF JUD. CONDUCT, CANON 3B(10).

⁶⁵ IND. CODE OF JUD. CONDUCT, CANON 3B(11).

⁶⁶ IND. CODE OF JUD. CONDUCT, CANON 3B(12).

⁶⁷ IND. CODE OF JUD. CONDUCT, CANON 3B(13).

⁶⁸ IND. CODE OF JUD. CONDUCT, CANON 3B(5) cmt.

- controversy, or in a party in the proceeding, or any other interest that is more than *de minimis* that could substantially affect the proceeding; or
- (4) The judge, the judge's spouse, a person within the third degree of relationship to either of them, or the spouse of such a person, or a person residing with the judge:
- a. Is a party to the proceeding, or an officer, director, or trustee of a party;
 - b. Is acting as a lawyer in the proceeding;
 - c. Is known by the judge to have more than a *de minimis* interest that could be substantially affected by the proceeding; or
 - d. Is to the judge's knowledge likely to be a material witness in the proceeding.⁶⁹

Additionally, Canon 4 of the Code of Judicial Conduct prohibits a judge from participating in extra-judicial activities that would:

- (1) Cast reasonable doubt on the judge's capacity to act impartially;
- (2) Demean the judicial office; or
- (3) Interfere with the proper performance of judicial duties.⁷⁰

c. Disciplinary Responsibilities

If a judge has actual knowledge or receives information indicating that there is a substantial likelihood that another judge has violated the Code of Judicial Conduct, the judge must take appropriate action.⁷¹ A judge who has actual knowledge or receives information that a substantial likelihood exists that an attorney has violated the Indiana Rules of Professional Conduct also must take appropriate action.⁷²

4. Complaints and Disciplinary Action Against Judicial Candidates, Including Incumbent Judges

a. Authority and Jurisdiction of the Commission on Judicial Qualifications (CJQ)

The CJQ has the authority to receive, investigate, and hear formal charges against judicial candidates, including incumbent judges running in retention elections, relating to the violation of any of the rules of judicial conduct.⁷³ In order to perform its duties, the CJQ has the "power to compel the attendance of witnesses, to take or cause to be taken the deposition of witnesses, and to order the production of books, records, or other documentary evidence,"⁷⁴ and to issue subpoenas.⁷⁵

⁶⁹ IND. CODE OF JUD. CONDUCT, CANON 3E(1)(a)-(d).

⁷⁰ IND. CODE OF JUD. CONDUCT, CANON 4A(1)-(3).

⁷¹ IND. CODE OF JUD. CONDUCT, CANON 3D(1).

⁷² IND. CODE OF JUD. CONDUCT, CANON 3D(2).

⁷³ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § I.

⁷⁴ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(E)(4).

⁷⁵ *Id.*

b. Investigation of the Complaint

Disciplinary investigations are initiated upon the filing of a written and verified complaint with the CJQ.⁷⁶ The investigative panel has the authority to receive complaints, initiate investigations upon its own authority, or dismiss complaints.⁷⁷ If the CJQ concludes after its initial inquiry that a formal investigation should be conducted, the judicial officer is notified of the investigation, the nature of the charge(s), and the name of the person making the complaint.⁷⁸

c. CJQ Hearing Panel

If the CJQ determines that there is probable cause for discipline or involuntary retirement of a judicial candidate or incumbent judge in a retention election, a notice about the initiation of a formal proceeding is filed with the Indiana Supreme Court.⁷⁹ Within twenty days of filing the notice of formal proceedings, the judicial officer being investigated may file an answer.⁸⁰ Upon receiving the answer or expiration of the time to answer, the Indiana Supreme Court will appoint three Masters and a presiding Master,⁸¹ who are retired or active judges in Indiana, to conduct a formal hearing addressing the grounds for discipline.⁸²

At the conclusion of the hearing, the Masters will submit a report to the Indiana Supreme Court, a copy of which must be served to the CJQ, addressing the disposition of the formal proceedings and which may include a recommendation of discipline, removal, or retirement of the judicial officer.⁸³ If the CJQ disagrees with the Masters' recommendations, their report must state all of the objections and they must submit a memorandum in support of their recommended discipline to the Indiana Supreme Court.⁸⁴ The CJQ also may petition the Indiana Supreme Court for an interim suspension with pay for the judicial officer being investigated should the Court determine the suspension is "necessary to protect public confidence in the integrity of the judiciary."⁸⁵

d. Indiana Supreme Court

⁷⁶ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(D).

⁷⁷ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(E)(2).

⁷⁸ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(E)(3).

⁷⁹ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(F)(1).

⁸⁰ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(G).

⁸¹ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(I).

⁸² *Id.*

⁸³ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(N).

⁸⁴ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § VIII(O).

⁸⁵ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § V(E).

The Indiana Supreme Court has the authority to supervise the courts in the State, including the “discipline, removal and retirement of justices and judges.”⁸⁶ While a recommendation by the CJQ for the retirement or removal of a judge is pending before the Indiana Supreme Court, the judge is suspended with pay.⁸⁷ Upon finding misconduct by the judicial officer, the Indiana Supreme Court may impose the following sanctions:

- (1) Removal;
- (2) Retirement;
- (3) Suspension;
- (4) Discipline as an attorney;
- (5) Limitations or conditions on the performance of judicial duties;
- (6) Private or public reprimand or censure;
- (7) Fine;
- (8) Assessment of reasonable costs and expenses; or
- (9) Any combination of the above sanctions.⁸⁸

⁸⁶ IND. CONST. art 7, § 4; *see also* IND. R. APP. P. 4(B)(2); *In re McClain*, 662 N.E.2d 935, 936 (Ind. 1996).

⁸⁷ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § V(B).

⁸⁸ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 25, § IV.

II. ANALYSIS

A. Recommendation # 1

States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

It does not appear that the State of Indiana has been examining, in any systemic way, the fairness of its processes for the appointment and election of trial court judges or is educating the public, judicial candidates, and incumbent judges about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.⁸⁹ Two recent pieces of proposed legislation would have fundamentally altered the selection process for judges, and each was defeated after the Indiana Bar Association and the Indianapolis Bar Associations mounted organized and vocal opposition.⁹⁰

Indiana elects most of its Superior Court and Circuit Court judges through partisan elections.⁹¹ Vacancies on the Indiana Supreme Court or the Court of Appeals are filled by the Governor and are subject to retention elections.⁹² When selecting a Justice for the Indiana Supreme Court or a judge for the Court of Appeals, the Governor is to make his/her selection without regard to political affiliation from a list of three nominees presented to him/her by the Judicial Nominating Commission.⁹³

Despite the selection process for Justices on the Indiana Supreme Court and judges on the Court of Appeals, politicization of judicial elections greatly affects the independence of the judiciary in the State of Indiana.

Politicization of Contested Public Elections

The very nature of public elections, including the submission of issue questionnaires to judicial candidates by political action committees and the impact of public opinion on judges' decisions, serves to undermine the impartiality of the judiciary.

⁸⁹ Despite the lack of a formal mechanism to examine the fairness of the State's processes for the appointment and election of trial court judges or to educate the public, judicial candidates, and incumbent judges about the importance of judicial independence, many individual judges are outspoken advocates of judicial independence. For example, the current Chief Justice of the Indiana Supreme Court, Randall T. Shepard, has spoken to numerous forums on the topic of judicial independence.

⁹⁰ See Kevin Corcoran, *Lawyers' Groups Oppose Judicial Proposal*, INDIANAPOLIS STAR, Mar. 5, 2005, at B7 (discussing bill that would have allowed required state senate confirmation of appellate judges and permitted removal of judges by a vote of thirty of fifty senators during a retention vote each decade after appointment); Mary Beth Schneider, *Bill to Appoint County Judges Dies*, INDIANAPOLIS STAR, Feb. 28, 2005, at B1 (discussing bill that would have allowed the Governor to appoint Marion County judges).

⁹¹ IND. CONST. art. 7, § 7.

⁹² IND. CONST. art. 7, § 10.

⁹³ *Id.*

While the Code of Judicial Conduct states that a judge has a duty to act impartially in any judicial proceeding,⁹⁴ the submission of candidate questionnaires addressing contentious legal and political issues by political action committees directly undermines a judge's duty to act impartially or, at a minimum, to avoid the appearance of partiality. In *Republican Party of Minnesota v. White*,⁹⁵ the United States Supreme Court ruled that Minnesota's judicial canon of conduct, which prohibited judicial candidates from announcing his/her views on disputed legal or political issues, "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our first Amendment freedoms' – about the qualifications of candidates for public office."⁹⁶ In response to *White*, organizations addressing contentious legal and political issues have sent judicial candidate questionnaires to prospective judges in Indiana. For example, the Indiana Right to Life organization sent a questionnaire to judicial candidates asking whether they agreed or disagreed with the following statements:

- "I believe that *Roe v. Wade* was wrongly decided."
- "I believe that abortion should be permitted only to prevent the death of the mother."
- "I believe that *Bader v. Johnson*, 732 N.E.2d 1212 (2000) was wrongly decided."⁹⁷

The Indiana Commission on Judicial Qualifications ("CJQ") issued a *Preliminary Advisory Opinion* addressing the *White* decision and judicial candidate questionnaires stating that:

Judicial candidates have a constitutional right to state their views on, for example, abortion or the death penalty, to characterize themselves as "conservative" or "tough on crime," or to express themselves on any number of other philosophies or perspectives. These examples are not exclusive, but are those about which candidates in Indiana most often inquire.⁹⁸

The CJQ advises judicial candidates to contact them directly to receive an opinion about the propriety of possible campaign statements. Additional guidance was provided by the CJQ addressing this issue:

⁹⁴ IND. CODE OF JUD. CONDUCT, CANON 3.

⁹⁵ 536 U.S. 765 (2002).

⁹⁶ *White*, 536 U.S. at 774.

⁹⁷ Ari Shapiro, *Questionnaires Test Judge Candidates' Views*, NAT'L PUB. RADIO, Oct. 10, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=6241933> (last visited Feb. 1, 2007). We were unable to find any judicial candidate questionnaires addressing the death penalty. The *White* decision, however, makes it possible for organizations to question judicial candidates on their views of the death penalty in future election seasons.

⁹⁸ Ind. Comm. on Jud. Qualifications, *Preliminary Advisory Opinion, #1-02*, at 2, available at <http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007).

As a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous “tough on crime” statement, or broad statements relating to the candidate’s position on disputed social and legal issues, the candidate incurs the risk of violating the “commitment” clause and/or “promise” clause.⁹⁹

The CJQ also determined that statements by candidates on such issues as “imposing harsh penalties in criminal cases,” likely represent “a bias against criminal defendants who later may appear before the candidate.”¹⁰⁰ The CJQ warned that even if the judicial candidate’s statements do not violate the “commitment” clause and/or the “promises” clause, the statements could be the basis for “future recusal requests, or even mandate recusal on future cases.”¹⁰¹ As indicated by the CJQ, answers to candidate questionnaires can undermine the impartiality or the appearance of impartiality of judicial candidates who may eventually sit on the bench.

However, the usefulness of the CJQ’s Advisory Opinion to judicial candidates is in question in light of the Northern District of Indiana Federal Court’s ruling in *Indiana Right to Life v. Indiana Commission on Judicial Qualifications, et al* in November 2006.¹⁰² *Right to Life* enjoined enforcement of Canon 5A(d)(3)(i) and (ii) which, prior to this case, prohibited judicial candidates from making pledges or promises of conduct in office “other than the faithful and impartial performance of duties of the office” or making statements that commit or appear to commit a candidate with respect to cases, controversies, or issues likely to come before the court.¹⁰³

Politicization of the Merit Selection Process and Retention Elections

In Indiana, the merit selection system used for the appointment of Indiana Supreme Court Justices and Court of Appeals judges generally mutes the possibility of political influence on these judicial seats. Some believe that merit selection systems like Indiana’s, which include a list of three qualified nominees prepared by the Judicial Nominating Commission from which the Governor must choose to fill a judicial vacancy,¹⁰⁴ provide

⁹⁹ Ind. Comm. on Jud. Qualifications, Preliminary Advisory Opinion, #1-02, at 3, available at <http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007). The commitment clause states that a judge or candidate for election to judicial office or retention in judicial office “shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issue that are likely to come before the court.” IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d)(ii). The promises clause states that a judge or candidate for election to judicial office or retention in judicial office “shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d)(i).

¹⁰⁰ Ind. Comm. on Jud. Qualifications, Preliminary Advisory Opinion, #1-02, at 3, available at <http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007).

¹⁰¹ *Id.*

¹⁰² *Ind. Right to Life, Inc. v. Shepard*, No. 4:04-CV-0071 at 21, 2006 U.S. Dist. LEXIS (N.D. Ind. Nov. 14, 2006).

¹⁰³ IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d)(i) and (ii).

¹⁰⁴ IND. CONST. art. 5, § 18.

an “alternative to the specter of expensive, contentious, and highly partisan races.”¹⁰⁵ Once appointed to the bench, judges face periodic retention elections.

While it is difficult to discern whether political attacks during retention elections have an appreciable affect on judges’ decision-making, a majority of judges that face retention elections seem to think that they do:

[O]ne survey of judges subject to periodic retention elections revealed that “three-fifths believe[d] judicial retention elections have a pronounced effect on judicial behavior.” Many judges subject to periodic retention affirm that this is true.¹⁰⁶

During the 2006 election, the Indiana Right to Life political action committee encouraged Indiana voters to vote against retaining five of the six judges that appeared on the ballot.¹⁰⁷ Some of the reasons advocated by the Indiana Right to Life for voting against retaining the judges included:

- Indiana Supreme Court Justice Frank Sullivan Jr. – wrote a majority opinion that expanded taxpayer funding for abortions in Indiana through Medicaid.
- Indiana Court of Appeals Judge Ezra Friedlander – wrote the majority opinion recognizing parental rights of same sex couples.
- Indiana Court of Appeals Judge Patricia Riley – ruled that same sex orientation should have no bearing on parental custody, supported same sex adoption in Indiana, and overturned a court order barring divorcing parents from exposing their child to Wiccan practices.¹⁰⁸

These recommendations to voters also were advertised on the GOP USA Indiana headquarters website.¹⁰⁹ Although we were unable to find any political attacks during judicial retention elections addressing the death penalty, these sort of political attacks, whatever the subject matter, affect the independence of the judiciary.

¹⁰⁵ DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 37 (2005), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (last visited Feb. 1, 2007).

¹⁰⁶ Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 37 (1995). The survey cites included judge respondents from ten states who were subject to retention elections. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 n.3 (1994). Six judges in Indiana were included, or 85 percent of the judges in the State that are subject to retention elections. *Id.*

¹⁰⁷ See Indiana Right to Life PAC, Candidate Surveys, available at <http://www.candidatesurveys.com/judicialvotes.asp> (last visited Feb. 1, 2007).

¹⁰⁸ *Id.*

¹⁰⁹ See GOPUSA, Indiana HQ, available at <http://www.gopusa.com/indiana/> (last visited Feb. 1, 2007).

Conclusion

It does not appear that the State of Indiana is currently examining the fairness of the judicial appointment/election process in any systemic way. Nor does it appear that the State is undertaking any type of concerted public education effort to ensure that the public is aware of the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary. The Chief Justice of the Indiana Supreme Court has been an outspoken proponent of judicial independence, and his efforts and those of the CJQ in defending the Judicial Canons are to be commended.¹¹⁰ Moreover, the efforts of the Indiana State and Indianapolis Bar Associations, when faced with proposed legislation that could undermine judicial independence, are also laudable.¹¹¹ Therefore, the State of Indiana is in partial compliance with Recommendation #1.

B. Recommendation # 2

A judge who has made any promise—public or private—regarding his prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.

Canon 5A(3)(d) of the Indiana Code of Judicial Conduct states that a candidate for judicial office “shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office”¹¹² and shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”¹¹³ Moreover, the commentary to Canon 5A(3)(d) of the Code of Judicial Conduct states that a “candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.”¹¹⁴ However, in November 2006, the Federal District Court for the Northern District of Indiana enjoined the CJQ and the Indiana Disciplinary Commission from enforcing Canon 5(A)(3)(d)(i) and (ii).¹¹⁵ The Court held that Canon 5(A)(3)(d)(i) and (ii) was not sufficiently narrowly tailored to support the State of Indiana’s interest in supporting impartiality in the judiciary and found the Canon both underinclusive and overbroad, as well as unconstitutionally vague.¹¹⁶

¹¹⁰ See *supra* note 89.

¹¹¹ See *supra* note 90.

¹¹² IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d)(i).

¹¹³ IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d)(ii).

¹¹⁴ IND. CODE OF JUD. CONDUCT, CANON 5A(3)(d) cmt.

¹¹⁵ See *Ind. Right to Life, Inc. v. Shepard*, No. 4:04-CV-0071 at 21, 2006 U.S. Dist. LEXIS (N.D. Ind. Nov. 14, 2006).

¹¹⁶ *Id.* at 18-21. The Court found Canon 5(A)(3)(d)(i) and (ii) unconstitutionally (1) underinclusive because it prohibits a candidate for judicial office from making statements that commit or appear to commit the candidate on legal issues, but permitting s/he to do so up until the very day before s/he declares him/herself a candidate; (2) overbroad because candidates were prohibited from making statements that “appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court,” when there “is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction,” (quoting White); and (3) vague because the

During the 2005-2006 fiscal year, there were 357 complaints filed with the Commission on Judicial Qualifications alleging judicial misconduct.¹¹⁷ Of the complaints filed, 178 were dismissed summarily because the complaints raised issues that were about the outcome of cases or were outside the Commission's jurisdiction; 143 were dismissed on the same grounds after staff for the Indiana Commission on Judicial Qualifications examined court documents and conducted interviews; 13 complaints were dismissed as not violating the Code of Judicial Conduct after a response was requested from the judge and an investigation was conducted; and 13 judges were "privately cautioned" for deviating from ethical conduct.¹¹⁸ Of the 13 cautions, four addressed instances of misuse of the court's power, three instances of delayed rulings, two instances of allowing the appearance of partiality, two instances of deviations from precedent or court rules, two instances of staff conflicts, one instance of improper campaign conduct, one instance of nepotism, and one instance of failing to disqualify.¹¹⁹ Additionally, the Indiana Supreme Court has publicly reprimanded judicial candidates who made promises or pledges during a campaign which violated the Code of Judicial Ethics.¹²⁰

Immediately after the United State Supreme Court's 2002 decision in *Republican Party v. White*,¹²¹ in which a Minnesota prohibition on judicial candidates' speech that announces "their views on disputed legal and political issues" was held unconstitutional,¹²² special interest groups in Indiana began sending judicial candidate questionnaires to gauge candidates' views on a variety of controversial issues.¹²³ In response, the CJQ issued a preliminary advisory opinion stating that judicial "candidates are permitted under the first amendment to state their general views about disputed social and legal issues"¹²⁴ but "[a] candidate's statement must not be mutually exclusive with a pledge to be faithful to the law and to judge without partiality."¹²⁵ In fact, the CJQ instructed in the opinion that a judicial candidate can make an "amorphous" statement such as "tough on crime" or even "broad statements relating to the candidate's position on disputed social and legal issues."¹²⁶

CJQ's Advisory Opinion on Canon 5(A)(3)(d)(i) and (ii) states that application of the Canon will depend upon the CJQ's ad hoc analysis and advice each time a question about a particular candidate's conduct arises. *Id.*

¹¹⁷ IND. JUD. NOMINATING COMMISSION/IND. COMMISSION ON JUD. QUALIFICATIONS, FISCAL YEAR 2005-2006, at 2, available at <http://www.in.gov/judiciary/jud-qual/docs/2005-2006QCfisYrReport.pdf> (last visited Feb. 1, 2007). The report does not detail the number of complaints that stemmed from capital cases.

¹¹⁸ *Id.*

¹¹⁹ *Id.* Some of the citations addressed more than one violation.

¹²⁰ See, e.g., *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997) (publicly reprimanding judicial candidate for campaign statements about potential rulings in criminal cases); *In re Spencer*, 759 N.E.2d 1064, 1065 (Ind. 2001) (publicly reprimanding judicial candidate for running campaign advertisements promising to send more child molesters, burglars, and drug dealers to jail).

¹²¹ 536 U.S. 765 (2002).

¹²² *Id.* at 788

¹²³ See, e.g., Ind. Right to Life Judicial Candidate Questionnaire, available at <http://www.npr.org/documents/2006/oct/judicial/indiana.pdf> (last visited Feb. 1, 2007).

¹²⁴ Ind. Comm. on Jud. Qualifications, Preliminary Advisory Opinion, #1-02, at 2, available at <http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007).

¹²⁵ *Id.* at 3.

¹²⁶ *Id.* at 3.

