ARTICLES

THE DEATH PENALTY IN FLORIDA

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INTRODUCTION

Florida is one of thirty-five states in the United States that executes its citizens.[1] Since 1972, when Florida's legislature reinstated the death penalty[2] (less than six months after the United States Supreme Court declared the capital punishment system as then administered unconstitutional[3]), the state has averaged over thirty-eight death sentences a year and executed sixty-seven individuals.[4] Close to four hundred people are currently imprisoned on Florida's death row (12% of the nation's total).[5] These numbers make Florida the second most active death sentencing state, after Texas.[6]

Florida leads the country in one other death penalty-related category: At least twenty-two people have been released from Florida's

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[1] *See* Facts about the Death Penalty, Death Penalty Information Center, http://www.deathpenaltyinfo.org/FactSheet.pdf [hereinafter DPIC Facts] (last visited Apr. 2, 2009).

[2] 1972 FLA. LAWS 16-17, 20, (amending FLA. STAT. §§ 782.04, defining murder; 775.082, defining penalties; 921.141, defining sentencing procedures).

[3] Furman v. Georgia, 408 U.S. 238 (1972).

[4] DPIC Facts, *supra* note 1, at 3.

[5] *Id.* at 2 (indicating 397 people on Florida's death row, out of 3309 nationwide).

[6] *Id.* at 2-3. Virginia (103) and Oklahoma (eighty-nine) have executed more individuals than Florida in the modern era, but have many fewer people on death row (Virginia has twenty-one, Oklahoma eighty-four). *Id.*

death row, nineteen of whom were sentenced after 1972.[7] The next state in line is Illinois, with eighteen exonerations, and the third state, Texas, is far behind, at nine.[8]

Thus, it was not surprising that the American Bar Association picked Florida as one of the eight death penalty states to be the focus of its Death Penalty Moratorium Implementation Project. That Project was created in 2001, in the wake of the ABA's 1997 call for a nationwide moratorium on executions.[9] The objective of the moratorium was to allow states time to identify and eliminate flaws in the death penalty process.[10] In aid of that goal, the ABA established the Project to collect data about the death penalty and encourage government leaders to undertake a detailed examination of capital punishment and enact any needed reforms.[11] The Project set up Assessment Teams in Florida and seven other states, with instructions to investigate twelve aspects of death penalty administration: police investigation procedures; the use of DNA evidence; crime laboratories and medical examiners; prosecutorial discretion; defense services; jury instructions; the judicial role; the direct appeal process; state post-conviction and federal habeas proceedings; clemency proceedings; the treatment of racial and ethnic minorities; and the treatment of people with mental illness and mental retardation.[12]

I was asked to be chair of the Florida Assessment Team. The rest of the Team consisted of an ex-Florida Supreme Court justice, a trial court judge, one of the leading prosecutors in the state, a retired public defender who litigated trials and appeals, a specialist in post-convic-

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[7] FLA. COMM'N ON CAPITAL CASES, CASE HISTORIES, A REVIEW OF 23 INDIVIDUALS RELEASED FROM DEATH ROW (June 20, 2002), *available at* http://www.floridacapitalcases.state.fl.us/Publications/Deathrow.pdf (listing twenty-three exonerees, one of whom, Frank Lee Smith, was cleared posthumously).

[8] DPIC Facts, *supra* note 1, at 2.

[9] AM. BAR ASS'N SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES ET AL., ABA RECOMMENDATION NO. 107 (Feb. 3, 1997), *available at* http://www.abanet.org/irr/rec107.html.

[10] *See id.*

[11] LESLIE A. HARRIS, AM. BAR ASS'N, ABA REPORT ACCOMPANYING RECOMMENDATION NO. 107, at 2 (Feb. 3, 1997), *available at* http://www.abanet.org/ftp/pub/irr/rpt107.wpd ("[I]t should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.").

[12] *See A.B.A, A.B.A. Death Penalty Moratorium Implementation Project, Individual State Assessments*, http://www.abanet.org/moratorium/assessmentproject/home.html (last visited Mar. 8, 2009).

tion appeals, a former special counsel to Florida governors on the criminal justice system and clemency in particular, and a social scientist.[13] Also attending one or more Team meetings were the President of the Florida Bar (a defense attorney), a State Senator (a former prosecutor), and a second trial court judge, as well as eight University of Florida Levin College of Law students, who helped gather and analyze information.

In this article, I will sketch out our findings in all twelve areas noted above, along with the recommendations the Assessment Team made with respect to each, all of which were endorsed unanimously by the eight Team members.[14] The three most significant concerns about the Florida death penalty process that evolved out of our research were the following: (1) mechanisms for assuring the quality and adequate compensation of counsel in capital cases are lacking; (2) the combination of poor jury instructions, Florida's unique practice of allowing the jury to recommend a sentence of death by a majority vote, and the fact that judges are elected (and thus arguably subject to popular pressure to impose the death penalty) undermines the legitimacy of death sentences that are imposed; and (3) the geographical and racial disparities associated with capital charging and death sentences call into question the fairness of the death penalty system.[15] The Team made recommendations in each of these areas. It also made recommendations concerning the clemency decision-making process and treatment of people with mental disabilities.[16] This article adds to these proposals several reform suggestions designed to deal with matters that the Team examined but did not make recommendations about: deficien-

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[13] In the order referenced in the text, these individuals were: ex-Justice Leander J. Shaw, Jr.; Judge O.H. Eaton, Jr. (18th Judicial Circuit); Harry L. Shorstein (Jacksonville state attorney); Michael Minerva (former public defender in the Second Judicial Circuit and Director of the Office of Capital Collateral Representative); Sylvia H. Walbolt (Carlton Fields law firm); Mark Schlakman (former special counsel to Governor Lawton Chiles and transition advisor to Governor Jeb Bush); Mark Fondacaro (Ph.D. psychologist at the University of Florida).

[14] AM. BAR ASS'N., EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT—AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES AND PRACTICES (2006), *available at* http://www.abanet.org/moratorium/assessmentproject/florida/report.pdf [hereinafter FLORIDA REPORT]. The Florida Report was based on a report by the Assessment Team, entitled PRELIMINARY REPORT: FLORIDA ASSESSMENT TEAM (July 1, 2005) (on file with author) [hereinafter ASSESSMENT TEAM REPORT].

[15] FLORIDA REPORT, *supra* note 14, at iv-ix.

[16] *Id.* at xi-xii.

cies in police investigation techniques, under-monitored crime labs, and attorney misconduct and nonfeasance.

All of the problems discussed in this article contribute to conviction of innocent people and to death sentences for people who are guilty but not deserving of the ultimate penalty. Thus, in addition to reforms in the specific areas identified above, the Assessment Team recommended the establishment of an independent commission scheme designed to investigate and evaluate claims of innocence.[17] This recommendation, discussed in the conclusion to this article, is meant to address deficiencies in all twelve areas to the extent they undermine the reliability of the legal process. A more subtle problem noted by the Assessment Team, also discussed in the conclusion, is the huge investment in financial and human resources required by the administration of the death penalty, to the probable detriment of the rest of the criminal justice system.[18]

The discussion below is inevitably selective. The subjects emphasized here are not necessarily the findings that other members of the Assessment Team would have stressed. Further, the characterizations and analysis of the case law, statutes, procedures, and practices are mine alone; they should not to be attributed to any other member of the Team.

Police Investigation Procedures

The police can heavily influence death penalty cases in a number of ways. Perhaps most importantly, the manner in which they conduct interrogations and identification procedures can seriously taint the entire prosecution if certain procedures are not followed.[19] If police violate constitutional rights during the investigative stages, they may prevent conviction of a person who is clearly guilty, because the courts may feel compelled to exclude illegally obtained confessions or identifications even though they are reliable.[20] Of at least equal concern is the possibility that conduct that courts do not consider unconstitu-

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[17] *Id.* at ix-x.

[18] *Id.* at xii.

[19] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, *passim* (1998).

[20] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 492 (1966) (requiring exclusion of confessions obtained in violation of the Fifth Amendment); Stovall v. Denno, 388 U.S. 293, 302 (1967) (requiring exclusion of identifications obtained in violation of the Due Process Clause, but holding there was no such violation).

tional, or violations of the Constitution that are not discovered by the courts, will produce evidence that is unreliable and lead to the conviction of an innocent person.

With respect to interrogations, the most important issue is whether police techniques are so coercive that they might cajole a person into confessing to a crime he or she did not commit. Florida courts have excluded confessions that appear to have been involuntary under the totality of the circumstances.[21] But in several cases involving capital charges, the Florida judiciary has refused to exclude confessions made under conditions that empirical research suggests can be conducive to false statements.

For instance, one of the primary precipitants of such confessions is a lengthy interrogation during which the police convince the suspect that making incriminating statements is the only way to escape an intolerably stressful situation.[22] Yet in *Chavez v. State*,[23] a capital case, the Florida Supreme Court held that an interrogation that took place over a fifty-four-hour period was not unconstitutional because the defendant was provided with food, drink and cigarettes "at appropriate times," permitted to have one six-hour rest period, and was repeatedly advised of his *Miranda* rights. In another capital case, *Nelson v. State*,[24] the Court stated that, although the suspect was interrogated from late one night to 8:30 the next morning and then from 9 p.m. that day "for the majority of the night," his confession was voluntary because he had three breaks during the latter period, was offered cold drinks and coffee, and was permitted to use the restroom.[25]

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[21] *See, e.g.*, State v. Sawyer, 561 So. 2d 278, 290-91 (Fla. Dist. Ct. App. 1990) (finding confession involuntary because it was the product of enforced sleeplessness resulting from a sixteen-hour serial interrogation, during which the defendant was provided with no meaningful breaks and police asked him misleading questions, denied his requests to rest, refused to honor his *Miranda* rights, and used the defendant's history of blackouts to undermine his reliance on his own memory).

[22] *See* Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1021 (2003) ("In fifteen of the sixteen proven or probable false confession cases in which Leo and Ofshe specify the length of the interrogation, the police interrogated the suspect for more than six hours."); Saul M. Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 54 (2004) (describing a 2004 study that found that the average length of interrogation leading to false confessions was 16.3 hours).

[23] Chavez v. State, 832 So. 2d 730, 749 (Fla. 2002).

[24] Nelson v. State, 850 So. 2d 514, 524 (Fla. 2003).

[25] *See also* Walker v. State, 707 So. 2d 300, 311 (Fla. 1997) (describing a 6 hour interrogation in which the suspect was allowed to use the restroom and was given drinks); Roberts v. State, 164 So. 2d 817, 819-20 (Fla. 1964) (holding confession admissible even

A second technique that research suggests is particularly likely to produce a false confession is a police pronouncement that the suspect will suffer a significant penalty unless a confession is forthcoming.[26] Yet in one capital case the Florida Supreme Court refused to find involuntary a confession from a defendant who not only was repeatedly told he was guilty but was threatened with the "electric chair" before being promised that a confession would help him out.[27] Similarly, in another capital case the court held that the interrogators' intimation that the suspect would be in a worse position legally if he did not admit his involvement in the murder did not invalidate his confession.[28]

Research also indicates that people who have mental retardation are especially likely to confess falsely because of their tendency to acquiesce to authority figures even when the resulting statements are inaccurate and detrimental to their interests.[29] To the state's credit, Florida police do receive training about how to communicate *Miranda* warnings to people suspected of being mentally retarded.[30] Training regarding the suggestibility and gullibility of people with retardation, however, is minimal. Furthermore, many Florida decisions do not evince sensitivity about this issue. For example, in one first degree murder case involving a defendant who possessed the verbal skills and sophistication of a nine year-old, the appellate court affirmed the voluntariness of his waiver of counsel based on an equivocal statement ("I ain't concerned about a lawyer. I'm concerned about my life.") and a

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though suspect was interrogated intermittently from 6:30 p.m. until 1:30 a.m., and then from 9:30 a.m. the next day until he confessed at around 12 p.m.).

[26] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 916-17 (2004) (distinguishing "low-end" from "high-end" inducements, and stating that "*[h]igh-end inducements* either implicitly or explicitly communicate the message that the suspect will receive less punishment, a lower prison sentence, or some form of investigative, prosecutorial, judicial, or juror leniency or clemency if he confesses, but that the suspect will receive a higher charge or longer prison sentence if he does not confess.") (emphasis in original).

[27] *Walker*, 707 So. 2d at 311.

[28] Davis v. State, 859 So. 2d 465, 472 (Fla. 2003).

[29] *See* Solomon M. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Retardation to Waive Miranda Rights: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 53, 56-58 (2004) (noting that people with retardation have "a strong desire to please others, especially those in authority"). Many of the known false confessions come from people with mental retardation. *See* Drizin & Leo, *supra* note 26, at 971 (finding "at least twenty-eight" cases involving mentally retarded defendants).

[30] FLA. DEP'T OF LAW ENFORCEMENT, CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, LAW ENFORCEMENT BASIC RECRUIT CURRICULUM VOLUME 1, at 157, *available at* http://www.fdle.state.fl.us/Content/getdoc/b1e94dd5-d9f2-49cf-b753-903fa3d1b472/FLBRCV1-pdf.aspx.