However, as explained above, the CJQ and Indiana Disciplinary Commission are currently enjoined from enforcing Canon 5(A)(3)(d)(i) and (ii).¹²⁷ The District Court for the Northern District of Indiana criticized Canon 5, in part, based on the Advisory Opinion's lack of guidance on the issue of what is and is not permitted under the Canon, as well as the Advisory Opinion's conclusion that many issues about campaign conduct will require ad hoc analysis and judicial candidates should contact the CJQ in order to determine what is and is not permitted.¹²⁸

Regardless of the federal court ruling, candidate questionnaires permit special interest groups to base its public support or opposition to the judge's candidacy on the answers to these questions. This process not only influences the selection of judges but also puts the judge's impartiality in question by giving the appearance that the judge has a predetermined view of an issue that may come before the court. We could only locate a candidate questionnaire addressing an issue other than the death penalty, but special interest groups are free to pose questions regarding the death penalty to judges. Regardless of the content of the questionnaires, however, the answering of these and other "disputed" issue questions can give the appearance that the judge is making commitments with respect to certain cases and/or issues before the facts of the case have been presented to the judge.¹²⁹

In at least one Indiana case, it appears that politics may have influenced a judge's decision in a capital case. Three weeks before sentencing, Judge Thomas Newman, Jr., learned that he would face opposition in the 1994 Democratic Party primary elections.¹³⁰ Despite the jury's 12-0 vote against the death penalty, Judge Newman overrode the jury's determination and imposed a death sentence against Benny Saylor.¹³¹ Judge Newman referenced the case in his campaign, using the campaign slogan, "A Tough Judge for Tough Times" and stating in a television advertisement that he had sentenced Mr. Saylor to death.¹³² In discussing the case and his decision to override the jury's decision, Judge Newman stated that "[i]t's a hard call. . . [jurors] do speak the conscience of the community . . . [b]ut they're only 12 people, and my community is 180,000 people."¹³³

This recommendation speaks against "prejudgment" of capital cases, which operates to disqualify only in extreme cases. For example, when confronted squarely with a claim brought by a county prosecutor that a judge should recuse himself from a death penalty case due the judge's alleged bias against imposition of the death penalty, the Indiana Supreme Court examined the issues before it and concluded that (1) prior rulings finding the death penalty statute unconstitutional did not support a rational inference of prejudice;

¹²⁷ See *supra* note 115 and accompanying text.

¹²⁸ *Ind. Right to Life, Inc. v. Shepard*, No. 4:04-CV-0071 at 21, 2006 U.S. Dist. LEXIS (N.D. Ind. Nov. 14, 2006) (*citing* Ind. Comm. on Jud. Qualifications, Preliminary Advisory Opinion, #1-02, at 3, *available at* <http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf> (last visited Feb. 1, 2007)).

¹²⁹ *Id.* at 3.

¹³⁰ Steve Mills, *In Death Cases, Jurors Don't Always Prevail*, CHICAGO TRIB., Dec. 28, 2000, at 1.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

(2) public comments regarding the necessity of extreme care in the administration of the death penalty did not evince a showing that the judge would not follow the law; and (3) the judge's representation of capitally charged defendants before taking the bench did not support a rational inference of bias involving the death penalty.¹³⁴

Based on this information, Indiana has made efforts to determine the appropriateness of comments made by judges and judicial candidates on prospective issues that may come before the court. Moreover, it appears that the State of Indiana has taken at least some steps to preclude judges who make prejudgments about prospective decisions in capital cases from presiding over capital cases or from reviewing death penalty decisions in the jurisdiction. However, because the *Right to Life* case currently enjoins enforcement of Canon 5A(d)(3)(i) and (ii) and because there is at least one example where the Indiana Supreme Court appears not to have sanctioned a clear example of abuse, the State of Indiana is only in partial compliance with Recommendation #2.

C. Recommendation # 3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

- a. **Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.**
- b. **Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.**
- c. **Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.**

We did not obtain sufficient information to assess the role of bar associations and community leaders in fulfilling the requirements of Recommendation #3a. We did, however, review the ballot sent to Indiana State Bar Association members to assess support for the retention of Justice of the Indiana Supreme Court or judges on the Court of Appeals. That ballot simply asked whether each sitting judge should be retained and did not ask any specific questions about views or positions on any issue.¹³⁵ Because state trial court judges are elected in Indiana, Recommendations #3b & c are not applicable to these positions.

¹³⁴ See *Voss v. State*, 856 N.E.2d 1211, 1217-1219 (Ind. 2006).

¹³⁵ Indiana State Bar Association, *Judges Receive ‘Yes’ Votes From Bar Members*, Sept. 25, 2006, available at <http://www.indianadecisions.com/2006retentionballot/#poll> (last visited Dec. 6, 2006).

As stated above, special interest groups in Indiana are using judicial candidate questionnaires to assess the views of judicial candidates on a variety of controversial issues.¹³⁶ Although the Chief Justice and CJQ are defending these canons against constitutional attack, the responses of bar associations and community leaders in Indiana regarding these questionnaires or any other questioning of judicial appointment candidates on controversial issues that may come before the court, including the percentage of capital cases in which they have imposed the death penalty, appears not to be especially vocal or organized.

The Indiana Commission on Judicial Qualifications has provided a framework against attacks on the judiciary that undermine its independence. Despite this framework, we were unable to obtain sufficient information assessing the role of bar associations and other organizations' public opposition to the questioning of judicial candidates, including incumbent judges, on their views regarding the imposition of the death penalty. It is therefore unclear if the State of Indiana is in compliance with recommendation #3.

D. Recommendation # 4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

The Indiana Rules of Professional Conduct state that “[a] lawyer shall provide competent representation to a client.”¹³⁷ If a judge has knowledge that a lawyer’s actions are ineffective and have violated the Rules of Professional Conduct “that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness,” the judge must inform the appropriate authority.¹³⁸ The Indiana Code of Judicial Conduct does not specifically mention the appropriate course of action a judge should take if confronted with ineffective lawyering, but a written complaint addressing ineffective lawyering can be filed by a member of the public, a member of the Indiana bar, a member of the Indiana Supreme Court Disciplinary Commission, or a bar association.¹³⁹ Upon receiving an ineffective lawyering complaint, the Indiana Supreme Court can strike a pleading filed by the defense lawyer, remove him/her as counsel from the case, and/or appoint new counsel.¹⁴⁰ The Court can also suspend the ineffective lawyer from the practice of law.¹⁴¹

¹³⁶ See *supra* note 97 and accompanying text.

¹³⁷ IND. RULES OF PROF'L CONDUCT R. 1.1 (2007).

¹³⁸ IND. CODE OF JUD. CONDUCT, CANON 3D(2).

¹³⁹ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 23, § 10(a) (2007).

¹⁴⁰ See, e.g., *In re Sexson*, 666 N.E.2d 402, 403 (Ind. 1996).

¹⁴¹ *Id.* at 404. In *Matter of Sexson*, defense counsel representing a death-sentenced inmate on appeal was provided three continuances totaling 11 months; billed the county approximately \$53,000; did not make an attempt to reimburse the county for \$40,743.50 collected in the case; had been suspended in a prior case for conflict of interest; and filed a twenty-page appeal brief raising five claims. *Id.* The Indiana Supreme Court suspended the attorney for six months. *Id.*

Additionally, Indiana courts are required under Criminal Rule 24 to monitor the workload of attorneys appointed to represent individuals in capital cases.¹⁴² Specifically, the judge cannot make “an appointment of counsel in a capital case without assessing the impact of the appointment on the attorney’s workload.”¹⁴³ The appointed attorney also should not “accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.”¹⁴⁴ Indeed, the Indiana Supreme Court has recognized that:

“Courts cannot be expected to police *sua sponte* the caseloads of the counsel appearing before them. It is incumbent upon defense counsel to raise any issue presented by counsel’s caseload in excess of the limits laid out in the rule [Criminal Rule 24].”¹⁴⁵

Accordingly, the Court emphasized that the Criminal Rule 24 workload requirements are “self-enforcing” in that the State can refuse to reimburse counties for attorney expenses for failing to comply with the Rule’s requirements.¹⁴⁶

While it is clear that ineffective defense lawyering exists within the State of Indiana’s death penalty system and that there is a framework in place for judicial monitoring of ineffective lawyering, we were unable to assess whether judges are doing all within their power to remedy the harm caused by these acts and prevent harm from occurring in the future. We are, therefore, unable to assess whether the State of Indiana is in compliance with Recommendation #4.

E. Recommendation # 5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

The Indiana Code of Judicial Conduct does not explicitly mention the appropriate course of action that a judge should take when confronted with prosecutorial misconduct, but it does require judges to “take appropriate action” when they receive information indicating a “substantial likelihood” that an attorney has committed a violation of the Indiana Rules of Professional Conduct.¹⁴⁷ Appropriate action can include directly communicating with “the lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency.”¹⁴⁸ Additionally, a judge can file a written complaint addressing prosecutorial misconduct which can be filed by a member of the public, a member of the Indiana bar, a member of the Indiana

¹⁴² IND. R. CRIM. P. 24(B)(3)(c).

¹⁴³ *Id.*

¹⁴⁴ IND. R. CRIM. P. 24(B)(3)(a).

¹⁴⁵ *Prowell v. State*, 741 N.E.2d 704, 716 (Ind. 2001).

¹⁴⁶ *Id.*

¹⁴⁷ IND. CODE OF JUD. CONDUCT, CANON 3D(2).

¹⁴⁸ IND. CODE OF JUD. CONDUCT, CANON 3D cmt.

Supreme Court Disciplinary Commission, or a Bar Association.¹⁴⁹ If, after investigating the complaint, the prosecutor is found guilty of misconduct, s/he can be permanently disbarred; suspended for an indefinite period of time subject to reinstatement; suspended for a definite period of time not exceed six months, with automatic reinstatement upon satisfying conditions specified in an order by the Indiana Supreme Court; a public reprimand; a private reprimand; or a private administrative admonition.¹⁵⁰

The Indiana Supreme Court also has addressed the judge's duty to "control the proceedings by taking responsible steps to insure that proper discipline and order exist in the courtroom."¹⁵¹ This duty to insure discipline "extends to any potentially disruptive behavior by parties or attorneys involved in the case."¹⁵² For example, if a prosecutor's closing statement constitutes misconduct, the defendant should object to the statement, request an admonishment from the judge, and if further relief is needed, move for a mistrial.¹⁵³ However, the court may also admonish the prosecutor on its own.¹⁵⁴

When reviewing prosecutorial misconduct, the court must determine if there was misconduct by the prosecutor and whether the misconduct, under the circumstances, placed the defendant in a position of "grave peril" to which the defendant should not have been subjected.¹⁵⁵ A determination of whether the prosecutor's conduct constituted grave peril involves an assessment of the "probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct."¹⁵⁶ Should the court determine that the prosecutor's conduct subjected the defendant to grave peril, the court can declare a mistrial.¹⁵⁷ However, a mistrial is "an extreme remedy in a criminal case which should be granted only when nothing else can rectify a situation."¹⁵⁸ Usually, a court's admonishment to the jury is deemed to be adequate to cure prosecutorial misconduct.¹⁵⁹

Because we were unable to ascertain the scope of the measures taken by judges to remedy the harm caused by prosecutorial misconduct or to prevent harm from occurring in the future, we are unable to assess the State of Indiana's compliance with Recommendation #5.

F. Recommendation # 6

¹⁴⁹ IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 23, § 10(a) (2007). Rule 23 refers to disciplinary proceedings for all attorneys, including prosecutors. IND. RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 23.

¹⁵⁰ IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 23, § 3(a) (2007).

¹⁵¹ *Marbley v. State*, 461 N.E.2d 1102, 1107 (Ind. 1984); *see also Taylor v. State*, 602 N.E.2d 1056, 1059 (Ind. Ct. App. 3d Dist. 1992) (stating that trial judge has responsibility to remain impartial).

¹⁵² *Games v. State*, 535 N.E.2d 530, 539 (Ind. 1989).

¹⁵³ *See Phillips v. State*, 719 N.E.2d 809, 811 (Ind. 1999).

¹⁵⁴ *Id.*

¹⁵⁵ *Wisehart v. State*, 693 N.E.2d 23, 57 (Ind. 1998).

¹⁵⁶ *Id.*; *see also Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006).

¹⁵⁷ *See Owens v. State*, 714 N.E.2d 250, 252 (Ind. Ct. App. 1999).

¹⁵⁸ *Schlomer v. State*, 580 N.E.2d 950, 955 (Ind. 1991).

¹⁵⁹ *Id.* at 956; *see also Underwood v. State*, 535 N.E.2d 507, 518 (Ind. 1989).

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Neither the Indiana Code, the Indiana Rules of Criminal Procedure, nor the Indiana Code of Judicial Conduct explicitly require judges to ensure that defendants are provided with full discovery in criminal cases, including capital cases. Canon 3 of the Judicial Code of Conduct requires judges to be “faithful to the law,” however, and to perform their judicial duties fairly and impartially,¹⁶⁰ which would seem to include enforcing existing discovery rules and ensuring that capital defendants are provided with full discovery.¹⁶¹

Additionally, the Indiana Supreme Court has recognized that the “key to the entire principle of discovery in criminal cases is that of reciprocity, the balancing of the right to discovery on both sides.”¹⁶² Accordingly, it is well recognized that “[a] trial court has broad discretion with regard to rulings on discovery matters based upon the court’s duties to promote discovery of the truth and to guide and control the proceedings.”¹⁶³ It is left to the trial judge to decide if there has been a failure to comply with the discovery rules and how to best remedy any non-compliance.¹⁶⁴ When fashioning remedies for non-compliance with discovery rules, the courts have determined that “a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial.”¹⁶⁵ In recent years, however, the Indiana Supreme Court has taken a strong stance against the untimely disclosure of evidence by the prosecution, emphasizing that “a prophylactic rule requiring reversal may be required if recurring abuses occur.”¹⁶⁶

The State of Indiana has a framework in place to ensure that defendants are provided full discovery in capital cases. Moreover, it appears that judges are generally enforcing the requirements that ensure full discovery in capital cases, although this is not always the case.¹⁶⁷ Therefore, the State of Indiana is in partial compliance with Recommendation #6.

¹⁶⁰ IND. CODE OF JUD. CONDUCT, CANON 3B(2).

¹⁶¹ By way of example, in the non-capital criminal case of *Jester v. State*, the Indiana Supreme Court ruled that a trial court’s own motion declaring a mistrial was proper when during the trial it became evident that the State had failed to turn over four written statements of witnesses to the defendant pursuant to an order. *Jester v. State*, 551 N.E.2d 840, 842 (Ind. 1990).

¹⁶² *State ex rel. Keller v. Criminal Court of Marion County, Division IV*, 317 N.E.2d 433, 428 (Ind. 1974).

¹⁶³ *Miller v. State*, 825 N.E.2d 884, 888 (Ind. Ct. App. 2005).

¹⁶⁴ *See Armstrong v. State*, 499 N.E.2d 189, 191 (Ind. 1986).

¹⁶⁵ *Id.*; *see also Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999) (stating that generally the proper remedy for a discovery violation is a continuance).

¹⁶⁶ *Lowrimore v. State*, 728 N.E.2d 860, 867 (Ind. 2000).

¹⁶⁷ *See, e.g., Dye v. State*, 717 N.E.2d 5 (Ind. 1999).

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there were systematic racial disparities in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that states identify the various ways in which race infects the administration of the death penalty and that they devise solutions to eliminate discriminatory practices.

¹ 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp*.² Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth (the Baldus study), McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.³ The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.⁴

A. *The Indiana Supreme Court Race and Gender Fairness Commission*

The Supreme Court created its Race and Gender Fairness Commission in 1999 to "study the status of race and gender fairness in Indiana's justice system and investigate ways to improve race and gender fairness in the courts, legal system, and state and local government, as well as among legal service providers and public organizations."⁵ As part of these efforts, the Indiana Supreme Court Race and Gender Fairness Commission (Commission) issued a report in 2002 presenting its findings regarding race and gender issues, including its recommendations for strategies to eliminate racial discrimination in the judicial system.⁶

While the report looked at race and gender issues throughout the entire legal system, several subcommittees looked at issues relevant to the criminal justice system. For example, the Treatment by the Courts Subcommittee examined how ethnic and racial minorities are treated in the courtroom and within the legal system generally, the Criminal and Juvenile Justice Subcommittee examined the effects of race and ethnicity in the criminal justice and correctional system, and the Language and Cultural Barriers Subcommittee examined issues of language and cultural barriers in the legal system.⁷

The Treatment by the Courts Subcommittee was charged with examining "how ethnic and racial minorities. . . are treated both in the courtroom and within the legal system in general."⁸ The subcommittee made six recommendations in relation to the criminal

² *Id.*

³ *Id.* at 291-92.

⁴ *Id.* at 297.

⁵ See Indiana Courts, Commission on Race and Gender Fairness, About, at <http://www.in.gov/judiciary/fairness/about.html> (last visited Feb. 11, 2007).

⁶ IND. SUP. CT. COMM'N ON RACE AND GENDER FAIRNESS, HONORED TO SERVE (2002) [hereinafter HONORED TO SERVE], available at <http://www.in.gov/judiciary/fairness/pubs/fairness-final-report.pdf> (last visited Feb. 11, 2007).

⁷ *Id.* at 6, 14, 20.

⁸ *Id.* at 6.

justice and correctional systems, one of which is relevant to Indiana's death penalty system:

That the Prosecuting Attorneys Council and the Public Defender Council be encouraged to include one session of programming a year promoting awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness to underscore that fairness and equitable treatment is a foremost concern in the justice system of a just society.⁹

The Criminal and Juvenile Justice Subcommittee examined the "effects of race, ethnicity and gender in the criminal justice and correctional system. In doing so, the subcommittee focused on information reflecting perceptions gathered in public forums, surveys and focus groups, and on statistics kept by government agencies regarding the correctional system."¹⁰ The subcommittee made seven recommendations in relation to the criminal justice and correctional systems, three of which potentially are relevant to Indiana's death penalty system:

- (1) That a Blue Ribbon Panel be convened with representation from all branches and levels of government, ethnic and racial communities, including academics, law enforcement and medical and mental health professionals to review the sentencing structure and offense classifications that appear to have a disparate impact on ethnic minorities and females. The Panel should consider whether changes in the current system are warranted and, if so, should suggest modifications in the classification of offenses and range of sentences that could result in possible legislation;
- (2) That bar associations, prosecutors, public defenders, and law enforcement be encouraged to educate the public about the difference between the functions of the judiciary, attorneys, and law enforcement in the criminal justice system; and
- (3) That trial courts throughout Indiana presiding over criminal proceedings be ordered to keep (a) statistics of the race, gender, and ethnicity of criminal defendants, the offense(s) charged, and the amount of bail, if any, and (2) statistics of the race, gender, and ethnicity of persons convicted of crimes, the offense(s) on which they were found guilty, the results of any plea bargain and sentence or probation, if any. These statistics should be submitted quarterly to the Office of State Court Administration beginning in July 2003.¹¹

The Language and Cultural Barriers Subcommittee was charged with examining "issues of language and cultural barriers in the legal system, including issues that newcomers to the United States and persons with limited English proficiency face with law enforcement and the correctional system."¹² Of the subcommittee's six recommendations, one

⁹ *Id.* at 9.

¹⁰ *Id.* at 20.

¹¹ *Id.* at 22-24.

¹² *Id.* at 14.

potentially is relevant to Indiana's capital system: "[t]hat law enforcement and prosecutors' offices in Indiana be encouraged to comply with international treaties regarding notification to foreign consulates when foreign nationals are arrested or detained."¹³

The number of recommendations in the Commission's report that have been or will be effectively developed and implemented is unclear.

B. The Indiana Criminal Law Study Commission

In 2000, the late Governor Frank O'Bannon and the Legislative Council of the Indiana General Assembly called upon the Indiana Criminal Law Study Commission (ICLSC) to review the State's administration of the death penalty for the first time since its reinstatement in 1977.¹⁴ The ICLSC undertook a study that examined six areas of concern, including whether Indiana imposes the death penalty in a race-neutral manner.¹⁵

The study of the race-neutrality of Indiana's death penalty was to be conducted in two phases. The first phase focused on 224 murder cases in which offenders who committed their crimes between July 1, 1993 (the effective date of Indiana's life-without-parole statute), and August 10, 2001 (the cut-off date for inclusion in the study), received a determinate sentence of years, life without parole, or the death penalty.¹⁶

The findings of the study's first phase broadly describe general sentencing outcomes and do not specifically spotlight death sentences. Nevertheless, the findings reveal that white offenders received harsher sentences for murder than offenders belonging to racial or ethnic minority groups. The report concluded that this disparity may be related to the combination of two factors: (1) the majority of murders in Indiana are intra-racial; and (2) the victim's race, more than the offender's race, influences the severity of sentencing.¹⁷ "When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders."¹⁸ African-

¹³ *Id.* at 18.

¹⁴ Letter from Governor Frank O'Bannon to Comm'n Chairman William E. Alexa (Mar. 9, 2000); (LCR)-OO-1 § 2(13) (Ind. 2000).

¹⁵ THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION 3 (2002) [hereinafter FINDINGS], available at http://www.in.gov/cji/special-initiatives/law_book.pdf (last visited Feb. 11, 2007).

¹⁶ Mary Ziembra-Davis et al., *Sentencing Outcomes for Murder in Indiana: Initial Findings*, in FINDINGS, *supra* note 15, at 123A, 123B-123C.

¹⁷ *Id.* at 123J.

¹⁸ *Id.* Although focused on post-conviction sentencing, the study refers to a separate unpublished report on the relationship between the race of the victim and the State's decision to charge the death penalty in Marion County, Indiana between 1979 and 1989. *Id.* at 123B n.3. This report found that the State was 3.7 times more likely to seek the death penalty in cases involving white victims than in cases involving black victims. *Id.*

Americans remain, however, greatly over-represented in the class of offenders receiving the death penalty when compared to their representation in the population at-large.¹⁹

Indiana launched the second phase of its capital sentencing review in 2003. In this more in-depth phase, the ICLSC collected data on the murder cases of (1) all individuals who were sentenced to death since 1977; (2) all individuals who were sentenced to life in prison without parole since 1993; and (3) a random sample of individuals who were sentenced to determinate, fixed-terms of incarceration between July 1, 1990, and December 31, 2002.²⁰ The study is supposed to consider more than 200 variables in sentencing, including legal variables such as manner of homicide and number of victims, and extralegal variables such as race of the offender and race of the victim, to predict who gets what type of sentence for murder in Indiana and why.²¹ As of January 2007, however, only a preliminary description of the study population, victims, and the context in which murders occur has been published. A substantive report on the factors influencing sentencing outcomes has yet to be released.²²

¹⁹ INDIANA CRIMINAL JUSTICE INSTITUTE, *THE SOCIAL ECOLOGY OF MURDER IN INDIANA* 12 (2004), available *at* <http://www.in.gov/cji/special-initiatives/The%20Social%20Ecology%20of%20Murder%20in%20Indiana.pdf> (last visited Feb. 11, 2007); *see also* NAACP LEGAL DEFENSE AND EDUCATION FUND, *DEATH ROW U.S.A.* 27 (2006) (noting that thirty-three percent of inmates on Indiana's death row are African-American).

²⁰ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 7.

²¹ *Id.*

²² *See* Indiana Criminal Justice Institute, Divisions: Research & Planning, *at* <http://www.in.gov/cji/research> (last visited Feb. 11, 2007).

II. ANALYSIS

A. Recommendation #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

The Supreme Court created its Race and Gender Fairness Commission (Commission) in 1999 to “study the status of race and gender fairness in Indiana's justice system and investigate ways to improve race and gender fairness in the courts, legal system, and state and local government, as well as among legal service providers and public organizations.”²³ In 2002, the Commission issued a report presenting its findings regarding race and gender issues, including recommendations for strategies to eliminate racial discrimination in the judicial system.²⁴ The report presented recommendations for addressing the problems raised in the report, including that:

- (1) The Prosecuting Attorneys Council and the Public Defender Council be encouraged to include one session of programming a year promoting awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness;²⁵
- (2) A Blue Ribbon Panel be convened with representation from all branches and levels of government, ethnic and racial communities, including academics, law enforcement and medical and mental health professionals to review the sentencing structure and offense classifications that appear to have a disparate impact on ethnic minorities and females; and
- (3) Trial courts throughout Indiana presiding over criminal proceedings be ordered to keep (a) statistics of the race, gender, and ethnicity of criminal defendants, the offense(s) charged and the amount of bail, if any, and (2) statistics of the race, gender, and ethnicity of persons convicted of crimes, the offense(s) on which they were found guilty, the results of any plea bargain and sentence or probation, if any. These statistics should be submitted quarterly to the Office of State Court Administration beginning in July 2003.²⁶

The number of recommendations in the Commission's report that have been or will be implemented is unclear. It does not appear that the three recommendations listed above have been implemented.

In 2001, the Indiana Criminal Law Study Commission (ICLSC), a commission comprised of individuals appointed by the Governor to review Indiana's criminal procedure, monitor

²³ See Indiana Courts, Commission on Race and Gender Fairness, About, at <http://www.in.gov/judiciary/fairness/about.html> (last visited Feb. 11, 2007).

²⁴ HONORED TO SERVE, *supra* note 6.

²⁵ *Id.* at 9.

²⁶ *Id.* at 22-24.

its penal codes, and draft recommendations to ensure the just and efficient operation of the criminal justice system, began studying the application of Indiana's capital sentencing law.²⁷ During the first phase of the study, the Indiana Criminal Justice Institute (Institute) staffed the ICLSC and studied six key issues in relation to the capital sentencing law, including race neutrality.²⁸ The ICLSC's final report was issued in January 2002.²⁹ Section V of the report, "Sentencing Outcomes for Murder in Indiana: Initial Findings," specifically examined the issue of whether Indiana imposes capital sentencing in a race neutral manner by studying the cases of 224 individuals who received varying sentences for murder³⁰ and found that, among other things: (1) the majority of murders in Indiana are intra-racial; and (2) the victim's race, more than the offender's race, influences the severity of sentencing.³¹

The Institute subsequently launched, but has not released, a second phase of the study, *Indiana's Murder Sentencing Study*, to continue the work begun in "Sentencing Outcomes for Murder in Indiana."³² The study is to examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim.³³ The results of the study are supposed to be distributed in a series of publications that will be shared with the Governor, the ICLSC, Indiana's Sentencing Policy Study Committee,³⁴ other policymakers, and criminal justice practitioners.³⁵

In sum, while the State of Indiana has begun to investigate the impact of racial discrimination in its criminal justice system, it has not released the more comprehensive study designed to determine whether racial bias exists in Indiana's capital punishment system. In addition, the State of Indiana needs to develop and implement strategies that strive to eliminate racial discrimination. Consequently, the State of Indiana is only in partial compliance with Recommendation #1.

Based on this information, the Indiana Death Penalty Assessment Team recommends that the *Murder Sentencing Study* be completed and released as quickly as possible to

²⁷ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 6; *see also* Indiana Criminal Justice Institute, Special Initiatives, Indiana Criminal Law Study Commission, at <http://www.in.gov/cji/special-initiatives/clsc.html> (last visited Feb. 11, 2007).

²⁸ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 6.

²⁹ FINDINGS, *supra* note 15.

³⁰ *Id.* at 123D.

³¹ *Id.* at 123J.

³² INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 7.

³³ *Id.*

³⁴ Indiana's Sentencing Policy Study Committee is a body that was established by the legislature in 2003 for a number of purposes, including recommending structures to be used by a sentencing court in determining the most appropriate sentence to be imposed in a criminal case, identifying critical problems in and recommending strategies to solve those problems for the criminal justice and corrections systems, and proposing plans, programs and legislation for improving the effectiveness of the criminal justice and corrections systems. *Id.*

³⁵ *Id.*

determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in Indiana's death penalty system.

B. Recommendation #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

The State of Indiana appears to recognize the importance of collecting and maintaining data on criminal cases, but it is unclear whether the State of Indiana actually is collecting and maintaining data in all of the areas listed above.

In 2002, the Indiana Supreme Court Commission on Race and Gender Fairness recommended that trial courts presiding over criminal proceedings be ordered to keep statistics regarding (1) the race, gender and ethnicity of criminal defendants, the offenses charged and the amount of bail; and (2) the race, gender and ethnicity of persons convicted of crimes, the offenses of which they were found guilty, and the results of any plea bargain, sentence or probation.³⁶ The report further recommended that these statistics be submitted quarterly to the Office of State Court Administration.³⁷ Despite the recognition of the importance of this sort of data, however, it does not appear that this recommendation has been fully implemented. In 2004, Chief Justice Shepard stated that while the Indiana Supreme Court supported the plan to create a framework to keep more detailed race and gender statistics in the criminal justice system, "much work remains to be done in accurately documenting the status of race and gender fairness in the state's justice system."³⁸

While this data framework has yet to be implemented, some data collection and maintenance efforts do appear to be moving forward. As discussed in Recommendation #1, the Institute has launched, but not yet released, *Indiana's Murder Sentencing Study*, which was designed to continue the work started in the ICLSC's 2002 study, *Sentencing Outcomes for Murder in Indiana*.³⁹ The unreleased study is to examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim.⁴⁰ We were unable to determine how close this study is to being completed.

³⁶ HONORED TO SERVE, *supra* note 6, at 23.

³⁷ *Id.*

³⁸ Press Release, Indiana Courts, Effort to Reduce Bias in Court System Moves Ahead (Mar. 26, 2004), at <http://www.in.gov/judiciary/press/2004/0326.html> (last visited Feb. 11, 2007).

³⁹ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 7.

⁴⁰ *Id.*

In addition, the Indiana Department of Correction (IDOC) maintains an Offender Information System database which contains files on all current inmates, including information regarding convictions, sentences imposed, race and gender of the prisoner, date and county of conviction, case number, and projected release date, if any.⁴¹ Additionally, the IDOC releases bi-annual “FACT Cards” which contain aggregated statistics regarding the offender population’s classification level (minimum, medium, maximum, etc.), sex, race/ethnicity, average age, sentence length, and type of offense.⁴²

Furthermore, the Prosecuting Attorney for Clark County maintains a website that contains information about every person sentenced to death in Indiana.⁴³ This website includes offender name, race, gender, date of birth, date of offense, date of sentence, name of the trial judge, county of offense and county of trial, aggravating and mitigating circumstances, and information about various stages of the trial and appellate process.⁴⁴

While Indiana does collect some data, currently available resources do not collect and maintain all of the data listed above for all potentially capital cases, and it is unclear whether the Institute’s *Murder Sentencing Study* will do so. Consequently, it is unclear whether the State of Indiana is in compliance with Recommendation #2.

C. Recommendation #3

Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.

It is unclear whether the State of Indiana is currently collecting and reviewing the data sought as part of one “non-predictive” study already released⁴⁵ or is carrying out any additional studies that would help determine discriminatory impact on capital cases.

As discussed in Recommendation #1, the ICLSC began studying the application of Indiana’s capital sentencing law in 2001.⁴⁶ During the first phase of the study, the

⁴¹ Indiana Department of Correction, Offender Search, *available at* <http://www.in.gov/apps/indcorrection/ofs/> (last visited Feb. 11, 2007); *see also* IND. ADMIN. CODE tit. 210, r. 1-6-2 (2006) (noting that IDOC may collect and maintain offender or juvenile personal information “that is relevant and necessary to accomplish the statutory purposes of the agency”); *Parker v. State*, 822 N.E. 2d 285, 287 (Ind. Ct. App. 2005); *Blackmon v. Duckworth*, 675 N.E. 2d 349, 350 (Ind. Ct. App. 1996).

⁴² *See, e.g.*, Indiana Department of Correction, FACT Card (Jul. 1, 2006), *available at* <http://www.in.gov/indcorrection/pdf/stats/jul06.pdf> (last visited Feb. 11, 2007). FACT Cards of this type have been released by the IDOC each January and July since at least 1997 and are available at Indiana Department of Correction, Frequently Asked Questions, <http://www.in.gov/indcorrection/facts.htm> (last visited Feb. 11, 2007).

⁴³ Clark County Prosecuting Attorney, The Death Penalty, Indiana Death Row 1977-2006, *available at* <http://www.clarkprosecutor.org/html/death/rowold.htm> (last visited Feb. 11, 2007).

⁴⁴ *Id.*

⁴⁵ *See, e.g.*, FINDINGS, *supra* note 15, at 123.

Institute assisted the ICLSC by studying six key issues in relation to the capital sentencing law, one of which was race neutrality.⁴⁷ The ICLSC's final report was issued in January 2002⁴⁸ and Section V of the report, "Sentencing Outcomes for Murder in Indiana: Initial Findings," specifically examined the issue of whether Indiana imposes capital sentencing in a race neutral manner by studying the cases of 224 individuals who received varying sentences for murder.⁴⁹ The study made several "non-predictive" observations, including that:

- (1) The majority of murders in Indiana since July 1, 1993 have been intraracial;
- (2) Since July 1, 1993, White offenders have received more severe sentences for murder than Non-White offenders; and
- (3) Although sentencing outcomes for murders committed since July 1, 1993 appear to be less severe for Non-White offenders than for White offenders, this observation may have more to do with the victim's race than with the offender's race. When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders.⁵⁰

Despite making these observations, the study indicated that further research was necessary to explain the findings. The Institute subsequently launched, but has not released, a second study, *Indiana's Murder Sentencing Study*.⁵¹ This study was designed to examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim.⁵² We were unable to determine how close this study is to being completed or when it is scheduled to be released.

As a result, it is unclear whether the State of Indiana is in compliance with Recommendation #3.

D. Recommendation #4

Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

⁴⁶ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 6; *see also* Indiana Criminal Justice Institute, Special Initiatives, Indiana Criminal Law Study Commission, at <http://www.in.gov/cji/special-initiatives/clsc.html> (last visited Feb. 11, 2007).

⁴⁷ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 6.

⁴⁸ FINDINGS, *supra* note 15.

⁴⁹ *Id.* at 123D.

⁵⁰ *Id.* at 123J.

⁵¹ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 7.

⁵² *Id.*

In 2004, in response to the Indiana Supreme Court Commission on Race and Gender Fairness' 29 recommendations designed to increase race and gender fairness in Indiana's court system, Indiana Supreme Court Chief Justice Shepard stated that "much work remains to be done in accurately documenting the status of race and gender fairness in the state's justice system and in reducing any barriers to full participation in the legal system, whether they are real or perceived."⁵³

Race does appear to play a role in Indiana's capital punishment process. The ICLSC's 2002 study of Indiana's death penalty examined the issue of whether Indiana imposes capital sentencing in a race neutral manner and found that

- (1) Since July 1, 1993, White offenders have received more severe sentences for murder than Non-White offenders; and
- (2) When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders.⁵⁴

The Institute subsequently launched a second phase of the study, *Indiana's Murder Sentencing Study*, to continue the work begun in "Sentencing Outcomes for Murder in Indiana."⁵⁵ The study will examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim.⁵⁶ It is unclear when and/or if this study will be released.

Despite the appearance of bias in Indiana's death penalty system, it does not appear that the State of Indiana currently is developing remedial and preventative strategies. Thus, it appears that the State of Indiana fails to comply with Recommendation #4.

E. Recommendation #5

Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

⁵³ Press Release, Indiana Courts, Effort to Reduce Bias in Court System Moves Ahead (Mar. 26, 2004), at <http://www.in.gov/judiciary/press/2004/0326.html> (last visited Feb. 11, 2007).

⁵⁴ FINDINGS, *supra* note 15, at 123J.

⁵⁵ INDIANA CRIMINAL JUSTICE INSTITUTE, *supra* note 19, at 7.

⁵⁶ *Id.*

The State of Indiana has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. Therefore, the State of Indiana is not in compliance with Recommendation #5.

It should be noted that during the 2000-2001 legislative session of the Indiana General Assembly, House Bill No. 1203 and Senate Bill No. 283 were introduced to amend the Indiana Code to provide that if: (1) a defendant is charged with a murder for which the state seeks the death penalty; (2) the defendant makes a *prima facie* showing that racial considerations played a part in the state's decision to seek or impose a death sentence; and (3) the state fails to rebut such showing, then the death sentence may not be imposed on the defendant.⁵⁷ Both bills died in committee.⁵⁸

F. Recommendation #6

Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.

In its 2002 report, the Indiana Supreme Court Commission on Race and Gender Fairness included three recommendations for the creation of educational programs to promote “awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness” in the justice system.⁵⁹ Chief Justice Shepard indicated in 2004 that the Indiana Supreme Court supported recommendations to increase training on race and gender bias issues for new attorneys and potentially for prosecutors and public defenders.⁶⁰ Other than a 2005 “Diversity Summit” that was designed to “bring together representatives of the judiciary, law schools, bar associations, law enforcement, corrections and other public organizations to discuss pertinent issues affecting race and gender in the legal system today,”⁶¹ however, we have not located any evidence demonstrating that these educational programs have been implemented.

⁵⁷ The Justice Project, State Legislation Results, at http://www.thejusticeproject.org/state/legislation-results.html?bill_status=&chamber=&related_issues=race&related_regions= (last visited Feb. 11, 2007).

⁵⁸ *Id.*

⁵⁹ These recommendations included: (1) that at least one hour of the legal program required for every new attorney contain materials promoting awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness; (2) that at least one session of every educational meeting of the Judicial Conference be devoted to promoting awareness, understanding and sensitivity to these issues; and (3) that the Prosecuting Attorneys Council and the Public Defender Council be encouraged to include one session of programming a year promoting awareness, understanding and sensitivity to these issues. HONORED TO SERVE, *supra* note 6, at 8-9.

⁶⁰ Press Release, Indiana Courts, Effort to Reduce Bias in Court System Moves Ahead (Mar. 26, 2004), at <http://www.in.gov/judiciary/press/2004/0326.html> (last visited Feb. 11, 2007).

⁶¹ Indiana Courts, Commission on Race and Gender Fairness, Projects, at <http://www.in.gov/judiciary/fairness/projects.html> (last visited Feb. 11, 2007).

Furthermore, we have not been able to find evidence that the State of Indiana has provided for sanctions to be implemented in the event a State actor is found to have acted on the basis of race in a capital case.

Each “law enforcement officer”⁶² appointed by the State of Indiana or any of its political subdivisions is statutorily required, within one year of the initial appointment, to complete a minimum basic training course at a training academy authorized by the Indiana Law Enforcement Training Board (ILETB),⁶³ including passing a series of written and practical examinations.⁶⁴ The minimum basic training course consists of 480 hours of classroom and practical training,⁶⁵ and is statutorily required to include a course of study on “cultural diversity awareness.”⁶⁶ The ILEA course schedule involves four hours of instruction in “Cultural Awareness” and ILEA maintains a catalog of video presentations under such subject headings as “Cultural Diversity,” “Minorities,” and “Racial Profiling.”⁶⁷

In addition, the Commission on Accreditation for Law Enforcement Agencies (CALEA) requires certified law enforcement agencies to each establish a written directive that prohibits bias-based profiling and requires training on how to avoid bias-based profiling.⁶⁸ Although eight law enforcement agencies in the State of Indiana are CALEA accredited,⁶⁹ many are not.

⁶² A “law enforcement officer” is defined as “an appointed officer or employee hired by and on the payroll of the state, any of the state’s political subdivisions, or a public or private college or university whose board of trustees has established a police department . . . who is granted lawful authority to enforce all or some of the penal laws of the state of Indiana and who possesses, with respect to those laws, the power to effect arrests.” IND. CODE § 5-2-1-2(1) (2006).

⁶³ The law enforcement officer must successfully complete the minimum basic training program prescribed by the ILETB in order to be permitted to enforce the laws of the state of Indiana or any political subdivision thereof. IND. CODE § 5-2-1-9(b) (2006); IND. ADMIN. CODE tit. 250, r. 2-2-1 (2006).

⁶⁴ In order to successfully complete the basic training course, the law enforcement officer must obtain a minimum passing score of 75% on all written examinations and a passing score on all practical examinations administered on a percentage or pass/fail basis. IND. ADMIN. CODE tit. 250, r. 2-2-4 (2006).

⁶⁵ IND. ADMIN. CODE tit. 250, r. 2-4-1(1) (2006). However, for towns having no more than one town marshal and two deputies, a “town marshal basic training program” is established with a minimum of 320 hours. *Id.* at § 2-4-1(2) (2006). Training is provided by the Indiana Law Enforcement Academy and its satellite academies, which are governed by the ILETB. *See* Indiana Law Enforcement Academy, About the Academy, at <http://www.in.gov/ilea/about/training.html> (last visited Feb. 11, 2007). A typical course schedule for the regular basic training program provided by the ILEA is available at Indiana Law Enforcement Academy, Course 2006168, available at <http://www.in.gov/ilea/bulletin/2006168R.pdf> (last visited Feb. 11, 2007).

⁶⁶ IND. CODE § 5-2-1-9(a)(4) (2006).

⁶⁷ *See* Indiana Law Enforcement Academy, Video Catalog, at <http://www.in.gov/ilea/video/list.html> (last visited Feb. 11, 2007).

⁶⁸ COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 1-4 (4th ed. 2001) (Standard 1.2.9).

⁶⁹ COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., 2005 ANNUAL REPORT 35 (2005), available at <http://www.calea.org/Online/AnnualReports/2005AnnualRpt.pdf> (last visited Feb. 11, 2007). CALEA-accredited agencies in Indiana include: Anderson Police Department; Brownsburg Metropolitan Police Department; Carmel Metropolitan Police Department; Elkhart County Sheriff’s

Because the State of Indiana has only presented educational programs on eliminating race in the criminal justice system in a limited manner, and because there do not appear to be any mandated state sanctions in the event a State actor is found to have acted on the basis of race in a capital case, the State of Indiana is only in partial compliance with Recommendation #6.

G. Recommendation #7

Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.

The State of Indiana does not require defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases, or to identify biased jurors during *voir dire*.