"written waiver" that apparently consisted of the defendant circling statements on a form at the direction of the officer.[31]

The confessions in these particular cases may have been accurate. But many confessions obtained by Florida police, using techniques similar to those just described,[32] have not been. Richard Leo and Richard Ofshe, the preeminent researchers in this area, describe three false confession cases out of Florida.[33] Donald Shoup, a mentally retarded teenager charged with capital murder and robbery in Daytona Beach, confessed to the crime but was released after another person admitted he was responsible.[34] A second questionable confession came from Martin Salazar, whose murder charges were dismissed when it was discovered that the prosecutor and police withheld exculpatory fingerprint evidence.[35] In the third case, Tom Sawyer confessed to rape and murder, but the judge suppressed his confession because no evidence linked him to the crimes, his narrative fit poorly with the facts, and he could not produce any statements specific to the crime scene.[36]

Three other cases are described by other sources. In the first, investigators from Ft. Lauderdale, Miami, and the Broward Sheriff's Office obtained a confession from a man who was later exonerated with DNA evidence.[37] In the second, Peter Dallas confessed to murder and implicated two friends after being threatened with the electric chair by

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[31] Lewis v. State, 747 So. 2d 995, 996-97 (Fla. Dist. Ct. App. 1999). *See also* Bevel v. State, 983 So. 2d 505, 515-16 (Fla. 2008); Benitez v. State, 952 So. 2d 1275, 1278-79 (Fla. Dist. Ct. App. 2007) (remanding case, rather than suppressing confession of person with mental retardation).

[32] *See* Paula McMahon & Ardy Friedberg, *Behan Case Prosecutors in a Bind; Charge Unlikely for 2nd Suspect*, S. FLA. SUN-SENTINEL, May 16, 2003, at 1B (quoting an attorney who observed that exonerations that had recently occurred in Broward County had a "pattern" to them: "Mentally ill or mentally retarded people, often black men, are convicted on the strength of alleged confessions obtained by detectives who . . . are poorly trained and poorly supervised."); Daniel de Vise, *Suspects' False Confessions Ignite Interrogation Debate*, MIAMI HERALD, June 14, 2001, at A1 (alleging that police have regularly created false evidence, exaggerated the strength of the case, and led suspects to believe their fate is sealed, and that as a result people occasionally confess to a crime they did not commit).

[33] Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in an Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY. 429, 452, 454, 457-58 (1998).

[34] *See id.* at 452.

[35] *See id.* at 454.

[36] *See id.* at 457-58.

[37] Michael McGuire, *Taped Police Interrogations Gain Momentum in Florida*, CHI. TRIB., Mar. 8, 2003, at C1.

Broward County police. Two other men were later convicted of the murder.[38] Finally, the murder conviction of Timothy Brown, a mentally retarded teenager, was reversed after a federal judge deemed his confession inadmissible because of threats from his interrogators.[39]

All of these cases involved capital charges. In most of them suspicions about the accuracy of the confession surfaced prior to trial and conviction. But the fact remains that the police relied on methods that produced a provably false or highly suspect confession. The police in these cases probably believed that the techniques they used were not likely to produce flawed results. Those beliefs need to change, and arguably Florida courts need to do more to change them.

A separate problem is the difficulty of finding out if police have used techniques that courts identify as impermissible. One method of dealing with this problem, recommended by commentators on all points of the political spectrum, is to videotape interrogations.[40] A few states have mandated taping,[41] but no Florida court has done so. Some Florida police departments require taping of interrogations in homicide cases,[42] but they usually do not mandate that the entire interrogation be taped.[43] One large department even *prohibits* the latter

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[38] Tonya Alanez, *Case Costs County $2.7 Million*, S. FLA. SUN-SENTINEL, June 16, 2007, at 1B.

[39] Wanda DeMarzo, *Interrogation-Videotaping Bill Advances*, MIAMI HERALD, Mar. 10, 2004, at 5B. Editorial, *Interrogations on Tape*, ST. PETERSBURG TIMES, March 13, 2004, at 18A. Paula McMahon, *Hidden Cameras Earn Rave Reviews in Interrogations*, S. FLA. SUN-SENTINEL, Dec. 7, 2003, at 1B. *See also* Keaton v. State, 273 So. 2d 385, 386-87 (Fla. 1973) (noting state obtained confessions from Keaton and his co-defendant that they committed murders for which three other individuals were eventually convicted); Wanda J. DeMarzo & Daniel de Vise, *Ft. Lauderdale to Videotape all Homicide Interrogations*, MIAMI HERALD, Feb. 1, 2003, at 1A (noting that the adoption of a taping rule in Ft. Lauderdale came in the wake of a series of newspaper articles detailing thirty-eight murder confessions that were "rejected by Broward authorities as false or tainted in the past decade.").

[40] *See, e.g.*, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 489-92 (1996); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153-55 (1997).

[41] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004) (holding a cautionary jury instruction required if confession is not taped).

[42] As of 2006, twenty-three Florida law enforcement agencies regularly tape a majority of custodial interrogations. Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175 app. at 183 (2006).

[43] *Id.*

practice, instead only permitting taping of "a summary/recap" of the interview.[44]

In interesting contrast to these relatively relaxed rules for interrogations in capital (and noncapital) cases are the very restrictive rules that apply to interrogation of the police themselves when they are suspected of an infraction or crime. Florida law states that in interrogations of law enforcement and corrections officers, officers may not use offensive language or threaten transfer, dismissal, or disciplinary action. Further, interrogations must be limited to "reasonable periods" and "allow for such personal necessities and rest periods as are reasonably necessary," may not involve more than one interrogator, and must be taped in their entirety.[45] Apparently the police understand the ways in which interrogation can be coercive or produce misleading statements, and have lobbied to minimize those possibilities as much as possible when *they* are the focus of an investigation.

These revelations about interrogation law and practice in Florida should, by themselves, trigger significant concern about police investigation in death penalty cases. Even more troublesome, however, is Florida practice in connection with eyewitness identification, which is by far the most common cause of erroneous convictions.[46] To a jury, nothing is more persuasive than a witness who takes the stand and, under oath, points to the defendant saying, "That's the one." Yet misidentifications are, unfortunately, quite common. At least five of Florida's death row exonerees were convicted in part on the basis of faulty eyewitness testimony.[47]

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[44] OFFICE OF THE SHERIFF, CITY OF JACKSONVILLE, OPERATIONAL ORDER 18.1.12.VIII (cited in ASSESSMENT TEAM REPORT, *supra* note 14, at 79) (on file with author).

[45] FLA. STAT. § 112.532(l)(e)-(g) (2008).

[46] Wells et al., *supra* note 19, at 605 (estimating that eyewitness identifications are responsible for roughly 90% of convictions reversed through DNA testing). Of the eighty-six wrongful capital convictions studied by the Death Penalty Information Center, eyewitness identifications were by far the most prevalent cause. Rob Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, May 2001, http://www.deathpenaltyinfo.org/StudyCWC2001.pdf. Another study found that 48.8% of 205 cases involving erroneous convictions resulting from misidentifications. Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & HUM BEHAV. 283, 291 (1988).

[47] Joseph Green's conviction was overturned in 1996 because the testimony of the state's key eyewitness was often inconsistent and contradictory. Green v. Florida, 688 So. 2d. 301, 307 (1996). Frank Lee Smith's conviction was overturned based on DNA evidence; the chief eyewitness recanted her testimony. Sydney P. Freedberg, *He Didn't Do It*, ST. PETERSBURG TIMES, Jan. 7, 2001, at 1A. Freddie Pitts was pardoned in 1975 in part because the one eyewitness against him recanted her accusations. FLA. TIMES-UNION,

Sometimes witnesses simply get it wrong all on their own, due to perception or memory problems. But on other occasions the police, perhaps unwittingly, help create inaccuracy by relying on identification procedures that are highly suggestive and likely to produce unreliable results. Research indicates that a host of police practices significantly increase the potential for misidentifications. These include: one-on-one confrontations; lineups in which the "distractors" look like the suspect rather than the witness' pre-lineup description of the perpetrator; police suggestions or knowledge that the perpetrator is in the lineup; and failure to keep multiple eyewitnesses separate during the procedure.[48] Particularly troubling is laboratory research indicating that roughly 60% of eyewitnesses will say the perpetrator is present in lineups in which the researchers know the perpetrator is absent.[49] This finding has significant implications for real world identifications, where either police or self-induced pressure makes eyewitnesses particularly eager to help solve a case and look competent.

All of these problems can be easily avoided. For instance, whenever possible, police can use lineups or photo arrays instead of confrontations, avoid suggesting that a particular person in the lineup or array is a suspect, and always emphasize that the perpetrator may not be in the lineup or array. Numerous organizations have developed checklists that can aid police departments in carrying out reliability-enhancing identification procedures.[50]

April 23, 1998; Sydney P. Freedberg, *The 13 Other Survivors and Their Stories.*, ST. PETERSBURG TIMES, July 4, 1999, at 10A. The capital charges against Delbert Tibbs were dismissed, in part because the testimony of the female victim was uncorroborated and inconsistent with her first description of her assailant. Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976) (relying in part on dubious nature of eyewitness testimony in granting new trial); Bradley Scott was released by the Florida Supreme Court in 1991 in part because the testimony of eyewitnesses was plagued with inconsistencies. Scott v. State, 581 So. 2d 887 (Fla. 1991). *See also* Ramos v. State, 496 So. 2d. 121, 123 (Fla. 1986) (finding dog scent lineup unfair because defendant was interrogated in room in which the lineup was conducted and the shirt and knife identified were the only such items in lineup with blood on them).

[48] *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765 (1995).

[49] Ralph N. Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1080 (2000).

[50] *See* Wells et al., *supra* note 19, at 610-12; *How Fair is Your Lineup?*, 2 SOC. ACTION IN LAW 9-10 (1975).

But Florida practice does not always adhere to these types of guidelines and, in contrast to some states,[51] neither the courts nor the legislature in Florida has produced any specific rules governing identification procedures. Instead, Florida courts follow the U.S. Supreme Court's lead,[52] and thus admit identifications taken under unnecessarily suggestive circumstances such as confrontations or one-picture photo arrays as long as there are other "indicia of reliability," which can consist solely of a witness' declaration that he or she is basing a subsequent, non-suggested identification on a memory "independent" of the tainted identification.[53] Unfortunately, memories are not so easily compartmentalized; our current "recollections" of a given incident are often heavily (and unconsciously) influenced by intervening events, such as a suggestive identification procedure.[54]

Many individual Florida police departments have developed identification procedure rules, but they are deficient in various ways. For

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[51] *See, e.g.*, Office of the Attorney General, State of New Jersey, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 18, 2001), http://www.innocenceproject.org/docs/NJ_eyewitness.pdf.

[52] Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Moore v. Illinois, 434 U.S. 220, 226 n.2 (1977) (indicating that the factors to consider in determining whether an identification has an "independent basis" from a tainted identification include the prior opportunity to observe the alleged criminal act, any identification of another person prior to lineup, failure to identify defendant on a prior occasion, and lapse of time between the alleged act and the lineup identification).

[53] Thus, for example, a number of Florida cases have held that one-on-one show-ups, although inherently suggestive, were necessary or were not likely to produce unreliable identifications or both, given the circumstances. *See, e.g.*, Fitzpatrick v. State, 900 So. 2d 495, 518 (Fla. 2005) (holding that although showing a single photograph of defendant to witness prior to showing witness photographic array was unduly suggestive, witness's independent recollection of defendant at time of murder offense provided basis for his identification); State v. Hernandez, 841 So. 2d 469, 472 (Fla. Dist. Ct. App. 2002) (holding a show-up identification admissible because of witness' opportunity to view the criminal act); Macias v. State, 673 So. 2d 176, 180-82 (Fla. Dist. Ct. App. 1996) (holding unnecessarily suggestive voice identification admissible because of indicia of reliability); State v. Cromartie, 419 So. 2d 757, 759 (Fla. Dist. Ct. App. 1982) (holding show-up to several witnesses soon after commission of crime was suggestive, but necessary, and the identification was reliable given opportunity to view perpetrator).

[54] Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 120-22 (2006) (noting confidence levels are not necessarily strongly correlated with accuracy and can be infected by suggestion); Suzannah B. Gambell, *The Need to Revisit Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 201 (2006) ("[M]emory of an event is subject to 'the forgetting curve,' which shows that memory originally declines quickly and then at a more gradual rate, which leave gaps in memory which witnesses often 'fill in' if questioned.").

instance, the Jacksonville police department rules instruct officers who are conducting photo identifications to include at least six photos, keep witnesses separate, and avoid influencing them, but also state that the distractor photos should look like the suspect (rather than the witness' description) and do not admonish the police to tell witnesses that the perpetrator's picture may be absent from the array.[55] Furthermore, the Jacksonville rules contain no provisions governing lineups.[56] The Orlando police department's regulations, which do cover lineups as well as photo arrays, are otherwise very similar, and also tell officers that "language such as 'I think' or 'It looks like' should not appear in any written statement if the witness is certain of the identity."[57] All of the police regulations we obtained permitted one-on-one showups as long as they occur within a certain time of arrest (e.g., two hours in Orlando, four hours in Miami), regardless of whether less suggestive procedures are feasible.[58] Finally, while the Miami policy requires that the conducting officer videotape or at least photograph the procedure, the other policies do not, making post-procedure evaluation of police conduct difficult.[59]

In short, in Florida both the law and practice associated with police investigative procedures could be improved substantially if the goal is to avoid conviction of innocent individuals. Elimination of abusive interrogation techniques and adoption of the best identification procedures would cost very little, either in monetary terms or in terms of lost convictions of guilty people. In contrast, the gain in terms of greater confidence in the reliability of confessions and identifications would be substantial.