Rule 24 of the Indiana Rules of Criminal Procedure requires that a judge appoint two qualified attorneys to represent an indigent defendant in a capital case. To be appointed, the attorney must have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.⁷⁰ These training requirements do not apply in cases where counsel is employed at the defendant's expense, however.⁷¹

The Indiana Public Defender Commission has approved numerous courses offered by a variety of organizations to provide training in the defense of capital cases,⁷² but we were unable to determine whether all of these courses included instruction on issues relating to racial discrimination. The Indiana Public Defender Council offers an annual seminar on defense of death penalty and life-without-parole cases which is approved by the Indiana Public Defender Commission,⁷³ but it does not appear that this seminar includes instruction on issues relating to racial discrimination as a routine matter.

Although training for defense lawyers on the issue of race in capital litigation may be available, the State of Indiana does not require defense counsel to participate in training

Department; Evansville Police Department; Fishers Police Department; Kokomo Police Department; and Plainfield Metropolitan Police Department. In addition, the Wayne County Emergency Communications Department has received Communications Accreditation. *Id.* at 38.

⁷⁰ IND. R. CRIM. P. 24(B)(1)(d), (2)(c). Further qualifications for appointment include meeting specified levels of experience in criminal litigation in general and felony jury trials in particular. IND. R. CRIM. P. 24(B)(1)(a)-(b), (2)(a)-(b). To be appointed lead counsel in a capital case, an attorney also must have prior experience as lead or co-counsel in at least one case in which the death penalty was sought. IND. R. CRIM. P. 24(B)(1)(c).

⁷¹ IND. R. CRIM. P. 24(B).

⁷² Indiana Public Defender Commission, Commission Guidelines Related to Capital Cases 3-4, available at <http://www.in.gov/judiciary/pdc/docs/standards/cap.pdf> (last visited Feb. 11, 2007).

⁷³ See Indiana Public Defender Commission, Seminar Calendar, at <http://www.in.gov/pdc/general/calendar.html> (last visited Feb. 11, 2007).

to specifically identify and develop racial discrimination claims in capital cases or to identify biased jurors during *voir dire*. Thus, the State of Indiana is not in compliance with Recommendation #7.

H. Recommendation #8

Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

The “Indiana Pattern Jury Instructions – Criminal” instruct that a jury’s verdict “should be based on the law and the facts as you find them. It should not be based on sympathy or bias.”⁷⁴ The Supreme Court of Indiana has encouraged the use of the pattern jury instructions to avoid debates over semantics,⁷⁵ but also has stated that it has not endorsed the pattern instructions “as correct instructions in every circumstance.”⁷⁶ There is not a pattern jury instruction or case law requiring judges to inform jurors that it is improper to consider any racial factors in their decision making or requiring them to report any evidence of racial discrimination in jury deliberations.

Because consideration of racial factors in the jury’s decision-making process is prohibited only by the non-mandatory pattern jury instruction telling the jury that a verdict should not be based on “sympathy or bias,” the State of Indiana is in partial compliance with the requirements of Recommendation #8.⁷⁷

I. Recommendation #9

Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding

⁷⁴ IND. PATTERN JURY INSTRUCTIONS § 13.15 (2004). This is a general instruction, and is not specific to the sentencing phase of capital cases.

⁷⁵ See *McKinley v. State*, 379 N.E.2d 968, 969 (Ind. 1978) (“[W]e believe that the trial courts would better serve the administration of justice if they would address themselves to a consideration of the pattern criminal instructions which are available to all courts and thereby minimize the discussion of semantics which is present in this type of appeal.”).

⁷⁶ *Bane v. State*, 587 N.E.2d 97, 101 n.1 (Ind. 1992) (“The Indiana Pattern Instructions have been created to provide a guide to judges and counsel. They have not, however, been endorsed by this Court as correct instructions in every circumstance.”); see also *Gravens v. State*, 836 N.E.2d 490, 496 (Ind. Ct. App. 2005) (although the preferred practice is to use the pattern jury instructions, trial courts may properly supplement the pattern jury instruction with extracts from appellate court opinions “[w]here it is necessary to eliminate an ambiguity found in a certain rule of law or legal term of art”).

⁷⁷ There have been allegations that in some cases, racial considerations may have played a role in the jury’s decision making process. In *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), the Supreme Court of Indiana rejected a defendant’s claim for post-conviction relief based upon his allegation that the jury that convicted him was racially biased. An African-American juror testified that the jury foreman became angry with her “for being uncooperative on the issue of the death recommendation” and that the foreman attributed the disagreement to a “race thing.” *Id.* at 269. The Court rejected the defendant’s claim of racial bias, concluding that the defendant had failed to meet his burden to show that he was denied an impartial jury. *Id.* However, the Court upheld a lower court’s ruling that a new penalty phase was warranted due to the deficient performance of defendant’s trial counsel. *Id.* at 267-68.

that the judge’s decision making could be affected by racially discriminatory factors.

Canon 3B(5) of the Indiana Code of Judicial Conduct requires a judge to “perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice based upon race”⁷⁸ Canon 3E(1)(a) further requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including where the judge has a personal bias or prejudice concerning a party or a party’s lawyer[.]”⁷⁹ However, the number of judges, if any, who actually have disqualified themselves due to racial bias or prejudice is unknown.

Based on the FY2006 annual report of the Indiana Judicial Nominating Commission/Indiana Commission on Judicial Qualifications,⁸⁰ the Commission on Judicial Qualifications (CJQ) considered 357 complaints alleging judicial misconduct, all but 36 of which were dismissed on the grounds that they did not raise valid issues of judicial misconduct.⁸¹ Thirteen judges were privately cautioned, two for allowing the appearance of partiality and one for failure to disqualify.⁸² We were unable to determine the number of complaints based upon bias or failure to disqualify that were dismissed, and also were unable to determine whether race was a factor in the conduct that led to the cautions.

Consequently, we are unable to assess whether the State of Indiana is in compliance with Recommendation #9.

J. Recommendation #10

States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant has knowingly and intelligently waived the claim.

The State of Indiana does not make any exceptions to the normal procedural rules for claims of racial discrimination in the imposition of the death penalty. Specifically, if a

⁷⁸ IND. CODE OF JUD. CONDUCT, CANON 3B(5).

⁷⁹ IND. CODE OF JUD. CONDUCT, CANON 3E(1)(a).

⁸⁰ Indiana Courts, Judicial Qualifications Commission, Annual Reports, *available at* <http://www.in.gov/judiciary/jud-qual/reports.html> (last visited Feb. 11, 2007). The report is three pages in length, and provides little detail concerning cases other than those that resulted in judges being subjected to public disciplinary action.

⁸¹ 178 complaints were dismissed summarily, and 143 were dismissed after CJQ staff examined court documents or conducted informal interviews. *Id.* at 2.

⁸² Since some cautions related to more than one violation, it is possible that the judge cautioned for failure to disqualify also was cautioned for allowing the appearance of partiality. *Id.*

defendant fails to timely object to a discriminatory aspect of the trial, that objection will be deemed to have been waived and will not be reviewed on appeal.⁸³

Based on this information, the State of Indiana is not in compliance with Recommendation #10.

⁸³ See *Highler v. State*, 854 N.E.2d 823, 830 (Ind. 2006) (defendant waived claim that peremptory strike of prospective juror who was a pastor constituted unconstitutional religious discrimination by failing to object on that ground at trial).

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of eighteen. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his[/her] conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. When the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.

I. FACTUAL DISCUSSION

A. *Mental Retardation*

On July 1, 1994, Indiana's law, prohibiting the imposition of the death penalty upon mentally retarded defendants went into effect.¹ Eight years later, the United States Supreme Court in *Atkins v. Virginia*² found the imposition of the death penalty upon mentally retarded offenders to be unconstitutional.³ In an effort to integrate the *Atkins* decision into Indiana law, the Indiana Supreme Court has modified some of the procedures affecting mentally retarded individuals being tried for the death penalty.⁴

1. Definition of Mental Retardation

Section 35-36-9-2 of the Indiana Code defines the term "mental retardation" as: "an individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report."⁵

"Significantly subaverage general intellectual functioning" is defined as "an IQ of 70 or below, with a margin of error of five points in either direction."⁶ Because the test is "significant subaverage intellectual functioning," courts may consider IQ tests together with other evidence demonstrating mental capacity.⁷

Indiana law defines the term "adaptive behavior" as "how well an individual deals with everyday life demands compared to other people with similar educational and social backgrounds."⁸ Since the United States Supreme Court decided *Atkins*, the Indiana Supreme Court has sought to clarify the definition of "adaptive behavior." In *Pruitt v. State*, the Indiana Supreme Court determined that state statutes which provide the "national consensus" against executing the mentally retarded "generally conform" to the clinical guidelines provided by the American Association on Mental Retardation ("AAMR") or the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1997)* ("DSM-IV").⁹ Although "variation" with these

¹ IND. CODE §§ 35-36-9-6, 35-50-2-9 (2006); *see also* *Smallwood v. State*, 773 N.E.2d 259, 261 (Ind. 2002) (finding that "Indiana statutory law requires the dismissal of a request for the death penalty or for life without parole upon a determination that the defendant is mentally retarded"); *Rondon v. State*, 711 N.E.2d 506, 512 (Ind. 1999) (finding that the Indiana Code exempts mentally retarded individuals from the death penalty).

² 536 U.S. 304 (2002).

³ *Id.* at 321.

⁴ *See generally* *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005).

⁵ IND. CODE § 35-36-9-2 (2006).

⁶ *Rogers v. State*, 698 N.E. 2d 1172, 1178 (Ind. 1998), *rev'd on other grounds by Pruitt*, 834 N.E.2d at 90.

⁷ *See Pruitt*, 834 N.E.2d at 106.

⁸ *Rogers*, 698 N.E. 2d at 1178.

⁹ *Pruitt*, 834 N.E.2d at 108.

guidelines is permissible, Indiana courts “cannot go to the point of excluding a majority of those who fit clinical definitions.”¹⁰

2. Procedures for Raising and Considering Mental Retardation Claims

a. Contents of a Mental Retardation Petition

A defendant intending to raise mental retardation as a bar to execution must file a written notice which includes a statement that the defendant is mentally retarded and requesting that the death penalty be dismissed pursuant to Section 35-36-9-6 of the Indiana Code.¹¹

b. Time Requirements and Burden of Filing a Mental Retardation Petition

Section 35-36-9-3 of the Indiana Code provides that a defendant may not file a petition alleging mental retardation later than twenty (20) days prior to the omnibus date.¹² Under Indiana law that existed prior to *Atkins* and the Indiana Supreme Court’s response, a defendant had to prove by clear and convincing evidence that s/he was mentally retarded.¹³ However, after the United States Supreme Court’s decision in *Atkins v. Virginia*¹⁴ and *Cooper v. Oklahoma*,¹⁵ the Indiana Supreme Court concluded that “the defendant’s right not to be executed if mentally retarded outweighs the state’s interest as a matter of federal constitutional law.”¹⁶ Accordingly, a defendant need only demonstrate mental retardation by a preponderance of the evidence.¹⁷

c. Evaluation of the Defendant by Court Appointed Experts

Upon the defendant filing a notice for determination of mental retardation as a bar to execution, the court must order the evaluation of the defendant.¹⁸ The evaluation must determine whether the defendant has significant subaverage intellectual functioning; substantial impairment of adaptive behavior; and that these conditions manifested themselves in the defendant prior to becoming twenty-two years of age.¹⁹

¹⁰ *Id.* at 110.

¹¹ IND. CODE § 35-36-9-3(a)-(b) (2006).

¹² IND. CODE § 35-36-9-3(b) (2006); *see also Smallwood*, 773 N.E.2d at 261. The “omnibus date” is a date from which various deadlines in the course of the proceedings are to be calculated. *See WILLIAM ANDREW KERR*, 16A INDIANA PRACTICE SERIES, CRIMINAL PROCEDURE § 10.6 (2006). The omnibus date cannot be earlier than forty-five (45) days and no later than seventy-five (75) days after the completion of the initial hearing, unless the prosecutor and defendant agree to a different date. IND. CODE § 35-36-8-1 (2006).

¹³ IND. CODE § 35-36-9-4 (2006). *But see Pruitt*, 834 N.E.2d at 103 (requiring defendant to prove his/her mental retardation by a preponderance of the evidence).

¹⁴ 536 U.S. 304 (2002).

¹⁵ 517 U.S. 348 (1996) (finding a violation of due process if defendant is required to prove by clear and convincing evidence that s/he is competent to stand trial).

¹⁶ *Pruitt*, 834 N.E.2d at 103.

¹⁷ *Id.* at 101.

¹⁸ IND. CODE § 35-36-9-3(c)(1)-(3) (2006).

¹⁹ *Id.*

d. Determination of Mental Retardation as a Bar to Execution

An evidentiary pre-trial hearing must be held to determine if the defendant meets the definition of a mentally retarded individual.²⁰ At the pre-trial hearing, the court can consider the findings of the court-appointed expert, expert and lay testimony presented by the defendant and the State, and any other evidence relating to the defendant's mental retardation.²¹ The court must render a decision addressing the defendant's mental retardation "not later than ten (10) days before the initial trial date."²²

Evidence presented at the pre-trial hearing determining the defendant's mental retardation can also be used at other stages of the trial.²³ For example, evidence supporting or disproving the mental retardation of the defendant can be presented during the trial to the jury to address the voluntariness of a defendant's statements to the police.²⁴ If, however, the trial court has determined in the pre-trial hearing that the defendant is mentally retarded, the judge cannot inform the jury of this determination in the jury instructions²⁵ since the judge's decision on mental retardation could act as a presumption that would unduly influence the decision of the jury addressing the degree of the defendant's mental retardation.²⁶ The severity and degree of mental retardation is a decision for the jury to render based upon the facts.²⁷

B. Mental Disorders Other Than Mental Retardation

1. Insanity

a. Definitions of Insanity

A person is considered insane in Indiana if s/he is "not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, [s/]he was unable to appreciate the wrongfulness of the conduct at the time of the offense."²⁸ This includes actions of sudden and overwhelming impulses, and actions involving reflection and brooding.²⁹ A "mental disease or defect" refers to a "severely abnormal mental condition that grossly and demonstrably impairs a person's perception."³⁰ Under this definition, the mental illness must be so severe that it rendered the individual "unable to appreciate the wrongfulness" of their conduct at the time of the crime.³¹ Insanity,

²⁰ IND. CODE § 35-36-9-4(a) (2006); *see also* Smallwood v. State, 773 N.E.2d 259, 262 (Ind. 2002).

²¹ *See* Rogers v. State, 698 N.E. 2d 1172, 1178-80 (Ind. 1998), *rev'd on other grounds by Pruitt*, 834 N.E.2d at 90.

²² IND. CODE § 35-36-9-5 (2006).

²³ *See* Miller v. State, 825 N.E.2d 884, 888-89 (Ind. Ct. App. 2005).

²⁴ *Id.*

²⁵ *Id.* at 890.

²⁶ *Id.*

²⁷ *Id.*

²⁸ IND. CODE § 35-41-3-6(a) (2006); IND. PATTERN JURY INSTRUCTIONS § 11.07 (2004).

²⁹ *See* Smith v. State, 397 N.E.2d 959, 962 (Ind. 1979) (citing Hill v. State, 251 N.E.2d 429, 436 (Ind. 1969)).

³⁰ IND. CODE § 35-41-3-6(b) (2006); IND. PATTERN JURY INSTRUCTIONS § 11.07 (2004).

³¹ IND. CODE § 35-41-3-6(a) (2006); *see also* Higgins v. State, 601 N.E.2d 342, 343 (Ind. 1992).

however, does not include “an abnormality manifested only by repeated unlawful or antisocial conduct.”³²

Indiana courts have distinguished between mental disease -- or insanity -- during the commission of a crime, and mental illness suffered by a defendant generally. It is well accepted in Indiana that mental illness does not excuse the commission of a crime.³³

b. Appointment of a Defense Expert

In *Ake v. Oklahoma*,³⁴ the United States Supreme Court held that an indigent defendant has the right to access a competent psychiatrist to assist in preparing, evaluating, and presenting the defendant’s claims.³⁵ The Indiana Supreme Court has decided that the statutory provisions in Indiana Code Section 35-36-2-2, which provides for the appointment of two or three experts, one of whom is a psychiatrist, satisfies the *Ake* requirement.³⁶ However, this right does not include permitting the defendant to choose the psychiatric expert or being provided funds to hire his/her own expert.³⁷ Additionally, when an indigent defendant’s counsel requests the appointment of an expert to address the possibility of an insanity defense, the court can deny the appointment if the expert would only be “exploratory” of possible insanity claims.³⁸

c. Intent to Pursue an Insanity Defense and Pre-trial Proceedings

If the defendant intends to raise his/her insanity at the time of the offense as a defense to the charges, and wishes to introduce evidence for the purpose of establishing that defense, s/he must file a written notice of intent to rely on an insanity defense.³⁹ The notice must contain information addressing “the nature of the insanity the defendant expects to prove and the names and addresses of the witnesses they intend to use.”⁴⁰ The notice also must contain sufficient information to put the court on notice that the defendant will raise an insanity defense.⁴¹

This written notice must be filed no later than twenty days before the omnibus date.⁴² If the defendant fails to file a pretrial notice as required, then the insanity defense cannot be

³² IND. CODE § 35-41-3-6(b) (2006); IND. PATTERN JURY INSTRUCTIONS § 11.07 (2004).

³³ See *Higgins*, 601 N.E.2d at 343; see also *Lyon v. State*, 608 N.E.2d 1368, 1369 (Ind. 1993); *Truman v. State*, 481 N.E.2d 1089, 1090 (Ind. 1985).

³⁴ 470 U.S. 68, 78-79 (1985).

³⁵ *Id.* at 82.

³⁶ *Palmer v. State*, 486 N.E.2d 477, 482 (Ind. 1985).

³⁷ *Id.*

³⁸ See *Castor v. State*, 587 N.E.2d 1281, 1288 (Ind. 1992) (citing *Hough v. State*, 960 N.E.2d 511, 516 (Ind. 1990)).

³⁹ IND. CODE § 35-36-2-1 (2006); see also WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 17.2 (2006); see also IND. CODE § 35-36-2-1 (2006).

⁴⁰ Barbara E. Bergman & Nancy Hollander, 1 WHARTON’S CRIMINAL EVIDENCE § 2:16 (15th ed. 2005).

⁴¹ See *Schuman v. State*, 357 N.E.2d 895, 897 (Ind. 1976).

⁴² IND. CODE § 35-36-2-1(1) (2006).

raised at trial.⁴³ However, a defendant is permitted to file the notice at any time prior to trial upon a court's determination that it is in the interest of justice and with good cause.⁴⁴

When the notice is filed, the court must order that the defendant be examined by two or three disinterested, qualified experts⁴⁵ addressing the defendant's insanity during the commission of the offense.⁴⁶ Defendant's counsel is not permitted to be present during the expert's examination of the defendant.⁴⁷ After the examination, but prior to trial, defendant's counsel is permitted to have *ex parte* communications with the court-appointed expert.⁴⁸ Additionally, once the notice to pursue an insanity defense is filed, the defendant waives his/her right to refuse to be examined by an expert employed by the State to rebut the insanity claim.⁴⁹

d. Introduction of Evidence Concerning Insanity and Judgment of Not Guilty by Reason of Insanity.

Indiana law presumes that every person in a criminal prosecution is sane.⁵⁰ The burden, therefore, lies with the defendant to establish the defense of insanity and show by a preponderance of the evidence⁵¹ that s/he was legally insane at the time of the commission of the offense.⁵² Indiana recognizes no middle ground between insanity and sanity, or degrees of insanity.⁵³ Rather, the defendant must demonstrate "complete mental incapacity . . . before criminal responsibility can be relieved."⁵⁴ Once the defendant introduces evidence demonstrating the existence of a mental disease or defect, the burden shifts to the State to prove beyond a reasonable doubt that the defendant was sane at the time of the commission of the offense.⁵⁵

At trial, either party may introduce the court-appointed expert testimony, as well as any other evidence that is relevant to a determination of the defendant's insanity at the time of

⁴³ See *Hollander v. State*, 296 N.E.2d 449, 453 (Ind. Ct. App. 1973), *rev'd on other grounds sub nom*, *McClain v. State*, 678 N.E.2d 104 (Ind. 1997).

⁴⁴ IND. CODE § 35-36-2-1 (2006); *see also* *Eveler v. State*, 524 N.E.2d 9, 11 (Ind. 1988).

⁴⁵ For the qualification requirements of these experts, *see* IND. CODE § 35-36-2-2(b) (2006).

⁴⁶ IND. CODE § 35-36-2-2(a) (2006).

⁴⁷ *See State v. Berryman*, 796 N.E.2d 741, 745-46 (Ind. Ct. App. 2003) (prohibiting defense counsel presence at mental examination of the defendant by appointed counsel if counsel's sole stated purpose is to advise the client not to cooperate with the expert, *aff'd on this issue*, 801 N.E.2d 170 (Ind. 2004)).

⁴⁸ *See Palmer v. State*, 486 N.E.2d 477, 482 (Ind. 1985) (holding that "[a]ny discussions between counsel and the psychiatrist would necessarily be conducted *ex parte*, but never before the examination of the defendant").