Scientific Evidence—DNA, Crime Labs, and Medical Examiners

Although the ABA Death Penalty Moratorium Implementation Project designated "DNA" and "crime labs/medical examiners" as separate categories to be investigated by the state Assessment Teams, these topics are collapsed together here because both involve the scientific collection, analysis and description of physical evidence. Scientific evidence, explained by well-credentialed experts, can often be extremely

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[55] ASSESSMENT TEAM REPORT, *supra* note 14, at 20.

[56] *Id.*

[57] *Id.* at 20-21.

[58] *Id.*

[59] *Id.* at 22.

powerful. As with police investigative techniques, it is crucial that such evidence be as reliable as possible.

DNA testing has revolutionized the criminal justice system. Because it can provide objective proof of guilt and innocence, it has also helped expose how interrogations, lineup procedures, prosecutorial misconduct and other aspects of the criminal justice system can lead to conviction of innocent people. Nationally, roughly 12% of those who have been released from death row were cleared because of DNA evidence.[60] But there is a flip side to such evidence. An improper DNA testing procedure or incompetent testimony about DNA evidence can also lead to improper convictions.[61] While at least two of Florida's exonerees were cleared based on DNA testing,[62] one other exoneree was convicted in part because of flawed DNA evidence, which relied on an untested matching technique and a possibly contaminated sample.[63]

Other types of scientific evidence can also lead to wrongful convictions. In the case of Robert Hayes, one of the two capital defendants in Florida eventually cleared by DNA, an FBI hair analyst testified at trial that hairs in the victim's mouth could not have been the white victim's, because they came from an African-American (the race of the defendant).[64] But later DNA testing revealed the hairs *were* the victim's.[65] Similarly, Anthony Ray Peek's first murder conviction was overturned because hair identification evidence was shown to be false.[66] Medical examiners have also given inaccurate testimony. For instance, when she was the chief medical examiner in Pinellas and Pasco Counties, Joan Wood erroneously diagnosed shaken baby syndrome in two

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[60] Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty*, 29 (2004), Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty.

[61] *Id.* at 29-30.

[62] Frank Lee Smith was cleared through DNA testing in 2000 (after he died of cancer on death row). FLA. COMM'N ON CAPITAL CASES, CASE HISTORIES: A REVIEW OF 24 INDIVIDUALS RELEASED FROM DEATH ROW 143 (2002), *available at* http://www.floridacapitalcases.state.fl.us/publications/innocentsproject.pdf [hereinafter FLA. COMM'N ON CAPITAL CASES]. Rudolph Holton's conviction and sentence were overturned when DNA tests conclusively excluded Holton as the contributor of the hair found in the murder victim's mouth. State v. Holton, 835 So. 2d 269 (Fla. 2002).

[63] Hayes v. State, 660 So. 2d 257, 264 (Fla. 1995) (finding that expert who testified for the prosecution relied on a controversial matching technique and also might have contaminated the sample).

[64] David Karp, *The Innocence Defense*, ST. PETERSBURG TIMES, Feb. 9, 2003, at 1A.

[65] *See id.*

[66] Peek v. State, 488 So. 2d 52, 53 (Fla. 1986).

separate first degree murder cases.[67] According to the Department of Justice, another expert whose questionable testimony jeopardized several homicide prosecutions, including one capital case, "sometimes testified beyond his expertise, misleading juries about the scientific basis for his conclusions, misstating FBI policy or keeping notes that were inadequate to support his forensic opinions."[68]

Mechanisms for avoiding these types of problems include statutory provisions establishing a legal process for obtaining post-conviction DNA testing, rules governing the proper maintenance of physical evidence, accreditation requirements for the personnel in crime laboratories and medical examiner offices, and strict guidelines on testing procedures and the types of conclusions that can be drawn from testing.[69] Florida's success at implementing these protections has been mixed.

Florida law does provide a procedure for both pre-trial and post-conviction DNA testing, and even though petitioners must meet strict requirements to obtain an evidentiary hearing on post-conviction motions,[70] Florida courts are relatively generous in interpreting the rules and granting leaves to amend flawed petitions.[71] Less clear is the extent to which a successful motion provides a meaningful chance at relief. First, while Florida law requires that all physical evidence be maintained until at least sixty days after an individual is executed,[72] the courts have also held, consistent with U.S. Supreme Court holdings,[73] that destruction of physical evidence before the defense has an opportunity to examine it is not a due process violation unless the destruc-

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[67] WILLIAM R. LEVESQUE, REVIEW OF BABY'S DEATH FREES FATHER, ST. PETERSBURG TIMES, Nov. 21, 2002, at 1A.

[68] Sydney Freedberg, *Reports Highlight More Tainted Testimony*, ST. PETERSBURG TIMES, May 3, 2001, at A1. *See also* Laurie P. Cohen, *Strand of Evidence: FBI Crime-Lab Work Emerges as New Issue in Famed Murder Case*, WALL ST. J., Apr. 16, 1997, at A1.

[69] *See* FLORIDA REPORT, *supra* note 14, at 56-63.

[70] *See* FLA. STAT. § 925.11(2)(c) (2008); FLA. R. CRIM. P. 3.853(c)(2) (2007) (stating if a movant fails to meet any of six pleading requirements, the judge may summarily dismiss the claim without a hearing, and even a legally sufficient motion may be denied if its allegations are conclusively refuted by the record on appeal).

[71] *See, e.g.*, Girley v. State, 935 So. 2d 55 (Fla. Dist. Ct. App. 2006); Peterson v. State, 919 So. 2d 573, 574 (Fla. Dist. Ct. App. 2006). *But see* Overton v. State, 976 So. 2d 536, 567-71 (Fla. 2007) (interpreting narrowly the grounds on which an evidentiary hearing concerning the need for testing forensic evidence may be granted).

[72] *See* FLA. STAT. § 925.11(4)(b) (2008).

[73] *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

tion is an intentional effort to prevent exoneration;[74] thus, as a practical matter, police have significant discretion with respect to preserving evidence. Second, although all of the state's crime labs and many of the local labs are accredited, none are equipped to perform mitochondrial or Y-STR testing, which is necessary for old, degraded evidence.[75] Third, as previously noted, despite the protections that exist, serious mistakes have been made, which suggests that greater diligence is needed in this area.[76]

The situation with respect to medical examiners is even more troubling. Florida does not require that medical examiners be accredited and, as of 2006 only four of the state's twenty-four offices had sought such accreditation.[77] Although a statewide commission oversees all medical examiners, accredited and nonaccredited, Joan Wood, the Pinellas and Pasco county examiner mentioned above who was involved in two misdiagnoses (and who was forced to retired after a misdiagnosis in still another case), was chair of that commission for six years, which calls into question the quality of its supervision.[78] An accreditation requirement and more rigorous monitoring of evidence maintenance and testing procedures would go a long way toward mini-

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[74] *See* Guzman v. State, 868 So. 2d 498, 509-10 (Fla. 2003) (capital case holding that even though police destruction of hair found on victim was against departmental regulations, defendant failed to establish bad faith because officers had reasonably believed hair belonged to victim); Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (capital case holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

[75] *See* FLORIDA REPORT, *supra* note 14, at 63.

[76] The Assessment Team found at least two other examples of shoddy scientific expertise. *See* Lyda Longa, *Defendants Get Chance to Challenge FBI Lab Tests*, TAMPA TRIB., Dec. 4, 2000, at Metro 2 (FBI lab technician Jacqueline Blake was accused of failing to follow required procedures for analyzing DNA, over a period exceeding two years; she was later fired); Bill Hirschman, *Sherriff's Staff Raising DNA Standards; Goal is to Increase Accuracy After Errors in Murder Case*, S. FLA. SUN-SENTINEL, Oct. 7, 2003, at 1B (DNA analyst Lynn Baird at the Broward County Sheriff's Office Crime Lab accidentally mixed DNA from a murder case and a separate rape case; Baird was eventually reassigned and murder charges in the associated case were dropped, although the prosecutor said the lab mistake did not play a role).

[77] *See* FLORIDA REPORT, *supra* note 14, at 103.

[78] *See* MEDICAL EXAMINER'S APPARENT MISTAKES PUT MAN IN JAIL, ABC ACTION NEWS REPORT, Nov. 21, 2002.

mizing the most egregious scientific errors that have occurred in capital cases.[79]

Prosecutorial Professionalism

Under the Constitution, prosecutors are obligated to provide exculpatory information to the defense, and of course must also refrain from using perjured testimony (the "*Brady* rule").[80] Florida's Rules of Criminal Procedure also require the prosecution to disclose all of its witnesses as well as "a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial."[81] Finally, Florida's ethical code adds to the prosecutor's obligations by requiring production not only of exculpatory and relevant trial information but of any information that tends to "mitigate" the sentence.[82]

At least three of Florida's exonerees were convicted at trials in which the prosecutor knowingly withheld exculpatory information,[83] and another was convicted at a trial during which the prosecutor knowingly used false testimony.[84] Several other exonerees were convicted on the basis of testimony later determined to be perjured.[85] Although in these latter cases no finding was made that the prosecution knew the testimony was false, in many of them the testimony was plagued with

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[79] For state-of-the-art standards, *see* CODIS (Combined DNA Index System), *Quality Assurance Standards for Forensic DNA Testing Laboratories*, *available at* http://www.fbi.gov/hq/lab/pdf/testinglab.pdf.

[80] *See* Brady v. Maryland, 373 U.S. 83, 86-87 (1963).

[81] FLA. R. CRIM. P. 3.220(b)(1)(A) (2008).

[82] FLA. R. PROF'L CONDUCT, 4-3.8(c).

[83] The three were Freddie Pitts, Rudolph Holton and Juan Melendez. *See* State v. Pitts, 249 So. 2d 47 (Fla. Dist. Ct. App. 1971) (reversing previous opinion based on confession of error by state Attorney General concerning prosecutor's suppression of statement from one of state's witnesses); Death Penalty Information Center, www.deathpenaltyinfo.org/innocence-cases-1994-2003 (last visited Apr. 17, 2009) (Holton's first conviction for rape and murder overturned in 2001 by a circuit court, which found that the state withheld evidence pointing to another perpetrator); FLA. COMM'N ON CAPITAL CASES, *supra* note 62, at 76 (in 2001, a circuit court overturned Melendez's murder conviction after determining that prosecutors withheld evidence about another suspect).

[84] *See* Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) (knowing use of false testimony).

[85] Richardson v. State, 546 So. 2d 1037 (Fla. 1989).

inconsistencies or came from jailhouse snitches or co-defendants with obviously self-serving motives.[86]

Unethical, if not illegal, conduct by prosecutors is apparently quite frequent in capital cases. In *Gore v. State*, the Florida Supreme Court stated:

> This case is one more unfortunate demonstration that "there are [still] some [prosecutors] who would ignore our warnings concerning the need for exemplary professional and ethical conduct in the courtroom." As we did in [five other capital cases], we *once again* repeat our admonition: "[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. . . . It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office."[87]

Despite these explicit concerns, in virtually none of the cases in which prosecutors misbehaved were disciplinary measures taken, as far as the Assessment Team could tell.[88] Indeed, we were only able to find *one* case where a prosecutor in a capital case was referred for discipline[89] (although the nature of the state's filing system makes any kind of comprehensive statement about such matters difficult[90]). One judge in a lower Florida court has even intimated that such referrals are fruitless, given the weak response by the Florida Bar:

> [W]e have no illusions that [referring a lawyer who committed "egregious conduct" to the Bar] will have any practical effect. Our skepticism is

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[86] *See id. See also* Martinez v. State, 761 So. 2d 1074 (Fla. 2000); Green v. State, 688 So. 2d 301 (Fla. 1996); Scott v. State, 581 So. 2d 887 (Fla. 1991); Brown v. State, 515 So. 2d 211 (Fla. 1987).

[87] Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998) (citations omitted) (emphasis in original, "[five other capital cases]" added).

[88] In at least two capital cases, the Florida Supreme Court explicitly found a violation of the Code of Professional Conduct. In neither case did the violation affect the outcome, nor did the Court refer the matter to the Bar. *See, e.g.*, Suarez v. State, 481 So. 2d 1201 (Fla. 1985) (prosecutorial interview of unrepresented defendant); Darden v. State, 329 So. 2d 287 (Fla. 1976) (prosecutor's remarks during trial).

[89] *See* Ruiz v. State, 743 So. 2d 1, 10 (Fla. 1999) (referring prosecutor to Bar based on misconduct during closing argument in a capital case). The local bar committee declined to pursue the case, but the state Bar overruled the committee and a 30-day suspension resulted, although it ran concurrently with a year-long suspension the lawyer had already received for a separate, non-capital case in which she presented a witness under a false name. *See* Florida Bar v. Cox, No. SC01-2148 (Fla. Jan. 31, 2002).

[90] The Bar was only able to provide files on cases where the capital defendant made a complaint. Complaints filed by judges or defense attorneys would not have been included.

> caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer's conduct in litigation, . . . none has resulted in the public imposition of any discipline—not even a reprimand. . . . Speaking for himself alone, the present writer has grown tired of felling trees in the ethically empty forest which seems so much a part of the professional landscape in this area. Perhaps the time has come to apply . . . the rule of conservation of judicial resources which teaches that a court should not require a useless act, even of itself.[91]

Of course, even if prosecutors are not ordinarily disciplined by the Bar, an ethical violation that is also a violation of the law can lead to reversal. In the capital case of *Rogers v. State*,[92] for instance, the Florida Supreme Court held that withholding statements of the state's chief witness, combined with evidence of witness coaching, was reversible error. In *Cardona v. State*,[93] the Court held in another capital case that the prosecutor's failure to turn over statements that could have been used to impeach the co-defendant, a key witness in the state's case, violated the *Brady* rule. A study of all criminal cases involving prosecutorial misconduct between 1970 and 2003 found that Florida courts reversed multiple convictions for withholding evidence (forty cases), manipulation of evidence (four), and using perjured testimony (two).[94]

More often than not, however, prosecutorial misconduct is deemed harmless. In *Guzman v. State*,[95] the Court held that, although payment of $500 "reward" to a witness for her testimony was "favorable" evidence that should have been disclosed by the prosecution, its disclosure would not have affected the outcome of the trial. Similarly, in *Way v. State*,[96] the Court found that photos that could have been used to impeach an expert witness of the state in a capital case were "favorable" but found that there was no reasonable probability the outcome of the case would have changed had they been disclosed. In the above-referenced study of capital and noncapital cases, misconduct by the prosecutor was found to be harmless 55% of the time.[97] And the Florida Supreme Court has made clear that a prosecutorial

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[91] Johnnides v. Amoco Oil Co., 778 So. 2d 443, 444-45 n.2 (Fla. Dist. Ct. App. 2001) (internal citations omitted) (Judge Schwartz).

[92] *See* Rogers v. State, 782 So. 2d 373, 384-85 (Fla. 2001).

[93] *See* Cardona v. State, 826 So. 2d 968, 981 (Fla. 2002).

[94] Michael J. Sniffen, *Study Tells of Cases Tainted by Prosecutors; Thousands of Rulings Affected by Misconduct, Researchers Say*, S. FLA. SUN-SENTINEL, June 26, 2003, at A4.

[95] Guzman v. State, 868 So. 2d 498, 508 (Fla. 2003).

[96] Way v. State, 760 So. 2d 903, 915 (Fla. 2000).

[97] *See* Sniffen, *supra* note 94.

violation of the Code of Professional Responsibility does not require reversal unless it "was so prejudicial as to vitiate the entire trial."[98]

It must also be recognized that even if some types of "procedural" errors (e.g., commenting on the defendant's failure to take the stand; inappropriate closing statements) can be dismissed as harmless in terms of *trial* outcomes, they can still lead to inappropriate death sentences, which the U.S. Supreme Court has emphasized are to be reserved for the worst murderers.[99] For instance, a comment about the defendant's failure to take the stand at trial may not appreciably influence a trial jury that already has sufficient evidence of guilt, but could well still prejudice the jury's sentencing deliberations. Unfortunately, the Florida Supreme Court, once again following the Supreme Court's lead,[100] repeatedly finds these types of procedural errors harmless, which sends prosecutors the message that they may be committed with impunity.[101]

Prosecutorial professionalism can be enhanced by adopting two simple, inexpensive measures. First, if prosecutors appear to act unethically, they should be reported to the Bar by the relevant court and the Bar should take appropriate action. Reprimand, suspension or disbarment is likely to have much more of a deterrent effect on a prosecutor than a reversal or a finding that the prosecutor's error was harmless. Second, errors that are repeatedly committed should no longer be considered harmless. Florida courts can use their supervi-

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[98] State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

[99] *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (stating a capital crime must reflect "a consciousness materially more 'depraved' than that of any person guilty of murder").

[100] United States v. Hasting, 461 U.S. 499, 506 n.5 (1983) (repeated prosecutorial comment on defendant's silence that is considered harmless should be handled through ethical sanctions, not reversal).

[101] With respect to comments on defendant's silence found harmless, *see, e.g.*, Chandler v. State, 534 So. 2d 701, 703-4 (Fla. 1988) (prosecutor's penalty phase comment on defendant's silence); Lugo v. State, 845 So. 2d 74, 107 (Fla. 2003) (prosecutor's use of Golden Rule argument during trial closing); Jones v. State, 748 So. 2d 1012, 1021 (Fla. 1999) (detective's comment on defendant's invocation of silence during trial harmless); Heath v. State, 648 So. 2d 660, 663 (Fla. 1994) (comment on defendant's trial silence). With respect to closing argument during trial or sentencing, *see e.g.*, Rose v. State, 787 So. 2d 786, 797 (Fla. 2001) (inappropriate remarks during closing argument harmless); James v. State, 695 So. 2d 1229, 1234 (Fla. 1997) (same); Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997) (same); Heynard v. State, 689 So. 2d 239, 250 (Fla. 1996) (same); Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (same); Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986) (same); Robinson v. State, 702 So. 2d 213, 214, 217 (Fla. 1997) (same); Moore v. State, 820 So. 2d 199, 208 (Fla. 2002) (same).

sory power to apply a "one bite at the apple" rule, either statewide, or jurisdiction-by-jurisdiction.

A separate focus of the Assessment Team regarding prosecutors centered on charging practices. Florida has twenty state's attorneys, one in each judicial circuit.[102] Over 70% of the 393 people currently on death row were sentenced to death in one of seven circuits, representing only 35% of Florida's prosecutor's offices.[103] In terms of 2008 population numbers, a death sentence is seven times more likely in the Fourth Judicial Circuit (1 out of 19,000) than in the Fifteenth Judicial Circuit (1 out of 133,000), with the per capita death sentence rate in three circuits one or more standard deviations above the mean and in three other circuits a standard deviation below the mean (suggesting significant variation in charging and/or sentencing tendencies).[104] Of course, there may well be completely innocent explanations for these numbers, including population characteristics, size and growth over the four-decade period in which these death sentences were imposed. But sophisticated studies in a number of states have confirmed that charging practices in capital cases vary significantly among prosecutor offices.[105] And research in Florida suggests that some prosecutors have

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[102] Office of the State Attorney, Eighteenth Judicial Circuit of Florida, Brevard and Seminole Counties, http://sa18.state.fl.us/general/empabout.htm (last visited Mar. 12, 2009).

[103] Florida Dep't of Corrections, Death Row Roster, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited Mar. 12, 2009).

[104] *Id.* There are also other noteworthy variations. For instance, the First Circuit consists of Escambia, Okaloosa, Santa Rosa, and Walton counties. Escambia County had no death sentences until 1989; it has since had twelve. Okaloosa County had no death sentences until 1990, it has since had twelve. Santa Rosa County had no death sentences until 1991; it has since had six. Walton County had no death sentences until 1992; it has since had four. *Id.* Throughout this period, from January, 1969 through January, 2005, the same person was State Attorney for the First Circuit.

[105] *See, e.g.*, John Blume et al., *The Death Penalty in Delaware: An Empirical Study*, at 9 (2008) (unpublished), *available at* http://ssrn.com/abstract=1207882 (finding that two thirds of Delaware's death sentences were imposed in New Castle County, 29% were imposed in Kent County and only 5% of the death sentences resulted from murders which occurred in Sussex County); Katherine Barnes, David Sloss & Stephen Thaman, *Life and Death Decisions: Prosecutorial Discretion and Capital Punishment in Missouri*, at 76 (2008) (unpublished), *available at* http://ssrn.com/abstract=1107456 (review of 1046 homicide cases in Missouri found that "[p]rosecutors in different counties exercise their discretion in very different ways," leading to substantial variation in charging and sentencing practices in different counties across the state with some variation attributable to race of victim and race of defendant but more significant disparities based on geography); Raymond Paternoster et. al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, (Final Report), tbl.8 (2003), *available at* http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (docu-

been motivated by racial bias in deciding whom to charge with a capital offense.[106] This empirical information, combined with the fact that few prosecutor offices in Florida appear to have written policies governing the charging decision, led the Assessment Team to make the following explicit recommendation (the first of eleven to be reported in this article): "The State of Florida should develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision."[107]

Defense Services

Florida has a public defender system, meaning that most capital defendants are represented by salaried defense attorneys.[108] When the public defender office has a conflict (e.g., because it has represented or is representing a co-defendant, a victim, or a victim's relative), "conflict counsel" is appointed from a registry maintained by the clerk of court.[109] If there is a conviction in cases represented by a public defender, a different public defender from the appellate division brings the appeal.[110] In cases where conflict counsel litigated the trial, the same attorney brings the appeal unless the ground for conflict no longer exists, in which case the public defender appellate division usually takes over the case.[111] State and federal post-conviction petitions are handled by salaried attorneys from the Capital Collateral Regional Counsel (CCRC) in the southern and central parts of the state, and by private "registry attorneys" in the northern part of the state (the latter

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menting significant unadjusted geographic disparities in prosecutorial charging decisions in Maryland).

[106] Bob Levenson & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992, at A1; Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 618-19 (1985) (stating that "[i]t appears that not only are [Florida] prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined.").

[107] FLORIDA REPORT, *supra* note 14, at xi. *See* Office of the Ariz. Attorney General, Capital Case Commission Final Report, 17 (2002) (recommending that all prosecutors involved in trying capital cases adopt written policies for identifying cases in which to seek the death penalty, including policies on "soliciting or accepting defense input before deciding to seek the death penalty.").

[108] *See* FLA. STAT. § 27.51(1)(a) (2008).

[109] *See id.* §§ 27.40(3)(a) & 27.511(5) (2008).

[110] *See id.* § 27.51(4) (2008).

[111] *See id.* § 27.5303(4)(a) (2008).

arrangement constituting an experiment by the state in an effort to save money).[112] Any retrials or re-sentencings that result from the post-conviction process are handled by the public defender or conflict counsel.[113]

Two aspects of defense services in Florida particularly bothered the Assessment Team: qualification requirements for post-conviction counsel, and reimbursement schedules for private attorneys (i.e., conflict and registry attorneys). With respect to qualification requirements, lead *trial* counsel must have practiced criminal law for five years and served as lead counsel in at least nine "complex" trials, three or more of which involved a murder prosecution.[114] But post-conviction counsel need only three years of criminal practice experience, with only five felony jury trials under their belt.[115] These latter requirements fall well short of the basic qualifications recommended in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which also require significant training in a number of specific areas (e.g., involving mental disability, scientific evidence), as well as retraining every two years.[116]

Attorney reimbursement was an even more significant concern. At the time the Assessment Team drafted its report, Florida law limited conflict trial counsel to a maximum of $3,500.[117] In 2007, perhaps partly in response to the Assessment Team's recommendations (described below), the Legislature raised the maximum to $15,000.[118] The increased cap is obviously a great improvement, but it still only equals the lowest cap of any death penalty state, most of which do not set maxima.[119] Although the Florida Supreme Court has held that the statutory cap may be exceeded in "extraordinary and unusual cases,[120] the new legislation states that the flat fee is generally to "comprise the full and complete compensation for private court-appointed counsel"[121] and that the extraordinary-and-unusual threshold is met only under

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[112] *See id.* §§ 27.702(2); 27.701(2); 27.710(1) (2008).

[113] *See id.* § 27.511(8) (2008).

[114] *See* FLA. R. CRIM. P. 3.112(f) (2007).

[115] *See* FLA. STAT. §§ 27.701(1) & 27.704(2) (2008).

[116] *See American Bar Association: ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 961-62, 976 (2003).

[117] *See* FLA. STAT. § 27.5304(2)(2008).

[118] *See id.* § 27.5304(3)(a)(4) (2008).

[119] *See* Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel: A State-by-State Overview*, 16-23 (June 2007) (on file with the Review).

[120] Makemson v. Martin County, 491 So. 2d 1109, 1115 (Fla. 1986).

[121] FLA. STAT. § 27.5304(11) (2008).

limited circumstances involving a certain number of hours and witnesses;[122] further, even if met, this exception only permits up to a 200% increase above the flat fee, to the extent necessary to avoid making the fee "confiscatory."[123] Post-conviction registry attorney fees are also capped, at $84,000 (again with an "extraordinary and unusual" caveat).[124] According to one estimate, this sum amounts to payment for only a quarter of the average number of hours attorneys spend on a capital case after denial of direct appeal by the Florida Supreme Court;[125] furthermore, this amount is to be shared among attorneys if there is more than one.[126] Lawsuits arguing that these types of limitations are unfair have been uniformly unsuccessful.[127]

Others who know Florida's death penalty process well have recently noted the same deficiencies. The federal courts have been unwilling to certify that Florida has established a mechanism for ensuring competent post-conviction counsel that meets the requirements of the

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[122] *See id.* § (12)(b)(1) (2008).

[123] *Id.* § (12)(d).

[124] *See id.* § 27.711(4).

[125] *See* Spangenberg Group, *Amended Time & Expense Analysis of Post-Conviction Capital Cases in Florida* 16 (1998) (on file with the Review).

[126] *See* FLA. STAT. § 27.711(4)(h) (2008).

[127] On several occasions, the CCRC has asserted that it could not provide effective assistance of counsel because of insufficient funding and, as it stated in one petition, because it was "overworked and forced to labor under severe time constraints." White v. Singletary, 663 So. 2d 1324, 1325 (Fla. 1995). The Florida Supreme Court has refused to grant relief, while noting that exceptional circumstances would warrant additional compensation. *See* Spalding v. Dugger, 526 So. 2d 71, 73 (Fla. 1988); *White*, 663 So. 2d at 1325; Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999). *See also* Olive v. Maas, 811 So. 2d 644, 651-54 (Fla. 2002), where the Florida Supreme Court rejected claims that the registry system did not adequately compensate attorneys, noting that in previous cases it had held that courts could pay attorneys more than the cap under exceptional circumstances. The Florida legislature, concerned that the *Olive* decision would turn every death penalty case into an "exceptional" one, then instructed the Commission to take any attorney off the registry who would not agree to the maximum (which, as indicated above, is $84,000 from the end of appeal to the ultimate resolution of the case). *See* FLA. STAT. § 27.711(8) (2008).

Several attorneys have attempted to obtain fees in excess of the local rates of compensation by claiming that the rates were "confiscatory" of their time. They generally lose. *See, e.g.*, Sheppard & White v. City of Jacksonville, 827 So. 2d 925, 931 (Fla. 2002); Bobbitt v. State, 726 So. 2d 848, 851-52 (Fla. Dist. Ct. App. 1999); Leon County v. McClure, 541 So. 2d 630 (Fla. Dist. Ct. App. 1988), *rev'd* on other grounds *denied sub nom.* Harper v. Leon County, 551 So. 2d 461 (Fla. 1989); Bd. of Cty. Comm'ns of Hillsborough Cty. v. Lopez, 518 So. 2d 372 (Fla. Dist. Ct. App. 1987); Hillsborough Cty. v. Unterberger, 534 So. 2d 838, 842 (Fla. Dist. Ct. App. 1988).

federal Anti-Terrorism and Effective Death Penalty Act[128] (admittedly, a threshold that only one state has met[129]). In July 2008, Gerald Kogan, a Florida Supreme Court justice from 1987 to 1998, argued for a moratorium on executions in Florida in part because of "Florida's woefully inadequate system of providing those accused of capital crimes with representation at trial."[130] He added, "[t]he bar for inclusion in Florida's Capital Collateral Registry . . . is set embarrassingly low, and requires very little of participating attorneys."[131]

As Justice Kogan suggested, there is substantial evidence that, whatever one might think about Florida's efforts to assure quality defense representation, its capital defendants often do not receive it.[132] The proof comes from the Florida Supreme Court itself. For instance, in the six years immediately following the U.S. Supreme Court's 1984 decision in *Strickland v. Washington*,[133] which arguably made claims of ineffective assistance of counsel *more* difficult to win, the Florida Supreme Court granted relief on that ground in nine capital cases, and the Eleventh Circuit, which oversees Florida, awarded relief in fourteen out of forty-one such cases out of Florida.[134]

The Assessment Team Report recounts numerous examples of poor trial lawyering throughout the 1990s as well, particularly by private attorneys. In one case, the trial judge removed two defense lawyers

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[128] *See* Hill v. Butterworth, 941 F. Supp. 1129, 1143-44 (D. Fla. 1996). The court gave as a separate reason for disqualification the fact that, notwithstanding several improvements in the representation system as a result of legislation and rule changes, "Florida still has a substantial backlog of unassigned indigent defendants seeking post-conviction relief." *Id.* at 1146. The Eleventh Circuit remanded in light of subsequent modifications in the rules made by the Florida legislature. 147 F.3d 1333 (11th Cir. 1998). But as of 2004, that court was still saying "it is not clear whether the State of Florida has satisfied [AEDPA's] criteria." Kelley v. Sec. Dep't Corr., 377 F.3d 1317, 1340 (11th Cir. 2004). As of 2005, the U.S. Attorney General makes the approval decision under AEDPA. 28 U.S.C. § 2266(b)(1)(A).

[129] Spears v. Stewart, 283 F.3d 992, 998, 1008-09 (9th Cir. 2002) (finding Arizona had in place a system for appointment of post-conviction counsel sufficient to allow it to "opt in" and enjoy procedural benefits offered by AEDPA).

[130] Gerald Kogan, *Florida's Justice System Fails on Many Fronts*, ST. PETERSBURG TIMES, July 1, 2008, http://www.tampabay.com/opinion/essays/article652532.ece.

[131] *Id.*

[132] *See id.*

[133] Strickland v. Washington, 466 U.S. 668 (1984).

[134] *See* Marianne Lavelle & Marcia Coyle, *Effective Assistance: Just a Nominal Right?*, NAT'L L.J., Jun. 11, 1990, at 42.

because of their incompetence and "deceit."[135] In another, the defendant's lead lawyer was a former prosecutor who had been suspended once and publicly reprimanded another time, while the two assistants in the case had a year's experience between them.[136] In a similar vein, in 1997 the Florida Supreme Court reversed a capital conviction and sentence because of the corrupt relationship between the judge and the attorney, who was appointed by the judge after the public defender's office was barred from the representation by a conflict.[137] The same year, Florida Supreme Court Justice Harry Anstead expressed his frustration over the poor quality of representation at the trial level more generally:

> The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. *Once again,* we have a lawyer appointed who had absolutely no experience in capital cases. . . . [I]n this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.[138]

Post-conviction representation has also been very uneven. The mid-state CCRC office was dogged by charges of nepotism and unethical conduct at its inception.[139] And in one of the appeals filed by that office, the Florida Supreme Court heatedly criticized the lawyers for the poor quality of their work, pointing out that "the majority of the issues raised were conclusory in nature and made it very difficult and burdensome for this Court to conduct a meaningful review."[140]

Even more troubling are accounts of the representation provided by the private "registry attorneys" in Florida's northern district. Lawyers working with that office have admitted they were unqualified, missed federal filing deadlines (apparently because they were unaware of them), and filed petitions containing no citations to the trial or ap-

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[135] Marcia Coyle, *Suit: Death Defense Is a Sham; Claim is Florida Provides Lawyers But Makes It So They Can't Save Inmates,* NAT'L L.J., Dec. 21, 1998, at A1.

[136] *See id.*

[137] Robinson v. State, 702 So. 2d 213, 217 (Fla. 1997).

[138] Van Poyck v. State, 694 So. 2d 686, 699-700 (Fla. 1997) (Anstead, J., concurring in part and dissenting in part) (emphasis added).

[139] *See generally* Sydney P. Freedberg, *State's Death-Row Lawyers in Turmoil, Under Attack,* ST. PETERSBURG TIMES, Jan. 2, 1999, at 1A (describing creation of and controversy surrounding CCR regional offices).

[140] Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999).

pellate record or any judicial authority;[141] some, apparently overwhelmed, have simply "bailed out" of their assigned case.[142] Government officials have conceded that only a fraction of these attorneys were willing to take cases to federal court,[143] and that supervising the scores of attorneys involved is not possible.[144] Referring to these private registry attorneys, Florida Supreme Court Justice Raoul Cantero stated in 2005 that cases they filed with the Court involved "the worst lawyering I've seen" and "the worst briefs that I have read."[145] He also stated, "I'm not sure we have enough quality lawyers out there that would be able to pick up the slack."[146]

As with prosecutors, reporting defense attorneys to the Bar for unethical behavior is relatively rare. In *State v. Murray*, the Florida Supreme Court stated that "when there is 'overzealousness' or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation."[147] However, in none of the fifteen capital cases the Assessment Team randomly selected in which a Florida court found a deficiency in the attorney's conduct did the opinion state that the lawyer should be referred to the Bar.[148]

In light of the foregoing observations about defense counsel in capital cases, the Assessment Team adopted the following three recommendations:

> (1) The State of Florida should take steps to ensure that all conflict trial counsel in death penalty cases are properly compensated. Specifically, the State of Florida should (a) eliminate the statutory fee cap, thus giving judges the discretion to determine on a case-by-case basis the appropriate amount of compensation, and (b) allow greater flexibility for obtaining interim payments for services; (2) The State of Florida should adopt qual-

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[141] *See* Jo Becker, *System May Be Slowing Appeals*, ST. PETERSBURG TIMES, Jul. 17, 2000, at 1B.

[142] Jan Pudlow, *The Pros and Cons of Privatizing Death Penalty Appeals*, FLA. BAR NEWS, Mar. 1, 2003, at 7.

[143] *Panel Told Closing CCRCs Would Cause Delays*, FLA. BAR NEWS, March 15, 2003, at 10.

[144] Pudlow, *supra* note 142.

[145] Marc Caputo, *Justice Blasts Lawyers Over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005, at 1B.

[146] *Id.*

[147] State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

[148] ASSESSMENT TEAM REPORT, *supra* note 14, at 79-83. In one case, the prosecutor filed a complaint and an investigation of counsel's alleged conflict resulted. Burnside v. State, 656 So. 2d 241, 243 (Fla. Dist. Ct. App. 1995).

> ification standards for capital collateral registry attorneys and attorney monitoring procedures that are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). In the alternative, it should reinstitute the Capital Collateral Regional Counsel Office in the Northern Region of Florida, thereby eliminating reliance on registry counsel in non-conflict cases; (3) The State of Florida should adopt compensation standards for capital collateral registry attorneys that are consistent with the ABA Guidelines.[149]

Unlike the other recommendations made to this point in this article, these recommendations would require significant expenditures. But policymakers should also take into account the fact that good lawyering at the front-end can reduce costs connected with the post-conviction process. Especially when they are also assured adequate investigative and expert assistance,[150] good, well-paid trial lawyers not only are less likely to generate ineffective assistance of counsel claims but also are more likely to catch deficiencies in the state's investigative and charging process at a time when they can still be corrected or adjusted for, instead of years later when an expensive retrial or re-sentencing may be the only effective remedy. And, as the comments of the Florida Supreme Court suggest, qualified, well-paid post-conviction attorneys can enhance the efficiency of the litigation process through precise identification of issues and precedent. In the long run, money spent on defense attorneys is a good investment in capital cases from both a fiscal and fairness standpoint.

The Judicial Role During Trial and the Post-Conviction Process

This section combines three of the twelve areas the Assessment Team was asked to address: judicial independence; the direct appeal process; and the post-conviction process. The focus here will be judicial independence. As the discussion below reveals, a lack of such in-

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[149] FLORIDA REPORT, *supra* note 14, at ix-x.

[150] In Florida, trial attorneys are entitled to compensation for "reasonable and necessary expenses." *See* FLA. STAT. § 27.5304(1) (2008). These include court reporting and transcription fees, the costs of expert witnesses "summoned to appear," the costs of mental health professionals appointed to evaluate the defendant and "required in a court hearing," reasonable transportation and travel expenses, "reasonable library and electronic legal research services, other than a public law library," and "reasonable pretrial consultation fees and costs." *See* FLA. STAT. §§ 29.006, 29.007 (2008). However, the statutes do not specifically provide funding for investigators. *Post*-conviction attorneys are entitled to one or more investigators, paid at $40/hour up to a maximum of $15,000, as well as miscellaneous expenses up to a maximum of $15,000. FLA. STAT. § 27.711(5) & (6) (2008).

dependence can have a significant impact on all stages of the process, from trial and sentencing, through direct appeal and habeas review.

Trial judges in Florida are elected, and stand for re-election every six years.[151] Judges on the Florida Supreme Court and the District Courts of Appeal are appointed by the Governor from a list compiled by an independent commission, but are subject to retention elections at the next general election and every six years thereafter.[152] While in theory judges at all levels are insulated from political influence, the elective process may have subtle and not so subtle impacts on the outcomes of individual cases and death penalty jurisprudence more generally.

The Assessment Team found a number of accounts illustrating how election campaigns might influence judicial behavior. A Florida Supreme Court justice recalled that when he was responsible for assignments as a trial court judge, judges facing re-election asked him for assignments to criminal cases because it would help get their names in the press.[153] In another campaign, a judicial candidate ran a TV ad in which he was endorsed by the father of a slain victim, as well as by the investigating sheriff, in a case likely to be tried in the candidate's judicial circuit.[154] Probably the best-known judicial campaign in Florida occurred in connection with the merit-retention election of Florida Supreme Court Justice Rosemary Barkett in 1992. In advertisements sponsored by the National Rifle Association, law enforcement groups, and related organizations, Barkett was repeatedly criticized for her opinions in capital cases, despite the fact that she voted with the Court's majority in those cases 91% of the time.[155] Two years earlier, then Chief Justice Leander Shaw faced opposition from anti-abortion activists and "law-and-order" groups upset with rulings of the Court, including those involving the death penalty.[156]

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[151] *See* FLA. CONST. art. V, § 10(b)(3)(c).

[152] *See id.* §§ 10(a), 11(a).

[153] *Electing Judges Is Poor Policy, Overton Tells Panel*, FLA. BAR. NEWS, May 1, 1989, at 4.

[154] *See* Tom Lyons, *Judicial Candidate Moreland Found Way to Be Noticed, And Should Be*, SARASOTA HERALD-TRIBUNE, Oct. 21, 2004, at BS1.

[155] *See* Lucy Morgan, *Persistence Marks Barkett Fray*, ST. PETERSBURG TIMES, TAMPA ED., Oct. 21, 1992, at 1B; Jan Pudlow, *Law Enforcement Splits on Barkett*, TALLAHASSEE DEMOCRAT, Sept. 9, 1992, at C1.

[156] Randolph Pendleton, *Victim's Brother Wants Chief Justice Removed*, FLA. TIMES-UNION, Sept. 11, 1990, at B1.