⁴⁹ *See Taylor v. State*, 659 N.E.2d 535, 541 (Ind. 1995).

⁵⁰ *See Young v. State*, 280 N.E.2d 595, 597 (Ind. 1972) (finding that "[i]t is clearly the law in this state that the defendant in a criminal prosecution is presumed to be sane").

⁵¹ IND. CODE § 35-41-4-1(b) (2006) ("[T]he burden of proof is on the defendant to establish the defense of insanity by the preponderance of the evidence.").

⁵² *See* IND. CODE §§ 35-41-3-6, 35-36-2-2(a) (2006).

⁵³ *See Marley v. State*, 747 N.E.2d 1123, 1128 (Ind. 2001). *But see* IND. CODE § 35-36-2-3 (describing "guilty but mentally ill" verdict).

⁵⁴ *Id.* (citing *Cowell v. State*, 331 N.E.2d 21, 24 (Ind. 1974)).

⁵⁵ *See Mayes v. State*, 440 N.E.2d 678, 680 (Ind. 1982).

the commission of the offense.⁵⁶ When the verdict options before the jury include not responsible by reason of insanity or guilty but mentally ill, and the defendant requests an instruction on the penal consequences of these verdicts, the trial court is required to provide an appropriate instruction(s) to the jury addressing the penal ramifications of the verdict.⁵⁷

A jury verdict of “not responsible by reason of insanity at the time of the crime,” does not mean that the defendant will be released from custody.⁵⁸ Indiana law provides that “whenever a Defendant is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney shall file a written petition for mental health commitment with the Court. . . [t]he Court shall hold a mental health commitment hearing at the earliest opportunity after the finding of not responsible by reason of insanity at the time of the crime, and the Defendant shall be detained in custody until the completion of the hearing.”⁵⁹

Juries in Indiana may also return a verdict of guilty but mentally ill.⁶⁰ Although the Indiana Supreme Court has observed that a guilty but mentally ill verdict or plea “does not guarantee a defendant that the death penalty will not be imposed, as a practical matter, defendants found to be guilty but mentally ill of death-penalty-eligible murders normally receive a term of years or life imprisonment.”⁶¹

If the defendant is found “guilty” or “guilty but mentally ill” rather than “not guilty by reason of insanity,” s/he may present evidence of his/her mental condition as mitigation during the penalty phase of the capital trial.⁶²

e. Post-Verdict Actions Regarding a Person Found Not Guilty by Reason of Insanity

Upon a verdict of not guilty by reason of insanity, the trial court may commit the individual to a mental health facility if it determines that s/he is (1) “mentally ill and dangerous” or (2) “mentally ill and gravely disabled.”⁶³ If the person acquitted for reason of insanity satisfies these criteria, the superintendent of the State mental health

⁵⁶ IND. CODE § 35-36-2-2 (2006); *see also* *Lock v. State*, 403 N.E.2d 1360, 1366 (Ind. 1980) (permitting evidence which might otherwise be inadmissible to be admitted on the question of sanity); *Sceifers v. State*, 373 N.E.2d 131, 136 (Ind. 1978) (finding that “[I]ay testimony, including opinions, is competent on issue of insanity, as is all evidence which has a logical reference to defendant’s sanity, including his sobriety and behavior on the day of the offense”) (citations omitted).

⁵⁷ *See Alexander v. State*, 819 N.E.2d 533, 542 (Ind. Ct. App. 2004) (citing *Georgopoulos v. State*, 735 N.E.2d 1138, 1141 (Ind. 2000)).

⁵⁸ *Barany v. State*, 658 N.E.2d 60, 65 (Ind. 1995) (citing IND. CODE § 35-36-2-4 (2006)).

⁵⁹ IND. CODE § 35-36-2-4 (2006).

⁶⁰ IND. CODE § 35-36-2-3(4) (2006).

⁶¹ *Prowell v. State*, 741 N.E.2d 704, 717-18 (Ind. 2001) (citing *Harris v. State*, 499 N.E.2d 723, 725 (Ind. 1986)).

⁶² IND. CODE § 35-50-2-9(c) (2006).

⁶³ IND. CODE § 35-36-2-4(b) (2006). The court that conducted the trial retains jurisdiction over the commitment hearing. IND. CODE § 12-26-1-3 (2006).

facility to which the individual is committed must file a report every six months, or more often as directed by the court, addressing the individual's treatment and care.⁶⁴

C. "Next Friend"⁶⁵ Petitions On Behalf of the Incompetent

There is no statutory provision or case law permitting a "next friend" to pursue post-conviction relief on behalf of an incompetent prisoner in the State of Indiana.⁶⁶ Although it does not permit a "next friend" *per se* to file for post-conviction relief, the Indiana Supreme Court has provided for the appointment of appellate "amicus" counsel in a direct appeal after a guilty plea in which the defendant bargained for a death sentence.⁶⁷ As a matter of federal law, however, a person may have standing as a "next friend" where the "real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to the court, or other similar disability."⁶⁸ Specifically, in a capital post-conviction proceeding, a "next friend" has standing to file a petition on behalf of a death-row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the "next friend" can establish that there is an adequate explanation—i.e., mental incompetence—as to why the inmate cannot appear on his/her own behalf.⁶⁹ When considering if a "next friend" can act on behalf of a defendant, three issues are considered:

- (1) The "next friend" must provide an adequate explanation, such as inaccessibility, mental incompetence, or other disability, as to why the real party in interest cannot appear on his own behalf to prosecute the action;
- (2) The "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate; and

It has been further suggested that the "next friend" must have some significant relationship with the real party in interest.⁷⁰

D. Insanity at the Time of the Execution

⁶⁴ IND. CODE § 12-26-15-1(c)(1) (2006).

⁶⁵ A "next friend" is an individual acting for benefit of a person *sui juris*, without being regularly appointed guardian. A "next friend" is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit they appear. Where permitted, this includes acting to assert claims for a defendant in a capital case who seeks to waive such claims. *See* John Bordeau, 39A C.J.S. *Habeas Corpus* § 287 (2006).

⁶⁶ *See, e.g.,* Corcoran v. State, 820 N.E.2d 655, 663 (Ind. 2005) (dismissing the post-conviction petition filed by the State Public Defender alleging defendant's mental incompetence because the defendant did not authorize filing of the petition within the time frame permitted under Indiana Rules of Criminal Procedure).

⁶⁷ Smith v. State, 686 N.E.2d 1264, 1270 (Ind. 1997) (stating that Indiana Rule Criminal Procedure 24 permits appointment of *amicus curiae* attorney(s) to file a brief addressing the issues they believe the court should review).

⁶⁸ Whitmore v. Arkansas, 495 U.S. 149, 165 (1990).

⁶⁹ Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990) (demonstrating incompetence of defendant is "requisite threshold" for next of friend standing).

⁷⁰ Schornhorst v. Anderson, 77 F. Supp. 2d 944, 950 (S.D. Ind. 1999) (citing Whitmore v. Arkansas, 495 U.S. 149, 163-64 (1990)).

It is a violation of the Eight Amendment of the United States Constitution to execute an individual that is insane at the time of execution.⁷¹ However, while Indiana courts have held that “persons are insane if they are unaware of the punishment they are about to suffer and why they are to suffer it,”⁷² “Indiana has no specific statutory provision addressing either the standard of insanity or any procedural requirements to guard against the execution of the insane.”⁷³

⁷¹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”). The Indiana Supreme Court has affirmed the execution of individuals with mental illness. *See Matheney v. State*, 833 N.E.2d 454, 457 (Ind. 2005) (affirming death sentence for those with mental illness); *Baird v. Davis*, 388 F.3d 1110, 1114 (7th Cir. 2004) (the execution of individuals with mental illness has not been addressed by the United States Supreme Court), *cert. denied*, 544 U.S. 983 (2005). The Indiana Supreme Court recently granted a stay of execution for a death row inmate who raised a *Ford* claim, noting that the United States Supreme Court will soon be revisiting *Ford* in *Panetti v. Quarterman*, 127 S. Ct. 852 (Jan. 5, 2007). *See Timberlake v. State*, 859 N.E.2d 1209 (Ind. 2007). The majority aptly concluded that “[i]f there is doubt as to the applicable legal precedent, we should be cautious in carrying out the death penalty.” *Id.* at 1213.

⁷² *Baird*, 833 N.E.2d at 30.

⁷³ *Id.* at 33 (Boehm, J., dissenting).

II. ANALYSIS - MENTAL RETARDATION

A. Recommendation #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities.⁷⁴ Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.

The American Association on Intellectual and Developmental Disabilities (AAIDD) defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”⁷⁵

Since July 1, 1994, the State of Indiana has prohibited the execution of all mentally retarded offenders.⁷⁶ Indiana law defines a mentally retarded person as: “an individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior.”⁷⁷ In 2005, after the United States Supreme Court decision in *Atkins v. Virginia*, the Indiana Supreme Court provided further guidance in accordance with the “national consensus” defining “adaptive behavior.”⁷⁸ The Indiana Supreme Court clarified that adaptive behavior should “generally conform” to the guidelines delineated by the AAIDD or the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1997)* (DSM-IV).⁷⁹ Indiana courts vary in applying these guidelines, but the courts “cannot go to the point of excluding a majority of those who fit clinical definitions” of mental retardation.⁸⁰

Under the AAIDD definition of mental retardation, limited intellectual functioning requires that an individual be impaired in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not precise enough to identify the upper boundary of mental retardation. Experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but also includes

⁷⁴ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) on Jan. 1, 2007. See American Association on Intellectual and Developmental Disabilities, Welcome to AAIDD, at http://www.aamr.org/About_AAMR/new_name.shtml (last visited Feb. 11, 2007).

⁷⁵ American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Feb. 11, 2007).

⁷⁶ 1994 Ind. Acts 158.

⁷⁷ IND. CODE § 35-36-9-2 (2006).

⁷⁸ *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005).

⁷⁹ *Id.*

⁸⁰ *Id.* at 110.

some individuals with IQ scores in the low to mid-70s.⁸¹ Thus, no state should impose an IQ maximum lower than 75,⁸² with the additional understanding that measurements greater than 75 do not make the death penalty mandatory. Clinical judgments by experienced diagnosticians are necessary to ensure accurate diagnoses of mental retardation.

Indiana courts adhere to the AAIDD guidelines. Specifically, the Indiana Supreme Court has used the DSM-IV guideline of “an IQ of 70 or below, with a margin of error of five points in either direction” as defining “significant subaverage general intellectual functioning.”⁸³ In fact, the Indiana Supreme Court has counseled other courts in the state to use the AAIDD and DSM-IV mental retardation clinical guidelines in conformance with the United States Supreme Court’s *Atkins* decision.⁸⁴

Referring to the AAIDD and DSM-IV, Indiana law defines the term “adaptive behavior” as including “communication, self-care, home living, social skills, use of community resources, self directing health and safety, functional academics, leisure, and work.”⁸⁵ In *Atkins*, the United States Supreme Court indicated that a limitation in adaptive behavior is comprised of deficits in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety,

⁸¹ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at 7 (2002) (unpublished manuscript), available at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited Feb. 11, 2007). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 7 n.18; see also American Association on Intellectual and Developmental Disabilities, *Definition of Mental Retardation*, at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Feb. 11, 2007) (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement,” thus potentially making the IQ ceiling for mental retardation rise to 75. However, “an IQ score is only one aspect in determining if a person has mental retardation.”); AMERICAN ASSOCIATION OF MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5* (Ruth Luckasson ed., 9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, *CLASSIFICATION IN MENTAL RETARDATION 11* (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41* (4th ed. 2000) (“Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

⁸² In *Atkins v. Virginia*, the Supreme Court noted that “an IQ between 70 and 75” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” 536 U.S. 304, 309 n.5 (2002).

⁸³ *Rogers v. State*, 698 N.E. 2d 1172, 1178 (Ind. 1998), *rev’d on other grounds by* *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005).

⁸⁴ *Pruitt*, 834 N.E.2d at 108-10.

⁸⁵ *Williams v. State*, 793 N.E.2d 1019, 1027-28 (Ind. 2003).

functional academics, leisure, and work.⁸⁶ Adhering to *Atkins*, the Indiana Supreme Court relied upon the AAIDD and American Psychiatric Association guidelines which provide that limits in adaptive behavior must be considered with IQ to determine mental retardation.⁸⁷ The Indiana Supreme Court held that Indiana’s statutory definition of mental retardation “involves inquiry into two areas: intellectual functioning and adaptive behavior.”⁸⁸

The AAIDD also requires that mental retardation be manifested during the developmental period, is generally defined as up until the age of 18. This does not mean that a person must have been IQ tested with scores in the mentally retarded range during the developmental period, but instead, there must have been manifestations of mental disability, which at an early age generally takes the form of problems in the area of adaptive functioning.⁸⁹ The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.⁹⁰

The State of Indiana requires the subaverage intellectual functioning and concurrent deficits in adaptive behavior manifest in the individual “before becoming twenty-two (22) years of age.”⁹¹ This portion of the statute therefore exceeds the AAIDD definition.

Based on this information, the State of Indiana appears to be in compliance with Recommendation #1.

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.

Although the State of Indiana provides training for law enforcement working with mentally ill individuals, it is unclear whether the State has any training or formal procedures used for the identification of suspects with mental retardation.

The State of Indiana requires law enforcement personnel to receive at least six hours of training in interacting with suspects with mental illness, addictive disorders, mental retardation, and developmental disabilities.⁹² The basic training course at the Indiana Law Enforcement Academy provides four hours of training entitled “Law Enforcement and Persons with Mental Illness” and two hours of training entitled “Law Enforcement

⁸⁶ 536 U.S. 304, 309 n.3 (2002) (relying on the definitions utilized by the American Association on Mental Retardation and the American Psychiatric Association).

⁸⁷ *Williams*, 793 N.E.2d at 1027-28.

⁸⁸ *Id.* at 1027; *Rogers*, 698 N.E. 2d at 1178.

⁸⁹ Ellis, *supra* note 81, at 9 n.27.

⁹⁰ *Id.* at 9.

⁹¹ IND. CODE § 35-36-9-2 (2006).

⁹² IND. CODE § 5-2-1-9(a)(9) (2006).

and Disabilities.”⁹³ It appears the training on disabilities includes only minimal training on mental retardation,⁹⁴ and the Executive Director of the Indiana Law Enforcement Academy candidly reported that “street officers have little time to make an in-depth evaluation” of these issues.⁹⁵

Indiana law requires that the courts appoint qualified counsel to represent indigent defendants in capital punishment cases. Pursuant to the Indiana Rules of Criminal Procedure, the court must appoint “two qualified counsel” designated as lead counsel and co-counsel to represent an indigent capital defendant.⁹⁶ The Rules require appointed counsel to have experience in criminal litigation, felony jury trials, and “two years prior to appointment at least twelve hours of training in the defense of capital cases approved by the Indiana Public Defender Commission.”⁹⁷ At the Indiana Public Defender Council annual training seminar on capital litigation, speakers have discussed topics related to mental retardation.⁹⁸ Criminal Rule 24 does not, however, require that counsel in capital cases receive training in any specific areas, such as recognizing mental retardation.

Based on this information, it appears that state actors potentially are receiving some training on issues relating to identifying and interacting with mentally retarded individuals. Law enforcement officials are required to receive some mandatory training on how to interact with people who have mental illness, addictive disorders, mental retardation, or developmental disabilities. However, most actors in the criminal justice system, including prosecutors and public defenders, do not receive mandatory training on recognition of mental retardation or litigation of a capital defendant’s mental retardation claim. The State of Indiana, therefore, is only in partial compliance with Recommendation #2.

C. Recommendation #3

The jurisdiction should have in place policies to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These

⁹³ Indiana Law Enforcement Academy, Course 2006168, *available at* <http://www.in.gov/ilea/bulletin/2006167R.pdf> (last visited Feb. 11, 2007). The training program entitled “Law Enforcement and Disabilities” addresses working with individuals with autism, epilepsy, cerebral palsy, mobility impairment, deaf and hard of hearing, blindness, and mental illness. Videotape: Disability Awareness for Law Enforcement (Indiana Law Enforcement Academy 2005) (on file with author). The training program entitled “Law Enforcement and Person with Mental Illness” includes over four hours addressing working with individuals with mental illness. Videotape: Law Enforcement & Persons with Mental Illness (Indiana Law Enforcement Academy 2005) (on file with author).

⁹⁴ Indiana Law Enforcement Academy, Basic Minimum Curriculum (on file with author).

⁹⁵ Email from Scott Mellinger, Executive Director, Indiana Law Enforcement Academy, to Joel Schumm, Chair, Indiana Death Penalty Assessment Team (Nov. 30, 2005) (on file with author).

⁹⁶ IND. R. CRIM. P. 24(B)(1)-(2).

⁹⁷ *Id.*

⁹⁸ Specifically, in the past five years, training from the Indiana Public Defender Council has included: 1-1.25 hour elective workshop (2002), 1-1.25 hour mandatory lecture (2003), .5-hour mandatory lecture and 1-hour elective workshop (2005); and 1-1hour elective workshop (2006). No training specifically addressing mental retardation was offered in 2004. Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Dec. 11, 2006).

attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

As discussed under Recommendation #2, the State of Indiana does not require capital defense attorneys to participate in any special training on recognizing and understanding mental retardation in capital defendants.

Resources are provided to capital defendants to assist in their defense. These resources could be used to accurately determine and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation. Upon a court's determination that a defendant is indigent, the presiding judge must enter an order appointing two qualified trial counsel.⁹⁹ In accordance with the Indiana Rules of Criminal Procedure, the appointed counsel must satisfy specified criminal litigation experience and workload requirements.¹⁰⁰ There is no requirement, however, that the appointed counsel be trained in issues related to interaction with and identification of mental retardation as specified in this Recommendation.

During the capital trial and appeal, appointed public defenders and private attorneys representing capital defendants are entitled to compensation for reasonable and necessary expenses.¹⁰¹ This includes funds for experts "necessary to prepare and present an adequate defense at every stage of the proceeding."¹⁰² These funds are allocated either by county public defender organization or upon an *ex parte* request to the court demonstrating "reasonableness and necessity" for the expert.¹⁰³ The appointment of experts is left "to the sound discretion of the trial court,"¹⁰⁴ and a court must provide an expert only "where it is clear that prejudice" will result.¹⁰⁵ There are four issues the court should consider in deciding if the defendant is entitled to funds for an expert:

- (1) Whether defendant's counsel already possess the skills to cross-examine the expert adequately or could prepare for the cross-examination by studying published writings;
- (2) Whether the purpose of the expert would be only exploratory;

⁹⁹ IND. R. CRIM. P. 24(B).

¹⁰⁰ IND. R. CRIM. P. 24(B)(1)-(3).

¹⁰¹ IND. R. CRIM. P. 24(C)(1)-(2).

¹⁰² IND. R. CRIM. P. 24(C)(2).

¹⁰³ *Id.*; see also *Williams v. State*, 669 N.E.2d 1372, 1383 (Ind. 1996) (finding that "[a] defendant who requests funds for an expert witness has the burden of demonstrating the need for that expert").

¹⁰⁴ *Williams*, 669 N.E.2d at 1383.

¹⁰⁵ *Harrison v. State*, 644 N.E.2d 1243, 1253 (Ind. 1995), *rev'd on other grounds by*, *Allen v. State*, 737 N.E.2d 741, 744 (Ind. 2000).

- (3) Whether the nature of the expert testimony involves precise physical measurement and chemical testing, results of which are not subject to dispute; and
- (4) Whether the defendant's retained expert would provide an opinion addressing a statutory mitigator.¹⁰⁶

Appointed attorneys for indigent defendants may obtain reimbursement for reasonable and necessary expenses associated with the retention of mental health experts during the pre-trial stage for the purposes of evaluating the defendant for mental retardation.¹⁰⁷ We were unable to find any cases at the trial or appellate level in which the resources provided or the funding for these resources were challenged as insufficient.¹⁰⁸

Based on this information, it is unclear whether the State of Indiana is in compliance with Recommendation #3.

D. Recommendation #4

Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State.

For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*¹⁰⁹ or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

The State of Indiana prohibited the execution of mentally retarded defendants sentenced on or after July 1, 1994.¹¹⁰ Although the Indiana Supreme Court declined to apply the statute retroactively to defendants sentenced prior to that date,¹¹¹ the U.S. Supreme Court's decision in *Atkins v. Virginia*¹¹² in 2002 requires retroactive application.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ *See supra* note 101 and accompanying text.

¹⁰⁸ The denial of funds for this purpose has not been raised as an issue on direct appeal in any case tried since the adoption of the statute in 1994.

¹⁰⁹ 536 U.S. 304 (2002).

¹¹⁰ 1994 Ind. Acts 158; IND. CODE § 35-36-9-1 to -7 (2006).

¹¹¹ *See Rondon v. State*, 711 N.E.2d 506, 512 (Ind. 1999) (finding that the Indiana statute prohibiting the execution of mentally retarded individuals did not apply retroactively).

¹¹² 536 U.S. 304 (2002).

¹¹³ *See Williams v. State*, 793 N.E.2d 1019, 1027 (Ind. 2003) (citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

Because Indiana law allows for a determination of mental retardation as a bar to execution in the pretrial stages, the State of Indiana is in compliance with Recommendation #4.

E. Recommendation #5

The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

In *Pruitt v. State*, the Indiana Supreme Court found Indiana Code Section 35-36-9-4 unconstitutional because it required the defendant to prove by “clear and convincing evidence” that s/he was mentally retarded.¹¹⁴ Based on the United States Supreme Court’s decision in *Atkins*,¹¹⁵ the Indiana Supreme Court accordingly held that the state cannot require proof beyond a preponderance of the evidence that the defendant is mentally retarded.¹¹⁶

Consequently, the State of Indiana is in compliance with Recommendation #5.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

Police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Indiana certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹¹⁷ and/or the Indiana Law Enforcement Accreditation Commission (ILEAC)¹¹⁸ are required to adopt written directives

¹¹⁴ *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005) (finding that “the defendant’s right not to be executed if mentally retarded outweighs the state’s interest as a matter of federal constitutional law”).

¹¹⁵ 536 U.S. 304 (2002).

¹¹⁶ *Pruitt*, 834 N.E.2d at 103.

¹¹⁷ Fifteen police departments, sheriff’s departments, and university/college police departments in Indiana have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 11, 2007) (use second search function, designating “U.S.”; “Indiana”; and “Law Enforcement Accreditation” as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 11, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs’ Association (NSA); and Police Executive Research Forum (PERF)).

¹¹⁸ Nine police departments, sheriff’s departments, and emergency communications departments in Indiana have obtained accreditation under the ILEAC standards. Commission for Indiana Law

establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.¹¹⁹ CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.¹²⁰ Although written directives produced in an effort to comply with the CALEA and ILEAC standards may include procedures designed to ensure that Miranda rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, the CALEA and ILEAC standards do not specifically require special procedures for interrogating or taking the confession of the mentally retarded person.

However, Indiana law enforcement officers are statutorily required to complete a basic training course¹²¹ at a training academy authorized by the Indiana Law Enforcement Training Board, which is the regulatory body that oversees the training of law enforcement candidates.¹²² The Indiana Law Enforcement Academy provides four hours of training entitled “Law Enforcement and Persons with Mental Illness” and two hours of training entitled “Law Enforcement and Mental Disabilities.” However, there is no formal mechanism to ensure the *Miranda* rights of mentally retarded individuals are protected.¹²³ In fact, law enforcement officers who were interviewed indicated that they would contact the local prosecutor’s office before proceeding if there was a question addressing a suspect’s competence or ability to understand their *Miranda* rights.¹²⁴

The U.S. Court of Appeals for the Seventh Circuit has held that a defendant who is found competent to stand trial is therefore competent to waive his/her *Miranda* rights.¹²⁵ Furthermore, the court has explained that “the question is not whether if [the defendant] were more intelligent, informed, balanced, and so forth he would not have waived his *Miranda* rights, but whether the police believed he understood their explanation of those rights; more precisely, whether a reasonable state court judge could have found that the police believed this.”¹²⁶

It is unclear whether the written directives adopted by Indiana law enforcement agencies in an effort to comply with the CALEA and ILEAC standards include procedures designed to ensure that the Miranda rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used. Furthermore, while we do know that Indiana provides training for law enforcement

Enforcement Accreditation, ILEAC Accredited Agencies, *at* http://www.iacop.org/ileac/accredited_agencies.htm (last visited Feb. 11, 2007).

¹¹⁹ COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1).

¹²⁰ *Id.* at 1-3 (Standard 1.2.3).

¹²¹ IND. CODE § 5-2-1-9 (2006); *see also* IND. ADMIN. CODE tit. 250, r. 2-4-3 (2006).

¹²² IND. CODE § 5-2-1-3(a) (2006).

¹²³ Interview by Doug Cummins with Captain Simmons, Madison County Sheriff’s Detective and Indiana State Police Duty Officer (who declined to be identified) at the Indiana State Police Post, Pendleton, Indiana.

¹²⁴ *Id.*

¹²⁵ *Young v. Walls*, 311 F.3d 846, 849 (7th Cir. 2002).

¹²⁶ *Rice v. Cooper*, 148 F.3d 747, 750-51 (7th Cir. 1998).

officers pertaining to interaction with people who have mental illness, addictive disorders, mental retardation, and developmental disabilities, it does not appear that this training includes information on *Miranda* rights or protecting against false, coerced, or garbled confessions.¹²⁷ Consequently, it does not appear that the State of Indiana is in compliance with Recommendation #6.

G. Recommendation # 7

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.

Courts can protect against “waivers” of rights, such as the right to counsel, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant’s mental disability affects their ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant’s mental disability.

In order for a capital defendant to waive his/her rights, Indiana courts must, at a minimum, conduct some level of inquiry to determine whether the defendant is making a knowing and voluntary waiver, as required by *Faretta v. California*.¹²⁸ When a defendant clearly states a desire to dismiss his/her counsel “a trial court should conduct a pre-trial hearing to determine a defendant’s competency to proceed without counsel and establish a record of a defendant’s waiver of his right to counsel.”¹²⁹ During the hearing, the court must inform the defendant of the “dangers and disadvantages of self representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”¹³⁰ If the judge has any concerns addressing the defendant’s mental competency to waive his/her right to counsel, the court may have to conduct a mental competency hearing.¹³¹ A mental competency hearing can involve the appointment of psychiatrists to evaluate the mental competency of the defendant.¹³²

The U.S. Court of Appeals for the Seventh Circuit has held that a defendant who is found competent to stand trial also is competent to waive his/her right to counsel¹³³ and that a

¹²⁷ Indiana Law Enforcement Academy, Basic Minimum Curriculum (on file with author).

¹²⁸ 422 U.S. 806, 835 (1975).

¹²⁹ *Dobbins v. State*, 721 N.E.2d 867, 872 (Ind. 1999) (citing *Russell v. State*, 383 N.E.2d 309, 315 (Ind. 1978)); see also WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE § 23.2 (2006) (when defendant states that they would like to dismiss their counsel, the court must have a hearing to determine the “propriety of the request” and make a written record of the hearing and determination of the request).

¹³⁰ *Osborne v. State*, 754 N.E.2d 916, 920-21 (Ind. 2001) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 209, 279 (1942)).

¹³¹ See WILLIAM ANDREW KERR, 16B INDIANA PRACTICE SERIES: CRIMINAL PROCEDURE, § 23.2 (2006).

¹³² See, e.g., *Sherwood v. State*, 717 N.E.2d 131, 133 (Ind. 1999). In *Sherwood*, the trial court appointed two psychiatrists to evaluate and determine if defendant was competent to stand trial. *Id.*

¹³³ *Young v. Walls*, 311 F.3d 846, 849 (7th Cir. 2002) (citing *Godinez v. Moran*, 509 U.S. 389 (1993)).

capital defendant may waive presentation of mitigating evidence at sentencing.¹³⁴ The Indiana Supreme Court has come to a similar conclusion, holding that if Indiana law permits, but does not require, a defendant to present evidence relevant to mitigating circumstances, s/he has the right to decline to present this evidence.¹³⁵

Additionally, regardless of whether a capital defendant can make a knowing and voluntary waiver, direct appeal in a capital case is mandatory.¹³⁶ A defendant in a death penalty case can waive their appellate rights as they pertain to their guilt/innocence phase conviction; but may not waive appellate review of a penalty phase, i.e., imposition of death sentence.¹³⁷ A capital defendant may also waive post-conviction relief,¹³⁸ and filing a petition for *habeas corpus* relief and clemency also are voluntary.¹³⁹

Based on this information, it appears that the State of Indiana is in compliance with Recommendation #7.

¹³⁴ *Sigaly v. Peters*, 905 F.2d 986, 1007-08 (7th Cir. 1990) (refusing to reverse defendant's death sentence for pro se defendant who did not present mitigation during penalty phase of capital trial).

¹³⁵ *Smith v. State*, 686 N.E.2d 1264, 1275 (Ind. 1997).

¹³⁶ IND. R. APP. P. 4(A)(1); *see also* IND. R. CRIM. P. 24(I).

¹³⁷ *Judy v. State*, 416 N.E.2d 95, 102 (Ind. 1981) (finding that a defendant can waive review of any issue that might be raised with reference to their conviction, but the death sentence cannot be imposed on any individual in Indiana "until it has been reviewed by [the Indiana Supreme Court] and found to comport with the laws of this State and the principles of our state and federal constitution")

¹³⁸ *See Corcoran v. State*, 827 N.E.2d 542, 544 (Ind. 2005); *see also* IND. R. CRIM. P. 24(H) (describing filing deadlines for petitions for post-conviction relief).

¹³⁹ *See generally* *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997) (defendant did not seek *habeas* relief or clemency).

III. ANALYSIS - MENTAL ILLNESS

A. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.

As in the case with mental retardation, the State of Indiana does not explicitly require any actors in the criminal justice system, other than law enforcement officers, to participate in training addressing interaction with mentally ill suspects and death row inmates. Each law enforcement officer is required to complete a basic training course that includes four hours of mental illness training.¹⁴⁰ This training does not include how to recognize mental illness in a criminal suspect.¹⁴¹ Public defenders occasionally have speakers on mental illness issues attend their annual conference on capital punishment, but these have been largely elective workshops rather than mandatory sessions.¹⁴²

Although it appears that law enforcement officials receive mandatory training on interacting with mentally ill individuals, not all actors within the criminal justice system are required to receive this training. Therefore, the State of Indiana is only in partial compliance with Recommendation #1.

B. Recommendation #2

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The State of Indiana does not appear to require instruction on the proper methods of explaining *Miranda* warnings to individuals with mental illness. In fact, law enforcement officers who were interviewed indicated that they contact the local prosecutor's office when issues addressing a suspect's competency or understanding of his/her *Miranda* rights arise.¹⁴³

¹⁴⁰ Indiana Law Enforcement Academy Basic Minimum Curriculum (on file with author).

¹⁴¹ Interview by Doug Cummins with Captain Simmons, Madison County Sheriff's Detective, at the Madison County Sheriff's Office, Anderson, Indiana, and Indiana State Police Duty Officer (who declined to be identified) at the Indiana State Police Post, Pendleton, Indiana. Both individuals stated that no formal procedures exist for training officers to deal with potentially mentally ill suspects.

¹⁴² Rule 24 of the Indiana Rules of Criminal Procedure does not mandate that any training for capital defense attorneys specifically address issues related to mental illness. In the past five years, the Indiana Public Defender Council's seminar has included the following sessions on mental illness: 6-1.25 hour elective workshops (2002); 2.75 hour mandatory lecture and 3-1.25 hour elective workshops (2003); 4-1.5 hour elective workshops (2004); 4-1.25 hour elective workshops (2005); and 1 hour mandatory lecture and 1 hour elective workshop (2006). Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Aug. 12, 2005)

¹⁴³ See *supra* note 141.

The State of Indiana, therefore, is not in compliance with Recommendation #2.

C. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

This Recommendation is identical to Recommendation #3 in the Mental Retardation section, except that it pertains to mental illness instead of mental retardation.¹⁴⁴ Like Recommendation #3 in the Mental Retardation section, it is unclear whether the State of Indiana is in compliance with Recommendation #3.

D. Recommendation #4

For cases commencing after *Atkins v. Virginia* or the state’s ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

We were unable to obtain information on trial judges’ decisions to appoint certain medical and mental health professionals and not others.¹⁴⁵ We were, however, able to obtain information on state training requirements and on qualifications and experience of mental health experts appointed by the court.

The State of Indiana does not provide any guidelines regarding the competence of experts testifying on a defendant’s insanity. Instead, it is within the discretion of the trial court to determine if a witness is competent to testify as an expert.¹⁴⁶ The Indiana courts have long accepted the principle that physicians are competent to testify in pre-trial insanity

¹⁴⁴ See *supra* 99 note and accompanying text.

¹⁴⁵ Although the trial court is required by statute to appoint mental health experts, both the defense and prosecution may retain their own experts. IND. CODE § 35-36-2-2(b) (2006) We were unable to obtain information pertaining to the hiring procedures for mental health experts by county prosecutors or the Attorney General to determine whether the hiring of these experts is based on qualifications and relevant professional experience.

¹⁴⁶ See 8 IND. LAW ENCYCLOPEDIA, CRIMINAL LAW, § 232 (2006) (“Whether or not a witness should be allowed to testify as an expert is within the sound discretion of the trial court.”).

proceedings¹⁴⁷ and there is no requirement that a medical doctor have more specialized training and experience than a general practicing physician in order to be competent to testify as to a defendant's sanity.¹⁴⁸

However, section 35-36-2-2 (b) of the Indiana Code provides that at least one of the experts appointed by the court must be a psychiatrist.¹⁴⁹ Defendant's counsel may inquire about the competence of an expert.¹⁵⁰ and the extent of an expert's competence to testify about issues addressing insanity is an issue reserved for the jury.¹⁵¹

Additionally, in cases in which an indigent defendant's counsel informs the court that the defendant may be incompetent and not understand the court proceedings, the State of Indiana requires the appointment of two or three experts to examine the defendant and assist counsel in the preparation of the defense.¹⁵² After the examination, defense counsel is permitted to have *ex parte* communications with the expert to prepare for trial.¹⁵³

Although the statute does not provide for court appointments of experts to evaluate mental illness or competence at the appellate level, the Indiana Supreme Court recently appointed Dr. George Parker of the Department of Psychiatry at the Indiana University School of Medicine to examine a defendant who alleged that he was not competent to be executed.¹⁵⁴ We commend the Indiana Supreme Court not only for appointing an expert to assist in this important determination but also for appointing one with such impressive qualifications and relevant experience.¹⁵⁵ Such appointments are a model to be emulated in the future by all Indiana courts.

Although it appears that trial judges are required to appoint "competent disinterested" medical professionals in accordance with section 35-36-2-2 (b) of the Indiana Code, we do not have sufficient information about prosecutors' or trial judges' expert decisions on the selection and appointment of mental health experts to assess whether the State of Indiana is in compliance with Recommendation #4.

E. Recommendation #5

Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and

¹⁴⁷ See, e.g., *Davis v. State*, 35 Ind. 496, *1 (Ind. 1871) (finding that medical physicians engaged in the practice of medicine for 15 years can be experts addressing insanity).

¹⁴⁸ See *Cody v. State*, 290 N.E.2d 38, 43-44 (Ind. 1972).

¹⁴⁹ IND. CODE § 35-36-2-2(b) (2006).

¹⁵⁰ See *Tyler v. State*, 236 N.E.2d 815, 817 (Ind. 1968).

¹⁵¹ *Id.*; see also 8 IND. LAW ENCYCLOPEDIA § 232.

¹⁵² IND. CODE § 35-36-3-1(a) (2006).

¹⁵³ See *Palmer v. State*, 486 N.E.2d 477, 482 (Ind. 1985).

¹⁵⁴ *Timberlake v. State*, 49S00-0606-SD-235 ("Order for Mental Examination in Capital Case" entered on September 18, 2006).

¹⁵⁵ See Indiana University-Purdue University Indianapolis, Psychiatry Department, George Parker, M.D., available at <http://www.iupui.edu/~psycdept/faculty/geoparke.htm> (last visited Feb. 11, 2007).

who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

The State of Indiana provides funding for experts to attorneys representing indigent defendants charged with or convicted of a capital offense through “every stage of the proceeding, including the sentencing phase,”¹⁵⁶ but we were unable to obtain the specific amount of funding allocated by the State of Indiana for the employment of mental health experts in capital cases. In counties with a chief public defender, funding is provided from the public defender’s budget.¹⁵⁷ In other cases, funding is determined through an *ex parte* showing to the trial court of “reasonableness and necessity” to present an adequate defense.¹⁵⁸ The trial court retains oversight of the number of hours an expert works on a given case.¹⁵⁹

Defendants represented by the State Public Defender’s office during post-conviction relief proceedings have had access to a wide array of expert witnesses,¹⁶⁰ and no funding concerns have been publicly vetted.

Therefore, it appears that the State of Indiana is in compliance with Recommendation #5.

F. Recommendation #6

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Recommendation #7

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. [A disorder manifested primarily by repeated

¹⁵⁶ IND. R. CRIM. P. 24(C)(2).

¹⁵⁷ Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Aug. 12, 2005).

¹⁵⁸ IND. R. CRIM. P. 24(C)(2).

¹⁵⁹ See *Williams v. State*, 669 N.E.2d 1372, 1384 (Ind. 1996). *But see id.* at 1384 n.12 (stating that “[i]n situations where a trial court has imposed unreasonable limitations on a defendant's rights under Crim. R. 24, interests of judicial economy may dictate that trial counsel not wait until appeal to seek recourse. Often the Indiana Public Defender Commission, which administers our reimbursement program, can be of assistance. And while we strongly encourage defense counsel to resolve such disputes at the trial court level, our court is open to receive motions seeking to rectify trial court violations of Crim. R. 24.”).

¹⁶⁰ Interview with Paula Sites, Assistant Executive Director, Indiana Public Defender Council (Aug. 12, 2005).

criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.]

The State of Indiana only excludes from the death penalty defendants who have mental retardation, defined as “an individual who, before becoming twenty-two (22) years of age, manifests: (1) [s]ignificantly subaverage intellectual functioning; and (2) [s]ubstantial impairment of adaptive behavior.”¹⁶¹ This exclusion does not include defendants who have other disabilities, such as dementia or traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning but manifest after the age of twenty-two. Similarly, this exclusion does not include individuals who at the time of the offense had a severe mental disorder or disability that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to conduct; or to conform their conduct to the requirements of the law.¹⁶² As a result, the State of Indiana is not in compliance with either Recommendation #6 or Recommendation #7.

Accordingly, the Indiana Death Penalty Assessment Team recommends that the State of Indiana adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; and (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law.

G. Recommendation #8

To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see below for recommendations as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.

The Indiana Code allows the jury to consider the defendant's mental disorder or disability as a mitigating circumstance. In fact, the Indiana Statutes contain two relevant mitigating

¹⁶¹ IND. CODE § 35-36-9-2 (2006).

¹⁶² See, e.g., *Matheny v. State*, 833 N.E.2d 454, 457 (Ind. 2005) (affirming death sentence for those with mental illness); *Baird v. Davis*, 388 F.3d 1110, 1114 (7th Cir. 2004) (stating that the execution of individuals with mental illness has not been addressed by the United States Supreme Court), *cert. denied*, 544 U.S. 983 (2005).

circumstances: (1) “[t]he defendant was under the influence of extreme mental or emotional disturbance when the murder was committed”¹⁶³ and (2) “[t]he defendant’s capacity to appreciate the criminality of the defendant’s conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect. . .”¹⁶⁴ The Indiana Code also permits the jury to consider “[a]ny other circumstances appropriate for consideration” as mitigation during the sentencing phase of a capital trial.¹⁶⁵

The Indiana Code and the Indiana Pattern Jury Instructions do not require or recommend that judges instruct capital jurors against relying on the defendant’s mental disorder or disability to conclude that s/he represents a future danger to society. The State of Indiana does indirectly attempt to prevent jurors from considering future dangerousness as an aggravating factor. Future dangerousness is not a statutory aggravating circumstance in Indiana, and the state prohibits juror consideration of non-statutory aggravators.¹⁶⁶

In *Wisehart v. State*,¹⁶⁷ the Indiana Supreme Court addressed future dangerousness as a consideration in imposing the death penalty and acknowledged that “[i]t was inappropriate for the prosecutor to advance these arguments [future dangerousness] as reasons for imposing death: a death sentence is imposed for what the defendant has done, not what he or she might do.”¹⁶⁸ Despite the rules, future dangerousness has been advanced as a reason to impose the death penalty during capital trials, and the Indiana Supreme Court has relied upon the juries’ recognition that this was a product of “overly zealous advocacy” inherent in the judicial adversarial system and that the jury will adhere to the judge’s sentencing instructions.¹⁶⁹

Although the Indiana statutes broadly allow the introduction of mitigating evidence, they do not explicitly require or recommend that judges instruct the juries on the three issues contained in Recommendation #8. Therefore, the State of Indiana is not in compliance with this recommendation.

H. Recommendation #9

Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.

The Indiana Code and the Indiana Pattern Jury Instructions for capital cases do not require or recommend an instruction addressing the administration of medication for a

¹⁶³ IND. CODE § 35-50-2-9(c)(2) (2006).

¹⁶⁴ IND. CODE § 35-50-2-9(c)(6) (2006).

¹⁶⁵ IND. CODE § 35-50-2-9(c)(8) (2006).

¹⁶⁶ See *Corcoran v. State*, 739 N.E.2d 649, 657 (Ind. 2000).

¹⁶⁷ *Wisehart v. State*, 693 N.E.2d 23 (Ind. 1998).

¹⁶⁸ *Id.* at 60.