Although apparently no appellate level judge has lost an election in Florida because of death penalty rulings,[157] these and similar criticisms of judges during election campaigns may have had less obvious effects. Professor Webster pointed out that both Barkett and Shaw spent $300,000 on their retention "campaigns," and that both received only about 60% of the vote, compared to much higher percentages for colleagues who were not challenged.[158] He also describes a survey of judges subject to periodic retention revealing that "three-fifths believe[d] judicial retention elections have a pronounced effect on judicial behavior."[159]

A more subtle interaction between the executive, legislative and judicial branches is described in the following passage:

> In the early 1990s, the Florida Supreme Court, a highly visible institution, especially with respect to its death penalty jurisprudence, developed a meaningful system of comparative proportionality review that relied on a rich and transparent database with well reasoned opinions. . . . [D]uring the 1990s, the court vacated 19% (32/170) of the death cases it reviewed on [the proportionality] issue . . . . However, the practice was scaled back dramatically in 2000 after the Florida court came under severe political attack from the Governor and the Republican-controlled legislature for allegedly slowing unreasonably the pace of the executions in state. The 19% vacation rate on the proportionality issue in the 1990s dropped to 3% (3/97) between 2000 and 2003. The message from the experience of the Florida court is clear. Whatever a court's commitment to selective and consistent death sentencing may be, top-down, highly visible, and aggressive review practices may carry distinct political risks.[160]

Other research confirms that, in the past decade, reversal rates in Florida capital cases continued to drop,[161] and use of procedural default rules to bar post-conviction claims has increased.[162]

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[157] *See* Ann W. O'Neill, *Supreme Court Justices Face Voter Review; Two Bush Appointees Hoping for Retention*, S. FLA. SUN-SENTINEL, Aug. 4, 2004, at 1B.

[158] Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 37 (1995).

[159] *Id.*

[160] David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1463-64 (2004).

[161] In the ten years through 2000 the reversal rate on direct appeal was roughly 40%. More recent years have seen reversal rates of 37% (2001) and 20% (2003). *See* Judge O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, 34 STETSON L. REV. 9, 16 (2004).

[162] This increase was evident even in the 1980s. *See* Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Threat" to the Intricacies of Procedural Default, Adequate and*

The prospect of a re-election campaign might also interact with the Florida practice, almost unique among death penalty states, of allowing judges to override capital jury recommendations with respect to sentencing.[163] Consistent with the results of a nationwide survey finding that elections influence capital sentencing decisions,[164] Bright and Keenan's study of Florida death penalty cases found a statistically significant correlation between judicial overrides of life sentence recommendations and the occurrence of judicial elections.[165] These authors also describe three Florida judges who seemed particularly eager to override life sentence recommendations under circumstances that suggested prejudicial pro-death penalty bias.[166] Dieter describes a fourth Florida judge who overrode a unanimous jury recommendation for life and, two decades later when the conviction was overturned, "offered to come back from his retired status to hear the case, despite the fact that he had made recent comments to the press about [the defendant's]

Independent State Grounds, and Florida's Death Penalty, 76 CAL. L. REV. 87, 132 (1988). Since then the trend has continued. Although the Court struck down a legislative attempt to shorten post-conviction litigation, Allen v. Butterworth, 756 So. 2d 52 (2000), it upheld against constitutional attack a one-year time limitation on post-conviction claims. *See* Amendments to FLA. R. CRIM. PRO., 3.851(d)(1), 3.852 and 3.993, 772 So. 2d 488, 491 (Fla. 2000). Further, it rarely grants exceptions to that rule, *see* Porter v. State, 653 So. 2d 374, 377 (Fla. 1995); Mills v. State, 684 So. 2d 801, 804-05 (Fla. 1996); Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001), even holding (albeit consistently with U.S. Supreme Court precedent on federal habeas) that ineffective post-conviction counsel claims "do not present a valid basis for relief." *See, e.g.*, Vining v. State, 827 So. 2d 201, 215 (Fla. 2002); Arbalaez v. State, 775 So. 2d 909, 919 (Fla. 2000).

[163] FLA. STAT. § 921.141(3),(4) (2008).

[164] Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 495-97 (1995) (state judges more likely to uphold death sentences in last two years of their term).

[165] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 779, 793-96 (1995). *See also* Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1043-44 (1999).

[166] *See* Barclay v. Florida, 463 U.S. 939, 980-81, 981 n.12 (1983) (Marshall, J., dissenting) (discussing Judge's Oliff's overrides of jury life sentence recommendations in four cases, in all of which he found aggravating factors in clear violation of Florida law); DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW 414-18 (Times Books 1995) (describing Judge Rose's override of a unanimous life sentence recommendation in the case of Doug McCray, and the eventual reversal of that conviction after seventeen years in the Florida state courts); Porter v. Singletary, 49 F.3d 1483, 1487 (11th Cir. 1995) (describing Judge Stanley's statement to a clerk that he was changing the venue to another county that had "good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch" at which point the judge "would send Porter to the chair;" Stanley eventually overrode the jury's subsequent unanimous recommendation for a life sentence).

guilt."[167] Whether worried about election or simply enthusiastic about imposing death sentences, by 1992 Florida trial judges had imposed death sentences in 134 cases where the jury had recommended life but only overridden 51 death sentence recommendations.[168] Only in the past ten years, as the Florida Supreme Court has made clear that it will overturn most of the life-to-death overrides,[169] has the former practice diminished substantially.

None of this discussion is meant to suggest that the average Florida trial or appellate judge presiding over a capital case is swayed by extrinsic, non-legal factors. But it is meant to suggest that replacing judicial elections with a judicial appointment system would remove a significant source of pressure on judicial independence. Given the increasing amount of money spent on judicial campaigns, this proposed reform would probably also save money.

The Role of the Jury

Every one of the thirty-five death penalty states except Florida prohibits a death sentence unless the sentencing jury unanimously concludes either that at least one specified aggravator is present or that a death sentence is warranted, and twenty-seven of these states require both findings.[170] In order to recommend a death sentence in Florida, in contrast, only a mere majority of jurors (seven out of twelve) need agree on a death sentence and not even a majority is needed with respect to any particular aggravator.[171] Apparently the rationale for this arrangement is that the trial judge is the ultimate decision-maker with respect to the death sentence; thus, jury unanimity is not required.[172]

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[167] Richard C. Dieter, *With Justice for Few: The Growing Crisis in Death Penalty Representation* (1995), Death Penalty Information Center, http://deathpenaltyinfo.org/node/742.

[168] *See* Michael Radelet & Michael Mello, *Death to Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 196, 210-11 (1992).

[169] Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 924, 937-38 (1991) (finding that 93% of life-to-death overrides up to 1991 were reversed by the Court).

[170] *See* State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005) (discussing state statutes).

[171] *See* FLA. STAT. § 921.141(3) (requirement of majority); FLA. STAT. § 913.10 (requirement of twelve jurors); 15A Fla. Jur. 2d Criminal Law § 2327.50 ("Capital aggravating circumstances are not required . . . to be individually found by a unanimous jury verdict.").

[172] *See* FLA. STAT. § 921.141(3); 15A Fla. Jur. 2d Criminal Law § 2323 (Westlaw through Feb. 2009).

Totally aside from whether this procedure violates the U.S. Supreme Court's holding in *Ring v. Arizona*[173] that the jury, not the judge, must find beyond a reasonable doubt every fact that supports a death sentence (an argument the Florida Supreme Court has rejected[174]), Florida's decision-making framework undermines the reliability of the jury's death sentence recommendations in four ways. First, it permits such a recommendation when reasonable doubt is very likely to exist. Although the U.S. Supreme Court has held that a nine to three verdict is sufficient for conviction,[175] it has never sanctioned a seven to five verdict, and probably would not do so given the uncertainty it represents.[176] Second, even unanimous death sentence recommendations in Florida are suspect because they can occur despite the possibility that no single aggravator garnered more than one vote (each juror voting for the death sentence may have settled on a different aggravator). The U.S. Supreme Court has expressed considerable ambivalence about verdicts that leave unclear whether the necessary number of jurors has agreed that every element of the crime was proven beyond a reasonable doubt.[177] Third, research based on interviews with jurors in Florida capital cases indicates that, since only a majority need agree on the recommendation, discussion and deliberation in these cases is often minimal.[178]

A final problem with a majority-vote rule, especially when combined with the judicial override procedure that only Florida and two other states have,[179] is that jurors are much less likely to take their role

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[173] *See* Ring v. Arizona, 536 U.S. 584, 596-97, 609 (2002).

[174] *See* Bottoson v. Moore, 833 So. 2d 693, 694-95 (Fla. 2002) (upholding Florida statute despite *Ring*, but on narrow and heavily contested grounds).

[175] Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

[176] *See generally id. See also id.* at 366 (Blackmun, J., concurring) (Justice Blackmun provided the fifth and deciding vote in *Johnson* and stated that a 7-5 verdict "would afford me great difficulty.").

[177] *See, e.g.*, Schad v. Arizona, 501 U.S. 624, 627, 643-45, 651-52 (1991) (plurality holding that, when jurors may have based their vote on different elements of the crime, the elements must at least have a moral equivalence); Richardson v. United States, 526 U.S. 813, 816 (1999) (holding, in interpreting the continuing criminal enterprise statute, that the jury must unanimously agree on the three crimes that provide the predicate for conviction).

[178] *See, e.g.*, William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 979 (2006).

[179] *See* FLA. STAT. § 921.141(3) (2008); ALA. CODE § 13A-5-46 (1994); DEL. CODE ANN., tit. 11, § 4209(d) (2009) ("The jury's recommendation shall not be binding upon the Court.").

seriously. As the study just mentioned stated: "[J]urors in hybrid states are significantly more likely than others to deny responsibility for the defendant's punishment, to misunderstand sentencing instructions, and to rush to judgment, all signs of the jury's lack of conscientiousness in its role as sentencer."[180] Thus, the authors conclude, jurors make better decisions when they are made to understand that they are the ultimate arbiters of the defendants' fate, a conclusion that the U.S. Supreme Court has at least obliquely recognized.[181] Florida's death penalty process, which tells capital sentencing jurors that their decision is only a recommendation and need only be agreed upon by a majority,[182] is uniquely designed to send precisely the opposite message. In part influenced by these considerations, the Florida Supreme Court has called on the Florida Legislature "to revisit Florida's death penalty statute to require some unanimity in the jury's recommendation."[183]

A separate problem with Florida's capital jury system—one that probably afflicts all death penalty states—is that laypeople have great difficulty following capital sentencing instructions. In one study involving interviews of individuals who had recently served on capital juries in Florida, over 49% of the participants did not understand that they could consider any evidence in mitigation,[184] and 48.7% were under the misimpression that they needed to find mitigating evidence beyond a reasonable doubt.[185] The same study also found that over 36% of the jurors interviewed believed, incorrectly, that they were *required* to sentence the defendant to death if they found the defendant's conduct

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[180] Bowers et al., *supra* note 178, at 1003-04.

[181] *See* Caldwell v. Mississippi, 472 U.S. 320, 333 (1985) ("[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.").

[182] Fla. Standard Jury Instructions in Crim. Cases, § 7.11(2) (West, Westlaw through 2007) ("Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.").

[183] State v. Steele, 921 So. 2d 438, 549 (Fla. 2005).

[184] *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) (on file with the Review).

[185] *See id.* Although many of the interviews in the Bowers and Foglia study took place a year after the relevant trial, most jurors claimed to remember their deliberations "very well" or "fairly well," and studies in other states have consistently replicated these types of results. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1086 tbl.2 (1995).

to be "heinous, vile, or depraved",[186] and 25.2 % believed that if they found the defendant to be a future danger to society they were *required* to recommend a death sentence, despite the fact that "dangerousness" is not a legitimate aggravating circumstance under Florida law.[187] Some of these misunderstandings may result from ambiguity in the instructions;[188] others may be almost impossible to avoid.[189]

In light of the foregoing observations, the Florida Death Penalty Assessment Team made the following three recommendations:

> (1) The State of Florida should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature[.](2) The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance. (3) The State of Florida should give the jury final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.[190]

As with most of the other recommendations made to this point, these recommendations are virtually cost-free, and they can only improve the fairness of the death penalty process.

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[186] Bowers & Foglia, *supra* note 184, at 72. Note that Bowers and Foglia use the term "heinous, vile or depraved" instead of "heinous, atrocious or cruel," which is the way Florida expresses this aggravator. FLA. STAT. § 921.141(5)(h) (West 2009).

[187] *See* Bowers & Foglia, *supra* note 184 at 72; FLA. STAT. § 921.141(5) (West 2009).

[188] *See* Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992) (there need not be *any* instruction about each juror's authority to consider any mitigator). Further, while the judge must give an instruction about the "catch-all" mitigator, he or she need not give specific instructions on non-statutory mitigators. *See* Campbell v. State, 571 So. 2d 415, (Fla. 1990) (overruled on other grounds). The standard of proof with respect to mitigators is described as follows: "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Standard Jury Instructions in Crim. Cases, § 7.11(8)(b) (Westlaw though 2007) . Finally, as Professor Caldwell notes, "[t]he sentencing decision is not to be made simply on the basis of toting up the aggravating and mitigating circumstances and seeing which list is longer. Yet the standard [jury] instructions do not forbid such a practice in the jury room." Gary Caldwell, *Capital Crime Decisions: 1992 Survey of Florida Law,* 17 NOVA L. REV. 31, 37 (1992).

[189] *See, e.g.,* David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice,* 59 JUDICATURE 478, 480-82 (1976) (in comparing an experimental group that received Florida instructions on burglary to a control group that received no instructions, the experimental jurors failed to show that they understood the law sufficiently). *But see* Firoz Dattu, *Illustrated Jury Instructions: A Proposal,* 22 LAW & PSYCHOL. REV. 67, 70-71 n.15, 71 (1998) (criticizing methodology of the Strawn and Buchanan study).

[190] FLORIDA REPORT, *supra* note 14, at 308.

Clemency

Every state grants some entity within the executive branch the authority to pardon crimes and commute sentences, including death sentences; in Florida, this role is assigned to the governor and a Board of Executive Clemency, consisting of the three members of the Cabinet, two of whom must agree with any gubernatorial decision to pardon.[191] In death penalty cases, the clemency process has traditionally been viewed as a final safeguard, designed to evaluate the fairness of the penalty in light of the circumstances of the case.[192] And, as the ABA has noted, "[t]he 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."[193]

Unfortunately, in Florida, politics probably have affected the exercise of the clemency power. Since the re-establishment of the death penalty in the 1970s, only six inmates on Florida's death row have received executive clemency, three because of doubts about their guilt, and three based on other considerations.[194] In raw numbers, this figure is average (Ohio has had eleven grants of clemency in death cases since 1976, Virginia and New Jersey eight, and Georgia seven, but fifteen states have had fewer than six[195]). But the more important point for present purposes is that the last time a death sentence was commuted in Florida on humanitarian grounds was in 1983.[196]

That year is important as a political matter. As Bright and Keenan have noted, it was around that period that the death penalty became "a

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[191] *See* FLA. CONST. art. IV, § 8; FLA. STAT. § 940.01(1) (West 2009); Fla. Rules of Executive Clemency, Rule 4 (2007) *available at* https://fpc.state.fl.us/Policies/ExecutiveClemencyInfo.htm [hereinafter F.R.E.C.].

[192] FLORIDA REPORT, *supra* note 14, at 244.

[193] *Id.* at 244.

[194] *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 300 (1993). Note that, pre-*Furman*, 23% of death sentences were commuted. Margaret Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924-1966*, 27 U. RICH. L. REV. 315, 321-22 (1993) (cataloguing Florida's clemency record).

[195] *See Clemency*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/clemency (last visited Mar. 9, 2009). Illinois has had 172 death sentence commutations, in large part because of Governor George Ryan's decision that the death penalty process in that state was seriously flawed. *See id.; Illinois Commission on Capital Punishment*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/node/511 (last visited Apr. 17, 2009).

[196] *See Clemency*, *supra* note 195.

dominant political issue in Florida[.]"[197] Since that time Florida governors have often made the signing of death warrants a part of their campaign strategy.[198] One gubernatorial candidate even ran advertisements boasting about the ninety death warrants he signed in his four years of office, and an observer of another Florida gubernatorial campaign stated that "'nothing [sells] on the campaign trail like promises to speed up the death penalty.'"[199] Nationwide research indicates that states are 25% more likely to conduct executions in gubernatorial election years than in other years, that the total number of executions performed is higher in election years, and that the relationship between elections and executions is strongest in the South.[200]

Any potential for extrinsic factors to affect clemency decision-making is exacerbated by the absence in Florida law of clear criteria or procedures for making the clemency determination and the lack of transparency in the process. While the Parole Commission "may conduct a thorough and detailed investigation" of every death row inmate,[201] Florida law does not require the Board of Executive Clemency to consider these findings, does not specify the factors the Commission or the Board is to investigate or consider, does not require the Board to attend interviews with the inmate or his or her representative, leaves the decision as to whether to hold a public hearing to the Board (which in recent years has seldom requested one[202]), and does not require the Board to explain its decision.[203] All information gathered is to be kept confidential and Board meetings are not transcribed,[204] so the process usually remains hidden from the public.

The Assessment Team made the following recommendation regarding the clemency process in Florida:

> The State of Florida's Board of Executive Clemency should: (a) adopt a rule that calls for the Board of Executive Clemency (Board) to issue a brief written statement in every instance wherein a death-sentenced in-

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[197] Bright & Keenan, *supra* note 165, at 772.

[198] *See id.*

[199] *Id.* (alteration in original) (citation omitted).

[200] *See* Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1, 1 (2003).

[201] F.R.E.C., *supra* note 191, Rule 15(B).

[202] *See* Interview with Stephen Hebert, Director of the Clemency Administrative Office (Jan. 2005) (on file with author). *See also* F.R.E.C., *supra* note 191, Rules 15(E) & (F).

[203] *See* F.R.E.C., *supra* note 191, Rule 15. *See generally* Joseph B. Schimmel, *Commutation of the Death Sentence: Florida Steps Back from Justice and Mercy*, 20 FLA. ST. U. L. REV. 253 (1992).

[204] *See* F.R.E.C., *supra* note 191, Rule 16.

> mate is denied clemency, making specific reference to the various factors/claims that the Board may have considered; (b) adopt a rule delineating the factors that the Board should consider, but not be limited to, when reviewing a death-sentenced inmate's grounds for clemency; (c) adopt a rule establishing that a death-sentenced inmate will receive a public hearing before the Board prior to the clemency determination; and (d) adopt a rule that calls for the Governor to, at a minimum, assign a clemency aide to routinely attend, in person or via video-conference, the Parole Commission interviews with the death-sentenced inmate since the Governor is, in effect, the principal clemency decision-maker and could therefore be well-served by an aide's first-hand observations. We also recommend that such a rule should attempt to facilitate participation by the clemency aides of the other members of the Board, at the discretion of their respective principals.[205]

Race

Concern about racial discrimination permeates debates about the death penalty. One of the rationales for the U.S. Supreme Court's decision in *Furman v. Georgia*[206]—which concluded that the death penalty as administered in 1972 constituted cruel and unusual punishment—was its discriminatory impact on black defendants.[207] In the post-*Furman* era, with the elimination of obvious sentencing disparities between white and black defendants, the focus of the debate has shifted to the race of the victim; a significant body of research indicates that, even under modern statutes, people who kill whites are much more likely to be sentenced to death than people who kill blacks.[208] Although the U.S. Supreme Court rejected a constitutional challenge to the death penalty based on these types of data,[209] its principal rationale for doing so—that imperfections in the criminal justice system cannot be avoided[210]—hardly allays concerns that some people are sentenced to

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[205] FLORIDA REPORT, *supra* note 14, at xi.

[206] *See* Furman v. Georgia, 408 U.S. 238 (1972).

[207] *See id.* at 251 (Douglas, J., concurring) (describing research showing that black defendants were more likely to receive the death penalty than their white co-defendants and that blacks were more likely to receive the death sentence for charges of rape). *See also, id.* at 310 (Stewart, J., concurring); *id.* at 355-56 (Marshall, J. concurring).

[208] *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1711-15 (1998) (distinguishing midrange death penalty cases from those that had numerous or few aggravating circumstances, Baldus and his colleague concluded, after studying over 2000 cases in Georgia in the 1970s, that 14.4% of the black-victim midrange cases received the death penalty while 34.4% of the white-victim cases received the death penalty).

[209] *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

[210] *See id.* at 312-13 (admitting that the data indicate a discrepancy in death sentences "that appears to correlate with race[ ]" but stating that "[a]pparent disparities in sen-

death on invidious racial grounds rather than through application of appropriate legal criteria.

Numerous studies of the Florida capital punishment process, spanning the past thirty-five years, have confirmed a correlation between the imposition of a death sentence and the race of the murder victim.[211] After summarizing the relevant research, Baldus and his colleagues concluded that "[i]n states with strong evidence of race-of-victim discrimination, such as Florida, . . . we estimate that one quarter to one-third of death-sentenced defendants with white victims would have avoided the death penalty if their victims had been black."[212] The Florida Supreme Court itself has recognized the problem.[213] In 1990, a Commission it sponsored issued a report that concluded, among other things, that "[t]he application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if

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tencing are an inevitable part of our criminal justice system[ ]" and noting that "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'" (citation omitted)).

[211] *See* William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1535-36, 1542-43 (2002) (also finding race-of-defendant bias in Florida); Levenson & Salamone, *supra* note 106 (describing a study of 283 first-degree murder cases prosecuted from Jan. 1, 1986, through Sept. 30, 1991 in Orange, Osceola, Seminole, Brevard, Lake, and Volusia counties that found that prosecutors sought the death penalty 27% of the time when white victims were involved and only 14% of the time when minority victims were involved); Linda Foley, *Florida after the Furman Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases*, 5 BEHAV. SCI. & L. 457 (1987); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 108 (1984) (finding a stable and consistent pattern of racial discrimination in the imposition of the death penalty in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia, largely based on race of victim); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981) (finding, among 637 homicide indictments in twenty Florida counties during 1976 and 1977, that those who killed whites were substantially more likely to receive a death sentence after controlling for several nonracial factors that might be thought to explain the racial differences); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 599 tbl.3 (1980) (white victim bias).

[212] Baldus & Woodworth, *supra* note 160, at 1445 n.123.

[213] *See* Fla. Sup. Ct. Racial & Ethnic Bias Study Comm'n, *"Where the Injured Fly for Justice": Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida* (Dec. 11, 1990), *available at* http://www.flcourts.org/gen_public/pubs/bin/racial.pdf.

the victim is White than if the victim is an African-American."[214] This assertion was based in large part on a study conducted by Michael Radelet and Glenn Pierce that found that forty-nine of fifty-seven executions through 1990 involved defendants who had killed white victims (thirty-six white on white, twelve black on white, one Native American on white) and that none of the remaining eight executions involved whites who had killed blacks.[215]

This evidence of racial disparity, which appears to be overwhelming, has nonetheless been disputed. In 2000, the Capital Cases Task Force, created by Governor Jeb Bush to study racial factors in capital cases, concluded that previous studies were outdated and may have relied on flawed methodology.[216] The Task Force conceded that no white person had ever been executed in Florida for the murder of a black person and that, of 368 inmates on Florida's death row at the end of 1999, only five whites awaited execution for killing a black.[217] Yet Reginald Brown, the governor's deputy general counsel and a member of the Task Force, stated that "[w]hat we found is that the studies so far have been too simplistic and didn't have enough controls[.]"[218] This statement is correct in the limited sense that most of the studies focused on Florida did not include as many variables in their regression analysis as studies in other states have.[219] Nonetheless, all of the evidence that does exist points in one direction, and the Governor's Task Force did not offer any alternative explanations for the results.[220]

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[214] *Id.* at 15.

[215] *See* Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991). *See also* Radelet & Pierce, *supra* note 106, at 612 (finding that among Florida homicide cases from a sample of twenty-one counties, prosecutors were most likely to pursue the death penalty in cases in which the victim was white).

[216] *See* Jo Becker, *Task Force: Death Penalty Bias Unclear*, ST. PETERSBURG TIMES, April 8, 2000, at 4B.

[217] *See id.*

[218] *Id.*

[219] *See* Baldus & Woodworth, *supra* note 160. *But see* Lofquist, *supra* note 211, at 1535-36 (looking at dozens of variables and settling on twenty-nine that had a significant relationship to "death penalty intensity").

[220] *See* Becker, *supra* note 141. One unexamined variable that might explain some of the race-of-victim differences found by researchers, suggested by prosecutors, is that "black witnesses often are more reluctant to cooperate with authorities." Baldus & Woodworth, *supra* note 160, at 1449 n.146 (quoting Levenson & Salamone, *supra* note 106). Presumably, however, unavailability of witnesses would most likely make *convictions*, not death sentences, harder to obtain.

The Capital Cases Task Force did recommend that defense lawyers be permitted to question jurors privately about racial bias, that judges advise jurors that race, gender and ethnicity may not influence their deliberations, that the Legislature finance further study of racial bias in the capital punishment system, and that the Legislature also establish an information clearinghouse about race issues in the criminal process at Florida A & M University.[221] As of 2008, none of these recommendations had been followed. Accordingly, the Assessment Team once again recommended that "[t]he State of Florida should sponsor a 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, or, at least, implement the recommendations of its 2000 Governor's Task Force on Capital Cases."[222] If racial disparities are confirmed by such research, more serious consideration should be given to the Task Force's other recommendations, as well as initiation of a prosecutorial training program about racial issues. Furthermore, some entity (perhaps the innocence commission proposed later in this article) should undertake a close re-evaluation of death penalty cases in which the victim was white.[223]

Mental Disability

In recent years the U.S. Supreme Court has decided two important cases addressing the relevance of mental disability in death penalty cases. In *Atkins v. Virginia*,[224] it held that execution of people with mental retardation is cruel and unusual punishment under the Eighth Amendment. And in *Panetti v. Quarterman*,[225] it rejected a shallow interpretation of the rule prohibiting execution of people whose mental disability renders them incapable of understanding the death penalty and the reason it is being imposed on them; as the *Panetti* majority stressed, the offender's understanding of why the penalty is being im-

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[221] *See* Becker, *supra* note 141.

[222] FLORIDA REPORT, *supra* note 14, at xi.

[223] A number of Florida cases have claimed the death sentence should be reversed because a disproportionate number of defendants who kill whites are subject to capital prosecutions. These claims have always been dismissed. *See, e.g.*, Bundy v. Dugger, 850 F.2d 1402, 1414 (11th Cir. 1988); Funchess v. Wainwright, 788 F.2d 1443, 1445-46 (11th Cir. 1986); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984); Adams v. Wainwright, 709 F.2d 1443, 1449-50 (11th Cir. 1983), *vacated on other grds*, 466 U.S. 964 (1984); Spinkellink v. Wainwright, 578 F.2d 582, 612-16 (5th Cir. 1978).