¹⁶⁹ *Id.*

mental disorder or disability.¹⁷⁰ Upon a review of criminal cases in Indiana, it does not appear that this issue has been litigated.

Accordingly, it is unclear whether the State of Indiana is in compliance with Recommendation #7.

I. Recommendation #10

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

Recommendation #10 is divided into two parts; the first, which is identical to Recommendation #7 in the Mental Retardation section, pertains to the existence of state processes that protect against waivers which are a result of an inmate's mental disability, and the second pertains to the specific mechanism of "next friend" petitions.

As discussed under Recommendation #7 in the Mental Retardation section, the State of Indiana has in place some processes to protect against waivers that are a product of a person's mental disability.¹⁷¹ Therefore, the State of Indiana meets the requirements of the first part of Recommendation #10.

Apart from the processes discussed in Recommendation #7 in the Mental Retardation section, the State of Indiana does not provide for a "next friend" to pursue post-conviction relief,¹⁷² although the Indiana Supreme Court has provided for the appointment of appellate "amicus" counsel on a direct appeal after a guilty plea in which the defendant bargained for a death sentence.¹⁷³ Federal courts in the State of Indiana do, however, permit a "next friend" to act on behalf of a death-row inmate. Specifically, federal courts allow a "next friend" to file a petition on behalf of a death-row inmate who wishes to waive his/her right to pursue post-conviction proceedings. Before being allowed to file a petition on behalf of a death-row inmate, the "next friend" must:

- (1) Provide an adequate explanation-such as accessibility, mental incompetence, or other disability-why the real party in interest cannot appear on his own behalf to prosecute the action; and

¹⁷⁰ See generally INDIANA PATTERN JURY INSTRUCTIONS, CAPITAL CASE AND LIFE WITHOUT PAROLE INSTRUCTIONS AND VERDICT FORM.

¹⁷¹ See *supra* note 128 and accompanying text.

¹⁷² See, e.g., *Corcoran v. State*, 820 N.E.2d 655, 663 (Ind. 2005).

¹⁷³ See *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997).

- (2) Be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.¹⁷⁴

It has also been “suggested that a ‘next friend’ must have a significant relationship with the real party in interest.”¹⁷⁵

The U.S. Supreme Court has held that an individual is “incompetent,” thereby permitting next friend standing, if the individual lacks the “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation,” or suffers “from a mental disease, disorder, or defect which may substantially affect his capacity.”¹⁷⁶

Because the State of Indiana has adequate safeguards to prevent waivers that are a result of a person’s mental illness, but does not permit “next friend” standing to pursue claims on behalf of an incompetent defendant, the State of Indiana is in partial compliance with Recommendation #10.

J. Recommendation #11

The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.

Recommendation #11 consists of two parts: the first involves the suspension of post-conviction proceedings due to the prisoner’s mental disorder or disability, and the second involves the reduction of the prisoner’s sentence due to the likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings.

Suspension of Post-Conviction Proceedings

In *Timberlake v. State*, The Indiana Supreme Court held that in order for a defendant to be competent to participate in post-conviction proceedings, the defendant must be able to “understand the nature of the proceedings and be able to assist in the preparation of his defense.”¹⁷⁷ The Indiana Supreme Court did not, however, determine whether

¹⁷⁴ Schornhorst v. Anderson, 77 F. Supp. 2d 944, 950 (S.D. Ind. 1999).

¹⁷⁵ *Id.*

¹⁷⁶ Rees v. Peyton, 384 U.S. 312, 314 (1966).

¹⁷⁷ *Timberlake v. State*, 753 N.E.2d 591, 600 (Ind. 2001) (citing IND. CODE § 35-36-3-1 (2001)). However, in *Corcoran v. State*, the Indiana Supreme Court determined it will evaluate the defendant’s competency to proceed with post-conviction relief under a combination of two standards: (1) as the

competency is required for post-conviction proceedings, although it noted that “[i]t cannot be that in all circumstances an improperly convicted person has no remedy because of his/[her] incompetence.”¹⁷⁸ If the defendant is found mentally incompetent during post-conviction proceedings, it is unclear whether Indiana requires a suspension of the proceedings.¹⁷⁹

When defendant’s counsel files a motion claiming the defendant is incompetent to proceed with post-conviction relief, the court can consider extensive evidence and expert testimony addressing the defendant’s competency. For example, in *Timberlake*, defendant’s counsel conducted a five-day hearing with 32 witnesses and 48 exhibits addressing the defendant’s incompetence which arose during the post-conviction process.¹⁸⁰ The post-conviction court, however, determined that the defendant understood enough of the proceedings and remembered past proceedings of the case to continue with post-conviction.¹⁸¹

More recently, in *Corcoran v. State*, the defendant refused to sign a petition for post-conviction relief that was filed by his appointed counsel from the State Public Defender’s office.¹⁸² Counsel argued to the post-conviction court that Corcoran was incompetent to waive post-conviction review because of his mental illness and offered evidence from three experts who all “concluded Corcoran was unable to make a rational decision concerning the legal proceedings confronting him. Each expert stated that Corcoran’s decision to forego post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believes he experiences as a result of his delusions.”¹⁸³ Nevertheless, the trial court found him competent to proceed with post-conviction relief and the Indiana Supreme Court affirmed that decision.¹⁸⁴

Reduction of Prisoner’s Sentence

In cases in which a death-sentenced inmate is found incompetent to proceed during post-conviction proceedings, there is no Indiana law or case that requires the court to reduce the prisoner’s sentence to life without the possibility of parole.

Conclusion

defendant’s ability to consult with his lawyer with a reasonable degree of rational and factual understanding of the proceedings against him – as announced in *Dusky v. United States*, 362 U.S. 402 (1960); and (2) the defendant’s capacity to appreciate his/her position and to make a rational choice with respect to continuing or abandoning further litigation or on the other hand, whether s/he is suffering from a mental disease, disorder, or defect, which may substantially affect his/her capacity in the premises. 820 N.E.2d at 658-59 (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 601.

¹⁸¹ *Id.* at 600.

¹⁸² *Id.* at 657.

¹⁸³ *Id.* at 660.

¹⁸⁴ *Id.* at 662.

It is unclear whether the State of Indiana is in compliance with the first part of Recommendation #11. The issue of whether competence of the defendant is relevant in post-conviction proceedings has not been resolved, but it is clear that there is no requirement to reduce the prisoner's sentence to life without the possibility of parole upon a finding of mental incompetence to continue with the post-conviction proceedings. The State of Indiana is therefore not in compliance with Recommendation #11.

K. Recommendation #12

The jurisdiction should provide that a death row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.

Recommendation #12 is divided into two parts; the first pertains to a state's standard for determining whether a death-row inmate is competent to be executed, and the second pertains to a state's sentencing procedures after a death-row inmate has been found incompetent to be executed.

Standard for Competency to be Executed

In order for a death-row inmate to be “competent” for execution under Recommendation #12, the death-row inmate must not only “understand” the nature and purpose of the punishment but also must “appreciate” why it is being imposed.

The U.S. Constitution prohibits the execution of any death-row inmate who is insane.¹⁸⁵ The State of Indiana does not permit execution of a death-row inmate if the inmate is “unaware of the punishment they are about to suffer and why they suffer it.”¹⁸⁶ When considering a claim that the individual is insane and should not be executed, the court looks at the “applicable law, the petition, materials from his prior appeals and post-conviction proceedings including the record, briefs and court decisions, and any other material we deem relevant.”¹⁸⁷

Such claims are usually raised in a successive petition for post-conviction relief after habeas proceedings have concluded and an execution date is imminent.¹⁸⁸ In one recent

¹⁸⁵ See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Caritativo v. California*, 357 U.S. 549, 550 (1958) (finding that the Fourteenth Amendment prevents the execution of people who are insane).

¹⁸⁶ *Baird v. State*, 833 N.E.2d 28, 29 (Ind. 2005).

¹⁸⁷ *Id.* at 30.

¹⁸⁸ *Id.* The Indiana Supreme Court recently granted a stay of execution for a death row inmate who raised a *Ford* claim, noting that the United States Supreme Court will soon be revisiting *Ford* in *Panetti v. Quarterman*, 127 S. Ct. 852 (Jan. 5, 2007). See *Timberlake v. State*, 859 N.E.2d 1209 (Ind. 2007). The

case involving the alleged incompetency of an inmate, the Indiana Supreme Court appointed a psychiatrist to examine the defendant and file a report of his findings with the court.¹⁸⁹ However, this procedure is not provided for by statute or court rule and “Indiana has no specific statutory provision addressing either the standard of insanity or any procedural requirements to guard against the execution of the insane.”¹⁹⁰

Sentencing Procedures after Finding of Incompetence

In cases in which a death row inmate is found to be incompetent, the State of Indiana does not require that the inmate’s sentence be reduced to life imprisonment without the possibility of parole.

Conclusion

Although the State of Indiana appears to require that the individual be aware of the punishment s/he is to receive and the reason for the punishment, the standard and procedures by which this determination is made are not entirely clear, nor could we determine if a death sentence will be set aside if the court determines that a death-row inmate is insane to be executed. Therefore, the State of Indiana is only in partial compliance with Recommendation #12.

The Indiana Death Penalty Assessment Team, therefore, makes the following recommendation: The State of Indiana should adopt a law or rule providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

L. Recommendation #13

Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.

majority aptly concluded that “[i]f there is doubt as to the applicable legal precedent, we should be cautious in carrying out the death penalty.” *Id.* at 1213.

¹⁸⁹ See *Timberlake v. State*, 858 N.E.2d 625, 629 (Ind. 2006).

¹⁹⁰ *Baird*, 833 N.E.2d at 33 (Boehm, J., dissenting).

To the best of our knowledge, actors within the criminal justice system in the State of Indiana are not currently working with organizations devoted to protecting the rights of mentally ill citizens, or any other organization, to develop or disseminate—to police, attorneys, judges, and other court and prison officials—models of best practice on ways to protect mentally ill individuals within the criminal justice system. The State of Indiana, therefore, is not in compliance with Recommendation #13.

APPENDIX

**Race and Death Sentencing in Indiana
1981-2000**

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February 13, 2007

Between 1814 and 1961, a total of 131 prisoners were executed in the State of Indiana.¹ Until 1913, all prisoners were hanged (n=71); thereafter, the inmates were electrocuted at the state prison in Michigan City (n=60). This era ended in 1972, when the U.S. Supreme Court (in effect) invalidated all existing death penalty statutes in the United States in the seminal case, *Furman v. Georgia*. In Indiana, a new (“post-*Furman*”) death penalty statute was enacted for homicides committed after October 1, 1977,² and, under its authority,³ two inmates have been electrocuted and 15 more have been given lethal injections.⁴ Of the 17 inmates executed in Indiana since *Furman*, 16 were sent to their deaths for killing white victims (94.1 percent).⁵ In this paper, we present data to shed light on the question of whether the imposition of the death penalty in Indiana from 1981-2000 is correlated with the race of the defendant and/or the race of the victim.

¹ M. Watt Espy, *Executions in the U.S., 1608-1987*, available at <http://www.deathpenaltyinfo.org/ESPYstate.pdf> (last visited Jan. 22, 2007). The races of three of those executed are unknown. Of the remaining 128, 101 (78.9 percent) were white and 27 (21.1 percent) were black.

² Mary Ziemba-Davis & Brent L. Myers, *Sentencing Outcomes for Murder in Indiana: Initial Findings*, in INDIANA CRIMINAL JUSTICE INSTITUTE, *THE APPLICATION OF INDIANA’S CAPITAL SENTENCING LAW: A REPORT TO GOVERNOR FRANK O’BANNON AND THE INDIANA GENERAL ASSEMBLY* (Senator William Alexa, Chair) (Jan. 10, 2002), pp. A-Q, at B, available at http://www.in.gov/cji/special-initiatives/law_book.pdf (last visited Jan. 22, 2007).

³ Through the end of 2006.

⁴ See Death Penalty Information Center, Execution Data Base, available at <http://www.deathpenaltyinfo.org/executions.php> (last visited Jan. 22, 2007). Among the 17 prisoners executed in Indiana since 1972, five waived their appeals and asked to be executed (29.4 percent), raising the question of whether long imprisonment may be a more retributive punishment than death. A total of 87 offenders were sentenced to death for homicides that occurred between October 1, 1977 and August 10, 2001 Ziemba-Davis & Myers, *supra* note 2, at p. C). Of the 87, two were later found to be innocent: Larry Hicks and Charles Smith. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 313-14, 347 (1992).

⁵ *Id.* Fourteen executions were of whites convicted of killing whites, two blacks were executed for killing blacks, and one black was executed for killing another black. *Id.*

Previous Research

Since 1972, several dozen research projects have found that death sentencing in the U.S. is correlated with the homicide victim's race. In 1990, the U.S. General Accounting Office reviewed some 28 studies that had examined the issue of racial bias in death sentencing in various American jurisdictions since 1972. The GAO's synthesis of the 28 studies concluded there was:

a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.

In 82 percent of the studies, race-of-victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty ... This finding was remarkably consistent across data sets, data collection methods, and analytic techniques.⁶

The GAO found the evidence of a race-of-defendant impact was less clear, and hence the evidence supporting a defendant's race effect was "equivocal."⁷

In 2003, David Baldus and George Woodworth updated this overview. After reviewing the work that had been completed after the 1990 GAO Report, they concluded (among other things) that "with only a few exceptions the race of the defendant is not a significant factor in capital charging and sentencing decisions."⁸ However,

⁶ See U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57, at 5 (1990).

⁷ *Id.* at 6.

⁸ David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 214 (2003).

in a substantial majority of the jurisdictions where studies have been conducted, the data document race-of-victim disparities reflecting more punitive treatment of white-victim cases among similarly aggravated cases, regardless of the race of the defendant.⁹

Since that paper was published, at least three additional studies – one in California,¹⁰ one in Colorado,¹¹ and one in South Carolina¹² – have also found that for similar homicides, those who kill whites are more likely to be sentenced to death than those who kill blacks.

Unfortunately, none of the studies reviewed by the GAO or by Baldus and Woodworth was conducted in Indiana. The only relevant research on this issue conducted in Indiana comes from two overlapping studies done by the Indiana Criminal Justice Institute. Neither study focused on the question of which cases are the most likely to end with a death sentence, so they are of limited value. In the first, Ziemba-Davis and Myers collected data on all those sentenced for murder (death, life-without-parole, or a fixed prison term¹³) for crimes committed between July 1, 1993 and August 10, 2001. They analyzed data from that period on 224 cases: 10 offenders who were sentenced to death, 58 who received sentences of life-without-parole, and a sample of 156 offenders sentenced to fixed prison terms for murder taken from a population of 831 total prisoners. Overall, they found that white offenders received harsher sentences than non-white

⁹ *Id.*

¹⁰ Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005).

¹¹ Stephanie Hindson et al., *Race, Gender Region and Death Sentencing in Colorado, 1980-1999*, 77 UNIV. OF COLO. L. REV. 549 (2006).

¹² Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006) (finding that between 1993 and 1997, prosecutors in South Carolina seek the death penalty 2.5 times more often in cases with female victims than male victims, and three times more often in white-victim cases than black victim cases).

¹³ “Fixed prison term” sentences are defined as all prison sentences excluding Life-Without-Parole.

offenders,¹⁴ although offender race did not correlate with the length of prison terms meted out to those given fixed prison terms.¹⁵ Whites killing whites received harsher sentences than whites killing non-whites,¹⁶ and nonwhites with white victims received harsher sentences than nonwhites with nonwhite victims.¹⁷

Among those who received fixed prison terms, 4 percent had multiple victims, compared to 26 percent who received sentences of life-without-parole and 60 percent of those sentenced to death.¹⁸ Overall, the authors concluded that “the race of the victim alone may play a more important role than the race of the offender of the interaction between victim and offender race.”¹⁹

This study was updated in 2004.²⁰ The updated project included data on all those sentenced to death in Indiana from 1977 through December 31, 2002 (n=91), all those sentenced to Life Without Parole (LWOP) between the time it became a sentencing option on July 1, 1993 through December 31, 2002 (n=73), and a sample of the 1,326 offenders convicted of murder who were sentenced to fixed prison terms for homicides occurring July 1, 1990 through December 31, 2002 (n=298). The data presented is descriptive, focusing on such variables for the three groups as who raised the offender, whether there was a history of drug abuse or criminality among the caregivers, and the offender’s religion, marital status, and employment and military experience.

¹⁴ Ziemba-Davis & Myers, *supra* note 2, at F.

¹⁵ *Id.* at G.

¹⁶ *Id.* at I.

¹⁷ *Id.* at J.

¹⁸ *Id.* at H.

¹⁹ *Id.* at J.

²⁰ Mary Ziemba-Davis et al., *The Social Ecology of Murder in Indiana* (Indiana Criminal Justice Institute, Dec. 2004), available at <http://www.in.gov/cji/special-initiatives/The%20Social%20Ecology%20of%20Murder%20in%20Indiana.pdf> (last visited Jan. 22, 2007).

The 462 offenders were convicted of killing 544 victims, 64 percent of whom were white and 29 percent of whom were African American (the race/ethnicity of ten victims was unknown, one was American Indian, and five were Hispanic).²¹ However, whereas 83.2 percent of those sentenced to death and 74.4 percent of those sentenced to LWOP were convicted of killing whites, only 53.3 percent of those given determinate prison sentences were convicted of killing whites.²² No analysis was undertaken to attempt to explain these disparities.

We now turn attention to the methodology we used to build on this work and take a closer look at who is sentenced to death in Indiana.

Methodology²³

To study the possible relationships between the races of homicide suspects and victims and death penalty decisions, researchers must begin by comparing two groups of suspects and victims: those involved in cases in which the death penalty is imposed, and those involved in homicides that do not result in death sentences. Should rates of death sentencing vary between races of suspects and victims (e.g., if higher rates of death sentencing are found among those who kill whites than those who kill blacks), researchers must then examine legally relevant factors to ascertain if such factors account for the different rates between races.

²¹ Above we noted that 94 percent of those executed since 1972 in Indiana were sentenced to death for killing whites, a higher proportion than would be expected given that 64 percent of the homicide victims in the State are white.

²² *Id.* at 30.

²³ Because of similar methodology, this section is taken (with minor changes) from Glenn L. Pierce, Michael L. Radelet, & Raymond Paternoster, *Race and Death Sentencing in Tennessee, 1981-2000* (American Bar Association 2007).

To allow us to make comparisons between all homicide suspects and the subset of those suspects who were ultimately sentenced to death, information was collected on 1) all suspects associated with homicides committed in Indiana over the twenty-year study period (1981 through 2000) where the races of both the offender(s) and victim(s) were either white or black (n=4,175),²⁴ and 2) the subset of all those homicides which ended with a defendant being sentenced to death. This information was collected from the following two data sources:

1. Supplemental Homicide Reports (SHRs): The Supplemental Homicide Reports are the product of the FBI's national data collection system for all homicide incidents reported to local law enforcement agencies. SHR reports on homicides are collected by local police agencies throughout the United States. These agencies report the SHR data to the FBI either directly or through their state's crime reporting program. Eventually, information on each homicide collected through the SHR reporting system is included in the FBI's Uniform Crime Reports.²⁵ While the SHR reports do not record the suspects' or victims' names or the specific date of the homicide, they do include the following information: the month, year, and county in which the homicide occurred; the age, gender, race, and ethnicity of the suspects and victims; the victim-suspect relationship; the weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).²⁶ Since local law enforcement agencies usually report these data long before the suspect has been convicted (or sometimes even

²⁴ Homicides where either a victim or suspect was not white or black were excluded because they constitute too few cases to analyze when the appropriate control variables are incorporated into the analysis.

²⁵ See Nat'l Archive of Criminal Justice Data, Learn More About the Supplementary Homicide Reports, at <http://www.icpsr.umich.edu/NACJD/SDA/shr7699d.html> (last visited Dec. 22, 2006).

²⁶ *Id.*

before the suspect has been arrested), these data are for homicide “suspects,” not arrested defendants or convicted offenders.²⁷

2. Death Sentence Data Set: Information on all cases that ended in a death sentence for murders committed in Indiana during the study period was obtained and checked by the Indiana Death Penalty Assessment Team (“the Team”). A total of 74 cases that ended with a death sentence for homicides that occurred between January 1, 1981 and December 31, 2000 were identified. The team obtained the majority of this information from a database maintained by the Indiana Public Defender Council. Rule 24 of the Indiana Rules of Criminal Procedure requires prosecuting attorneys to file notice with the Indiana Supreme Court Administrator’s Office when a death penalty request is filed. The Administrator’s Office then notifies the Indiana Public Defender Council and the Indiana Prosecuting Attorney Council, and checks with these two agencies quarterly to ensure that all three have accurate information on the status of each case. The Indiana Public Defender Council obtains additional information, such as the race of defendant and victim, date of the offense, and aggravating circumstances alleged, by contacting defense counsel in each case. The team supplemented this information with data from the website of the Clark County Prosecuting Attorney.²⁸

In addition to information on the races of suspects and victims, both data sets collected information on legally relevant factors that are known to be important (and legitimate) in death penalty decisions. For this analysis, we examined two of the most important legally relevant aggravating factors that are related to the decision of who is sentenced to death: 1) whether the crime took the life of more than one victim, and 2)

²⁷ *Id.*

²⁸ Clark County Prosecuting Attorney, Indiana Death Row, 1977-2006, at <http://www.clarkprosecutor.org/html/death/rowold.htm> (last visited Jan. 29, 2007).

whether the homicide involved an accompanying felony, such as a rape or a robbery. Considering these two aggravating factors allowed us to focus our analysis on the question of who is sentenced to death among all those who commit what most would agree are truly some of the “worst of the worst” homicides.²⁹ With these two variables, we were able to classify each homicide in both the SHR and the Death Sentence Data Set as involving zero, one, or two potentially aggravating factors. In addition, each homicide incident was also classified by the decade in which the homicide occurred (*i.e.*, 1981-1990 or 1991-2000). This allowed us to examine whether any patterns of death sentencing changed over time.

To conduct the analysis of death sentencing patterns, we merged the SHR “suspect” Data Set with the Death Sentence “defendant” Data Set by matching cases based on victim’s race (white or black), suspect’s race (white or black), aggravating circumstances (none, one, or two), and time period (1981-1990 vs. 1991-2000). In effect, this procedure involved identifying which of the 4,175 cases in the SHR data ended with a death sentence. We were unable to match one of the 74 death penalty cases with a corresponding case in the SHR data set.³⁰ In order to include the case in the analysis, we constructed a new case for this homicide and added it to the SHR data, thereby increasing our sample of SHR homicide suspects from 4,175 to 4,176. All our analyses focus on 4,176 suspects. Each was coded as killing one or more whites or one or more blacks (not both), so when we address issues related to victims, we also use 4,176 cases. That is,

²⁹ As we will see *infra*, the presence of one or two of these aggravating factors is a strong predictor of who is sentenced to death in Indiana. We have also found that these two factors also are important predictors of who is sentenced to death in California. Pierce & Radelet, *supra* note 10, at 23-24.

³⁰ The lack of a matching case in the SHR data set occurs because of either a failure of the police to report the homicide to the SHR reporting program or reporting a case with several variables missing that are needed for matching.

each suspect was coded as killing a white or a black, regardless of the actual number of people she or he killed. We capture multiple murders in one of our measures of aggravating factors.

Results

Table 1 documents a dramatic decline in death sentencing in Indiana between 1981-1990 and 1991-2000. In the former decade, death sentences were imposed in 2.8 percent of the cases, compared to only .8 percent in 1991-2000. Thus, a death sentence was 3.5 times as likely for a homicide committed in the earlier decade than in the latter ($.028 \div .008$). Of the 74 death sentences, 56 were imposed for homicides committed between 1981 and 1990, and 18 for homicides committed 1991-2000. This decline came despite an overall increase in homicides: Table 1 shows that 2,189 homicides were committed in the 1990s, compared to 1,987 in the 1980s.³¹ Undoubtedly, at least part of the reason for the decline in death sentencing is because of the advent of the sentencing option of life without parole (LWOP) for homicides committed after July 1, 1993.

Table 2 displays the data for the 20-year study period cross-tabulated by the defendant's race. It can be seen that 52.6 percent of the known offenders were black ($2,197 \div 4,176$). Overall, 1.8 percent of the homicides ended with a death sentence ($74 \div 4,176$). However, whereas only one percent of the black offenders were sentenced to death, 2.7 percent of the white offenders were sent to death row. Table 2a shows that the racial difference in death sentencing is even higher in the 1990s than it is in the 20-year period as a whole. Here only 2/10 of one percent of the black offenders were sentenced

³¹ This figure is obtained by subtracting 2,189 (from Table 2a) from 4,176 total homicides suspects, 1981-2000 (Table 2).

to death, compared to 1.6 percent of the white offenders. In the period 1991-2000, whites convicted of homicides in Indiana were eight times more likely to be sentenced to death than blacks (.016 ÷ .002).

Table 3 shows that over the twenty-year study period, whites were 53.2 percent of the homicide victims in Indiana (2,223 ÷ 4,176). Among those who killed whites, 2.9 percent were sentenced to death, compared to .5 percent of those who killed blacks. Those who were convicted of killing whites were 5.8 times more likely to be sentenced to death than those convicted of killing blacks (.029 ÷ .005). This racial difference is larger in the data from the 1990s (Table 3a) than from the two decades as a whole (Table 3). As seen in Table 3a, 1.5 percent of the homicides from the 1990s with a white victim ended with a death sentence, compared to .2 percent of those with black victims, a ratio of 7.5.

To get a better idea of who is sentenced to death, Table 4 combines both the suspect/defendant's race and the race of the victim. Overall it can be seen that the highest death sentencing rates are for homicides in which a black is accused of killing one or more whites (3.8 percent), followed by white-on-white homicides (2.8 percent) and black-on-black cases (.4 percent). Of the 95 cases where whites were suspected of killing blacks, only one ended with a death sentence (1.1 percent). Since this is a relatively small number of cases, it is impossible to say that whites killing blacks are treated more harshly than blacks killing blacks. Overall, however, it can be seen that the crucial determinant of who is sentenced to death is the race of the victim; in addition, in cases with white victims, black suspects are more likely than white suspects to be condemned to death.

Table 4a shows that the race-of-victim effect is particularly pronounced in the 1990s. Here, among the 1,068 homicides in which a black was suspected of killing another black, only one ended with a death sentence. White defendants have similar chances of being sentenced to death regardless of the race of their victim/s.

Table 5 introduces “control variables” that will allow us to ascertain death sentencing rates among roughly similar homicides. As would be expected, the probability of a death sentence increases with the number of aggravating factors that are present in a given homicide event. Only .3 percent of the cases with no aggravating factors resulted in a death sentence, compared to 5.1 percent of those with one aggravating factor present and 33.9 percent of those with two aggravating factors present.

Table 6 shows that white suspects/defendants were more likely to be sentenced to death than black suspects in cases where there were zero or one aggravating factor present, but the racial difference in cases with two aggravating factors is not statistically significant. Since statistical significance is a sample of both sample size and the strength of the relationship, however, it could be that the lack of statistical significance among cases with two aggravating factors present is attributable to the fact that there are only 56 cases in the 20 year period where both aggravators were present. In Table 6 it can be seen that 41.4 percent of those cases with white defendants ended in a death sentence, compared to 25.9 percent of the cases with black defendants.

Similar patterns are displayed in Table 7, which focuses on the race of the victim. There are statistically significant differences in death sentencing rates between those who kill whites and those who kill blacks in cases with no or one aggravating factor present, but not among cases where both aggravators are present. Interestingly, among cases

where both aggravators are present, those suspected of killing blacks are actually more likely than those suspected of killing whites to be sentenced to death (.417 vs. .318), although, again, this difference is not statistically significant.

Table 8 combines both defendant's and victim's races. All eight of those sentenced to death in cases where no aggravators were present were whites suspected of killing whites. Where one aggravator is present, there are relatively similar death sentencing rates for white-on-white and black-on-white cases (.079 and .068), and few death sentences for cases with black victims, regardless of the defendant's race. Where two aggravators are present, the highest rates of death sentencing are among white on white and black on black cases, although it is again impossible to detect a statistically significant pattern because of the small number of cases.

Finally, Table 9 displays data relevant to the possibility that the decline in death sentencing between the decades is due to a decline in the level of aggravation of cases between the two decades. This hypothesis can be rejected. While the difference in death sentencing rates between the decades among cases where no aggravating circumstances are present is not statistically significant, the difference among cases with one or two aggravators is statistically significant.

To examine the combined effects of victim's race and aggravating circumstances on death penalty decisions in Indiana, a multivariate statistical technique was used. For the analysis of dichotomous dependent variables (such as death sentence vs. no death sentence), the appropriate statistical technique is logistic regression analysis.³² Table 10

³² 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

presents the results of the logistic regression analysis, using only cases from 1991-2000. The independent variables are all entered into the analysis as dichotomous measures. Thus, where there was one aggravating circumstance or two aggravating circumstances, such data were entered as dichotomous variables. Cases with neither aggravating circumstance present were left out of the equation so they could be used as the reference or comparison category. Three variables measuring race were entered as “dummy” (or yes-no) variables – one variable measuring if the case had a black suspect and white victim, a second measuring black suspect/white victim, and the third a white suspect/white victim. We left cases with black suspects and victims out of the equation, so the coefficients for the three race variables measure the difference between that variable and the omitted (black-black) cases.

Table 10 presents the estimated effect of a single independent variable, controlling for the effects of all other variables, using the exponentiated value of the Beta (β) coefficient, which is the logistic regression beta coefficient, $\text{Exp}(\beta)$. The results of the analysis, shows that there are three statistically significant factors that help explain who is sentenced to death over this ten-year period. The $\text{Exp}(\beta)$ in Table 10 shows that the odds of receiving a death sentence for homicide cases with one aggravating circumstance increase by a factor of 12.191, controlling for the other independent

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 is 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 $(1) \ln(y) = \hat{\alpha}_0 + X\hat{\alpha} + \xi_i$ 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 ξ_i is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, and odds ratio of 1 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. 39, 59 (2002).

variables. The odds of receiving a death sentence for homicide cases with two aggravating circumstances present increase by a factor of 77.958, again controlling on all the other independent variables. In addition, Table 10 shows that the odds of receiving a death sentence for homicide cases with white suspects and white victims increase by a factor of 16.076 compared with those cases with black defendants and victims. *In other words, during the 1980s and 1990s in Indiana, the odds of a death sentence among homicides with a similar level of aggravation were 16 times higher for cases where whites were suspected of killing whites than are the odds of a death sentence for cases in which blacks were suspected of killing blacks.* There are no statistically significant differences between cases with black suspects and black victims and 1) cases with black suspects and white victims, and 2) cases with white suspects and black victims.

Conclusions

Table 1 shows that there was a significant drop in the number of death sentences from 1981-1990 to 1991-2000. In the 1980s there were 56 death sentences, or 75.7 percent of the total of 74 death sentences observed over the twenty year study period. As Table 1 shows, in the 1980s, 2.8 percent of all homicides resulted in a death sentence; in the 1990s, this proportion fell to .8 percent.

Tables 2 and 2a show that white suspects are more likely to be sentenced to death than black suspects, regardless of whether we look at data for the entire 20-year study period (Table 2) or solely at 1990-1999 (Table 2a). Similarly, Tables 3 and 3a show that those suspected of killing whites are more likely to be sentenced to death, regardless of whether we look at data over the twenty year period or only from the 1990s. Because

these data show that both the race of the defendant and the race of the victim are important predictors of who is sentenced to death, Tables 4 and 4a combine both defendant's and victim's races. Here we see that in both the full study period and in the 1990s alone, the group with the lowest proportion of death sentences is the group with black defendants with black victims. In both the 20-year sample and in the 1990s, there are very few death sentences for those suspected of killings blacks.

The data presented in Table 5 indicate that the probability of a death sentence increases with the number of aggravating factors present. Table 5 shows that .3 percent of homicide cases with neither of our aggravating factors present ended with a death sentence, compared to 5.1 percent of the cases with one aggravator and 33.9 percent of the cases with two aggravators. Tables 6 and 7 show that the effect of defendant's race and victim's race on death sentencing is found among cases with zero or one aggravators, but not among the cases where both aggravators are present. Table 8, which combines defendant and victim races, also shows no effect among cases where both aggravators are present.

Table 9 shows that the decline in death sentencing rates between the 1980s and 1990s observed in Table 1 is not due to a decline in the level of aggravation of homicide cases between the two decades. Among cases with no aggravators present, there was no difference in death sentencing rates between the two decades, but there was a sharp decline in those rates among cases where one or two aggravators are present.

Finally, when the aggravating circumstances of homicide cases are controlled for in a multivariate analysis that examines the victim's and suspect's races, we find that inter-racial homicides (black on white or white on black) are not treated in a statistically

significant different manner than black-on-black homicides. Instead, what emerges from the data is a glaring difference in how white-on-white homicides are treated compared to black-on-black cases. Indeed, controlling for the level of aggravation, the odds of a death sentence are 16 times higher for the white-on-white case than for the black on black.

In the end, then, it seems that that the fact that 94 percent of the 17 people in Indiana who were executed since 1972 had white victims, whereas only 64 percent of the homicide victims in the state are white, is not explained by different levels of aggravation between cases with white victims and cases with black victims. In Indiana, blacks killing blacks are not treated with near the rigor than are cases where whites kill whites.

Table 1
Sentencing Outcome by Decade

	1981-1990	1991-2000	Total	χ^2 Sign ³³
Not Death	1,931	2,171	4,102	
Death	56	18	74	
TOTAL	1,987	2,189	4,176	
Proportion Death Sentence	.028	.008	.018	p < .001

³³ Fisher's Exact Test (2-sided).

Table 2
Sentencing Outcome by Suspect/Defendant's Race
1981-2000

	White Suspect	Black Suspect	Total	χ^2 Sign ³⁴
Not Death	1,926	2,176	4,102	
Death	53	21	74	
TOTAL	1,979	2,197	4,176	
Proportion Death Sentence	.027	.010	.018	p < .001

³⁴ Fisher's Exact Test (2-sided).

Table 2a
Sentencing Outcome by Suspect/Defendant's Race
1991-2000

	White Suspect	Black Suspect	Total	χ^2 Sign ³⁵
Not Death	902	1,269	2,171	
Death	15	3	18	
TOTAL	917	1,272	2,189	
Proportion Death Sentence	.016	.002	.008	p < .001

³⁵ Fisher's Exact Test (2-sided).

Table 3
Sentencing Outcome by Victim's Race
1981-2000

	White Victim	Black Victim	Total	χ^2 Sign ³⁶
Not Death	2,158	1,944	4,102	
Death	65	9	74	
TOTAL	2,223	1,953	4,176	
Proportion Death Sentence	.029	.005	.018	p < .001

³⁶ Fisher's Exact Test (2-sided).

Table 3a
Sentencing Outcome by Victim's Race
1991-2000

	White Victim	Black Victim	Total	χ^2 Sign ³⁷
Not Death	1,041	1,130	2,171	
Death	16	2	18	
TOTAL	1,057	1,132	2,189	
Proportion Death Sentence	.015	.002	.008	p < .001

³⁷ Fisher's Exact Test (2-sided).

Table 4
Sentencing Outcome by Suspect/Defendant-Victim's Race
1981-2000

Sentence	WkW ³⁸	WkB ³⁹	BkW ⁴⁰	BkB ⁴¹	Total	χ^2 Sig.
Not Death	1,832	94	326	1,850	4,102	
Death	52	1	13	8	74	
TOTAL	1,884	95	339	1,858	4,176	
Proportion Death Sentences	.028	.011	.038	.004	.018	p < .001 ⁴²

³⁸ White kills White.

³⁹ White kills Black.

⁴⁰ Black kills White.

⁴¹ Black kills Black.

⁴² Pearson Chi Square. One cell had an expected frequency of less than 5.

Table 4a
Sentencing Outcome by Suspect/Defendant & Victim's Race
1991-2000

	WkW ⁴³	WkB ⁴⁴	BkW ⁴⁵	BkB ⁴⁶	Total	χ^2 Sig.
Sentence						
Not Death	839	63	202	1,067	2,171	
Death	14	1	2	1	18	
TOTAL	853	64	204	1,068	2,189	
Proportion Death Sentences	.016	.016	.010	.001	.008	p = .002 ⁴⁷

⁴³ White kills White.

⁴⁴ White kills Black.

⁴⁵ Black kills White.

⁴⁶ Black kills Black.

⁴⁷ Pearson Chi Square. Two cells had an expected frequency of less than 5.

Table 5
Sentencing Outcome by Number of Aggravating Factors
1981-2000

	None	One	Two	Total	χ^2 Sig.
Sentence					
Not Death	3,191	874	37	4,102	
Death	8	47	19	74	
TOTAL	3,199	921	56	4,176	
Proportion Death Sentences	.003	.051	.339	.018	$p < .001$ ⁴⁸

⁴⁸ Pearson Chi-Square. One cell had an expected frequency of less than 5.

Table 6
Sentencing Outcome by Suspect/Defendant's Race
by Number of Aggravating Factors
1981-2000

		White Suspect	Black Suspect	Total	χ^2 Sign ⁴⁹	
Aggravating Factors	Not Death	1,497	1,694	3,191		
	Zero	Death	8	0	8	
	TOTAL	1,505	1,694	3,199		
	Proportion Death Sentence	.005	.000	.003	p = .002 ⁵⁰	
<hr/>						
One	Not Death	412	462	874		
	Death	33	14	47		
	TOTAL	445	476	921		
	Proportion Death Sentences	.074	.029	.051	p = .002	
<hr/>						
Two	Not Death	17	20	37		
	Death	12	7	19		
	TOTAL	29	27	56		
	Proportion Death Sentences	.414	.259	.339	p = .267	

⁴⁹ Fisher's Exact Test (2-sided).

⁵⁰ Two cells had an expected frequency of less than 5.

Table 7

**Sentencing Outcome by Victim's Race by Number of Aggravating Factors
1981-2000**

Aggravating Factors		White Victim	Black Victim	Total	χ^2 Sign ⁵¹
Zero	Not Death	1,606	1,585	3,191	
	Death	8	0	8	
	TOTAL	1,614	1,585	3,199	
	Proportion Death Sentence	.005	.000	.003	p < .008 ⁵²

One	Not Death	522	352	874	
	Death	43	4	47	
	TOTAL	565	356	921	
	Proportion Death Sentences	.076	.011	.051	p < .001

Two	Not Death	30	7	37	
	Death	14	5	19	
	TOTAL	44	12	56	
	Proportion Death Sentences	.318	.417	.339	p = .516 ⁵³

⁵¹ Fisher's Exact Test (2-sided).

⁵² Two cells had an expected frequency of less than 5.

⁵³ One cell had an expected frequency of less than 5.

Table 8

**Sentencing Outcome by Suspect/Defendant-Victim's Race
by Number of Aggravating Factors
1981-2000**

		WkW ⁵⁴	WkB ⁵⁵	BkW ⁵⁶	BkB ⁵⁷	Total	χ^2 Sig.
Aggravating Factors	Sentence						
	Not Death	1,431	66	175	1,519	3,191	
	Zero						
	Death	8	0	0	0	8	
	TOTAL	1,439	66	175	1,519	3,199	
	Proportion Death Sentences	.006	.000	.000	.000	.003	p = .020 ⁵⁸

One	Not Death	384	28	138	324	874	
	Death	33	0	10	4	47	
	TOTAL	417	28	148	328	921	
	Proportion Death Sentences	.079	.000	.068	.012	.051	p < .001 ⁵⁹

Two	Not Death	17	0	13	7	37	
	Death	11	1	3	4	19	
	TOTAL	28	1	16	11	56	
	Proportion Death Sentences	.393	1.00	.188	.364	.339	p = .264 ⁶⁰

⁵⁴ White kills White.

⁵⁵ White kills Black.

⁵⁶ Black kills White.

⁵⁷ Black kills Black.

⁵⁸ Pearson Chi Square. Four cells had an expected frequency of less than 5.

⁵⁹ One cell had an expected frequency of less than 5.

⁶⁰ Three cells had an expected frequency of less than 5.

Table 9
Sentencing Outcome by Decade
by Number of Aggravating Factors
by Decade

		1981-1990	1991-2000	Total	χ^2 Sign ⁶¹
Aggravating Factors	Not Death	1,545	1,646	3,191	
	Zero				
	Death	5	3	8	
	TOTAL	1,550	1,649	3,199	
	Proportion Death Sentence	.003	.002	.003	p < .495 ⁶²
<hr/>					
One	Not Death	376	498	874	
	Death	36	11	47	
	TOTAL	412	509	921	
	Proportion Death Sentences	.087	.022	.051	p < .001
<hr/>					
Two	Not Death	10	27	37	
	Death	15	4	19	
	TOTAL	25	31	56	
	Proportion Death Sentences	.600	.129	.339	p < .001

⁶¹ Fisher's Exact Test (2-sided).

⁶² Two cells had an expected frequency of less than 5.

Table 10
Logistic Regression Analysis of
Suspect/Victim Races and Aggravating Circumstances on the Imposition of a Death
Sentence
1991-2000

Independent Variables**	β	Sig.	Exp(β)
One aggravating circumstance	2.501	.000	12.191
Two aggravating circumstances	4.356	.000	77.958
Black Suspect/ White Victim	1.519	.224	4.567
White Suspect/ Black Victim	2.486	.084	12.014
White Suspect/ White Victim	2.777	.008	16.076
Constant	-8.320	.000	.000

Number of cases = 2,189

-2 Log likelihood = 158.205

“Death Sentence” is coded as 0 = no death sentence, 1 = death sentence.

“One aggravating circumstance” is coded: 0 = either no circumstance or two circumstances, 1 = one circumstance

“Two aggravating circumstances” is coded: 0 = no or one circumstance, 1 = two circumstances