[224] Atkins v. Virginia, 536 U.S. 304 (2002).

[225] Panetti v. Quarterman, 551 U.S. 930 (2007).

posed must be "rational" and not undermined by delusional thinking.[226] Lower courts have struggled with related issues, including the proper procedures to follow when a death row inmate who has mental disability wants to waive post-conviction appeals or is no longer able to assist his or her attorney with them.[227]

As in the other settings discussed in this article, Florida law in this area is subject to criticism in several respects. Of course Florida follows *Atkins*, and thus bans execution of people with mental retardation.[228] But its definition of mental retardation is narrow.[229] Furthermore, the state does not prohibit execution of people who were seriously mentally ill at the time of their offense, despite the fact that such people are generally more impaired and less able to appreciate the wrongfulness of their actions than people with mental retardation[230] (and certainly less so than juveniles, who are also exempt from death sentences after *Roper v. Simmons*[231]).

Florida law is also unclear about three key issues that arise when mental disability manifests itself *after* conviction and sentence. First, Florida law provides that, when courts are determining the competency of a death row inmate who decides to waive a post-conviction claim, their focus should be on whether the inmate "understands the consequences" of the waiver,[232] thus leaving unsettled the validity of a waiver by a depressed inmate who can understand these consequences but does not care about them (and yet may feel very differently after the depression is treated).[233] Second, Florida law does not resolve whether the post-conviction process may proceed when a death row

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[226] *See id.* at 27 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it.").

[227] *See, e.g.*, Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATHOLIC U. L. REV. 1169, 1177-92 (2005) (describing the issues and relevant court cases).

[228] *See* FLA. STAT. § 921.137(2) (West 2009).

[229] *See* FLA. STAT. § 921.137(1) (West 2009). *Compare* Jones v. State, 966 So. 2d 319, 329 (Fla. 2007) (holding that an IQ above 70 does not meet the subaverage intellectual functioning part of Florida's test) *with* Am. Ass'n on Intellectual & Developmental Disabilities, Definition of Intellectual Disability, *available at* http://www.aamr.org/content_100.cfm?navID=21 ("Generally, an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning.").

[230] CHRISTOPHER SLOBOGIN, MINDING JUSTICE, LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 73-75 (Harvard University Press) (2006).

[231] Roper v. Simmons, 543 U.S. 551 (2005).

[232] Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993).

[233] *See generally* John Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

inmate decompensates and can no longer assist the attorney in that process.[234] Third, while Florida's definition of competency to be executed is arguably consistent with *Panetti*,[235] Florida law does not address whether inmates who are found incompetent under this standard may be forcibly medicated to make them competent or instead should have their sentence commuted.

In August 2006, the American Bar Association's House of Delegates unanimously passed a resolution, also joined by the American Psychiatric Association and the American Psychological Association, that addressed all of these issues.[236] The Assessment Team endorsed that Resolution and restated several of its tenets as a multi-pronged recommendation:

> [T]he State of Florida 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

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[234] *See* FLA. R. CRIM. P. 3.210(a) (stating that a defendant must be competent during "any material stage of a criminal proceeding" including pretrial, trial and sentence-related proceedings but does not describe the consequences of a non-restorability finding in the post-conviction context). *See also* FLA. R. CRIM. P. 3.213(b) (Lexis, LexisNexis through Sept. 1, 2007) (providing for release or civil commitment within five years if a defendant is not restorable to competency).

[235] *See* FLA. STAT. § 922.07(2) (a person under sentence of death is insane for purposes of execution if the person lacks "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him or her"). *See also* Provezano v. State, 750 So. 2d 597, 602 (Fla. 1999) (a lower court opinion requiring rational comprehension and interpreting the language of Fla. Stat.§ 922.07 consistently with *Panetti*).

[236] *See* AM. BAR ASS'N RES. 122A (Aug. 2006), *available at* http://www.abanet.org/media/docs/122A.pdf [hereinafter ABA RESOLUTION].

> possibility of parole as the sole alternative punishment to the death penalty).[237]

Sections (a) and (b) of this recommendation call for expanding the death penalty prohibition to all of those with significant subaverage intellectual functioning at the time of the offense (including those whose impairment is due to something other than retardation) and to those who were insane at the time of the crime under the broadest formulation of the insanity defense (a rule that would have substantial impact at the sentencing phase in Florida, which has a very narrow insanity test[238]). Section (c) deals with the third *post*-conviction issue described above, by more clearly adopting *Panetti's* test and by requiring commutation of the death sentence whenever a person for whom a death warrant has been issued is found incompetent to be executed, a rule that would bar forcible medication designed to enable execution.[239]

The Assessment Team's report makes positive reference to (but did not officially endorse) two other provisions of the ABA/APA/APA Resolution, which deal with the other two post-conviction issues noted earlier.[240] The first of these provisions deals with the "depressed inmate" scenario described above by providing the following:

> If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.[241]

The second recommendation provides that post-conviction proceedings that require the participation of the death row inmate should be suspended if the inmate is significantly impaired in the ability to assist counsel, and that the death sentence should be commuted to life if "there is no significant likelihood of restoring the prisoner's capacity[.]"[242] The latter rule is arguably required by analogy to *Jackson v.*

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[237] FLORIDA REPORT, *supra* note 14, at xi-xii.

[238] *See* Fla. Standard Jury Instructions in Crim. Cases § 3.6(A) (insanity is established when the defendant had a mental infirmity, disease, or defect, and because of this condition, he or she did not know what he or she was doing or its consequences, or, he or she did not know that what he or she was doing was wrong).

[239] *See* FLORIDA REPORT, *supra* note 14, at xi-xii.

[240] *Id.* at 398.

[241] ABA RESOLUTION, *supra* note 236 § 3(b).

[242] *Id.* § 3(c).

Indiana,[243] where the U.S. Supreme Court held that a defendant who cannot be restored to competency to stand trial cannot be tried, but instead must either be released or civilly committed.

These various recommendations could have a noticeable impact on the administration of the death penalty. One observer estimated that "as many as fifty percent of Florida's death row inmates become intermittently insane[.]"[244] Some of these individuals were probably also seriously impaired at the time of the offense, presumably not significantly enough to be found insane under Florida's relatively strict insanity test but perhaps sufficiently so that they did not deserve the death penalty.[245] These facts suggest that under a normatively preferable, and arguably constitutionally required, standard at least some of the people on Florida's death row should never have been sentenced to death and others should have had their sentences commuted to life without parole.

Conclusion: Innocence and Economics

The description of Florida law and practice in this article raises grave doubts about whether all of the people who are currently on death row in Florida (not to mention the twenty-two who have been released from it) deserve it. Problems associated with police investigative techniques, scientific testing procedures, prosecutorial decisions during charging and trial, defense attorney qualifications and compensation, judicial and jury decision-making, jury instructions, the clemency process, and racial and disability bias can undermine the reliability of convictions in capital cases, the death sentences handed down in such cases, or both. The Florida Assessment Team believed that all of these matters deserve very serious consideration by policymakers.

The Assessment Team was particularly concerned about the possibility that people who do not commit capital murder will nonetheless

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[243] Jackson v. Indiana, 406 U.S. 715 (1972).

[244] Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fl. St. U. L. Rev. 35, 42 (1986).

[245] *See, e.g.*, Green v. State, 975 So. 2d 1081, 1088-90 (Fla. 2008). Another concern in such cases is that, without a prohibition on execution of those who were seriously mentally ill at the time of the offense, the jury will improperly consider mental disability an *aggravating* circumstance, relying on the incorrect assumption that such people are abnormally dangerous. *See* Slobogin, *supra* note 230, at 87-92 (for a detailed discussion of this point).

be convicted. Thus, as a final pair of recommendations, the Team concluded:

> The State of Florida should create two independent commissions to: (a) establish the cause of wrongful convictions in capital cases and recommend changes to prevent future wrongful convictions in these cases; and (b) review claims of factual innocence in capital cases that, if sustained, would then be reviewed by a panel of judges.[246]

The creation of the first type of commission is important because understanding the reasons for mistakes in the death penalty process—which have been numerous in Florida, as the long list of exonerees suggests—can help improve it.[247] The second type of commission, which would supplement the current largely ineffectual post-conviction process,[248] has long existed in some European countries,[249] was recently established in North Carolina, and is being considered in at least twelve other states,[250] in large part because of the perception that procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full consideration.

Throughout, this article has also devoted attention to the cost of the recommendations made. Aside from the innocence commission proposals, the recommendation that racial disparities be studied, and the suggested increases in defense compensation, none of the recommendations made here would require the State of Florida to incur significant expense, and even the innocence and race projects would have only minimal fiscal impact. Further, because all of the proposed reforms should improve the reliability of the process, death sentences and the associated costs would be reduced. Only a few of these reforms have been considered since the Assessment Team's report was

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[246] *Id.* at ix-x.

[247] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 127 (2008) ("While innocence commissions remain a new and largely untested institutional approach, an investment in such specialist institutions remains entirely justified where generalist appellate and post conviction courts face such difficulties in assessing innocence.").

[248] *See* FLORIDA REPORT, *supra* note 14, at ix-x. *See also* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (arguing, based on a study of federal habeas corpus cases, that the federal post-conviction process "offers no realistic hope of relief for those who reach federal court").

[249] *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 437 (2007) (describing development of innocence commission in the United Kingdom).

[250] *See* Patrik Jonsson & Jesse DeConto, *North Carolina Creates a New Route to Exoneration*, CHRISTIAN SCIENCE MONITOR, Aug. 10, 2006, at 1-2.

issued in September 2006, suggesting some resistance to them.[251] But that resistance is probably due less to their perceived cost than to a conviction that the system is good enough as it is, or the belief that, even if reform is needed, it will be politically unpopular precisely because fewer death sentences would result.[252]

Merely stating these latter reasons for truncating reform suggests how unsatisfactory they are. But for policymakers who remain concerned about the political fallout of endorsing change in the death penalty process, one further economic consideration is offered: the current system is simply too expensive. It is estimated that although capital cases comprise only 3% of all criminal felony filings, they occupy 50% of the Florida Supreme Court's docket.[253] And the cost of a capital case resulting in a death sentence far exceeds the costs associated with a case in which a sentence short of death is sought.[254] As a result, all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of re-

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[251] Ron Word, *Death Penalty Reforms Ignored*, THE LEDGER, Oct. 24, 2008, at B5, *available at* http://www.theledger.com/apps/pbcs.dll/article?AID=/20081024/NEWS/810240359/1374&Title=Death_Penalty_Report_Ignored.

[252] Evidence for the belief that many believe the system works sufficiently well comes from the Florida Commission on Capital Cases which, in implying that the Florida death penalty system is not in trouble, noted that none of the twenty-three exonerees it examined were found "innocent" (not surprisingly, since such a verdict does not exist), and that "[t]he guilt of only four defendants . . . was subsequently doubted by the prosecuting office or the Governor and Cabinet members." *See* FL.COMM'N ON CAPITAL CASES, *supra* note 7, at 5. (The Commission glossed over the fact that, of the remaining twenty, eight had their charges dismissed, ten were acquitted on retrial, and two pleaded guilty to lesser charges, presumably with the consent of the prosecution). Evidence of the second reason for resistance comes from the experience of the Assessment Team itself. At least four members of the original eleven-member Assessment Team were clearly worried about the political repercussions of a recommendation for a moratorium on the death penalty, and three of these individuals ended up removing themselves from the Team, although at least one of these agreed with all of our recommendations; such actions are understandable but unfortunate.

[253] Frank Davies, *Death Penalty System Called Highly Flawed: Two-Thirds of US Cases Overturned*, MIAMI HERALD, June 12, 2000, at 1A.

[254] *See* Glenn L. Pierce & Michael Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 719 (1990-1991) (noting that in Florida a death sentence case costs approximately $2.5 million more than a life sentence of forty years); D. Von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A (citing 1988 study showing $3.2 million in extra costs associated with death penalty in Florida). *Cf.* Richard C. Dieter, *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, at 10, (2007), Death Penalty Information Center, http://www.deathpenalty.org/downloads/CoC%20dpic%202007%20poll.pdf (noting that California is spending roughly $250 million per execution).

sources on capital cases significantly detracts from Florida's ability to render justice in *non*-capital cases.[255] Perhaps the ultimate rationale for correcting as many deficiencies as possible in the death penalty process (and thus reducing the number of capital charges and death sentences) is that the quality of the entire criminal justice system would be improved.

The fact that the death penalty system in Florida manages to soak up a huge proportion of judicial and financial resources yet remains seriously flawed suggests an alternative reform: abolition of the death penalty, or at least a moratorium on its administration while improvements are made. The American Bar Association has adopted the latter position.[256] The Florida Assessment Team could not reach a consensus on the issue, and therefore did not put forward that recommendation. But, as this article has demonstrated, there are numerous reasons for keeping both of the latter options on the table.

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[255] *Cf.* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing movement in public defender offices in seven states, including Florida, to refuse to represent defendants charged with misdemeanors and lesser felonies because of case overload).

[256] *See Death Penalty Moratorium Implementation Project*, Am. Bar Ass'n, http://www.abanet.org/moratorium/why.html (last visited Mar. 15, 2009).