

Joint Task Force to Review the Administration
Of Ohio’s Death Penalty

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION	VOTE COUNT	PAGE NUMBER	Implementatio n
1) Custodial interrogations, as defined by <i>Miranda v. Arizona</i> , shall be recorded and, if not recorded, then the statements made during the interrogation should be presumed “involuntary.”	13-5	3	None
2) The Joint Task Force recommends that each coroner’s office be required to become accredited by the National Association of Medical Examiners (NAME), or have at least one person on staff or under contract who is a fellow of that organization (and who performs the procedure in the case), or have in place a contract with an accredited crime lab.	18-1	3	None
3) The Joint Task Force also recommends that, subject to the special rule specified below, if evidence of the sort customarily subject to testing in a laboratory in a death penalty case is not originally reviewed by an accredited lab, then the defendant shall have the right to have the evidence reviewed a second time by an accredited lab. More specifically, any prosecution evidence that has not been tested in an accredited lab shall be retested in an accredited lab, at the request of the defendant and at the state’s expense. If such a request is made, there will be no reference at trial to the first test (in a non-accredited lab) except as may be necessary to establish chain of custody. Defense forensic experts shall also be required, by Supreme Court rule, to rely on testing by accredited labs, at the request of the prosecution, in death penalty cases.	17-2	3	None
4) The Joint Task Force recommends that legislation be enacted to require all crime labs in Ohio be certified by a recognized agency as defined by the Ohio General Assembly.	10-6	4	None
5) The Joint Task Force recommends that the legislature enact legislation to require prospective proportionality review in death penalty cases to include cases where the	10-7	4	None

	death penalty was charged in the indictment or information but was not imposed			
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6)	The Joint Task Force also recommends that the Supreme Court of Ohio mandate by court rule that, prospectively, all death eligible homicides be reported to a central data warehouse both at the charging stage and at the conclusion of the case at the trial level.	15-1	5	None -
7)	The Joint Task Force recommends that the Ohio Legislature amend R.C. 2929.03(F) to include the necessity for a prosecutor's rationale for a proposed plea agreement, on the record, for any indicted capital offense that results in a plea for a penalty less than death	15-1	5	None
8)	Enact legislation to consider and exclude from eligibility for the death penalty defendants who suffered from "serious mental illness," as defined by the legislature, at the time of the crime. Appropriate questions for the legislature to consider include: 1. Whether "serious mental illness" is causally related to the crime? 2. Whether the determination of "serious mental illness" should be considered before trial or at some other time as determined by the legislature? 3. Whether this issue is already adequately addressed by current law?	15-2	6	SB 162 introduced
9)	Enact legislation to exclude from eligibility for the death penalty defendants who suffer from "serious mental illness" at the time of execution.	12-7	6	None
10)	Adoption of an order, in the case of a pro se defendant who is competent to stand trial but may not be competent to represent himself or herself because of a mental health illness or developmental disability, directing either the appointment of counsel to conduct the trial or to act as "stand-by counsel" or "co-counsel" to assist the pro se defendant, or to assume or resume to proceed with trial as counsel of record, in the event the defendant changes their mind about proceeding as a pro se litigant.	11-1	7	None
11)	Adopt the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.	12-2	7	None
12)	Adopt the Supplementary Guidelines for the Mitigation Function of Defense Team in	13-4	8	None

	Death Penalty Cases. This recommendation is not meant, however, to alter the standard adopted in <i>Strickland v. Washington</i> .			
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13)	Enact and fund a Capital Litigation Fund to pay for all costs, fees, and expenses for the prosecution and defense of capital murder cases.	19-0	8	None
14)	It is specifically recommended that increased funding be provided to the Office of the Ohio Public Defender, by statute, to allow for additional hiring and training of qualified capital case defense attorneys, who could be made available to all Ohio counties, except in circumstances where a conflict of interest occurs, at which time a separate list of prospective appointed counsel would be provided.	20-0	9	None
15)	The Ohio legislature and Supreme Court of Ohio should implement and fund a statewide public defender system for representation of indigent persons in all capital cases for trials, appeals, post-conviction, and clemency except where a conflict of interest arises. In cases of conflicts of interest, qualified Rule 20 counsel shall then be appointed.	13-3	9	None
16)	Enact legislation to provide that private defense counsel appointed to represent death eligible defendants or those sentenced to death are equally paid throughout the state regardless of the location of the offense.	16-0	9	Partial H.B. 663 Effective 3/23/15 Requires Court to adopt a uniform fee schedule for appointed counsel
17)	Enact legislation that maintains that a death sentence cannot be considered or imposed unless the state has either: 1) biological evidence or DNA evidence that links the defendant to the act of murder; 2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or 3) a video recording that conclusively links the defendant to the murder; or 4) other like factors as determined by the General Assembly.	12-6	10	None
18)	Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently corroborated at the guilt/innocence phase of the death penalty trial.	19-0	10	None

19)	The legislature should study how to best support families of murder/homicide victims in the short and long term.	19-0	12	H.B. 663 Effective 3/23/15
20)	Enact legislation that allows a defendant to withdraw his or her waiver of a jury trial in either the guilt or penalty phase if either phase is reversed by a reviewing court.	11-7	12	None
21)	Amend Rule 20 of the Rules of Superintendence for Ohio Courts in the manner attached to these final recommendations as Appendix B.	18-0	12	Partial Court adopted Rules for Appointment of Counsel in Capital Cases
22)	The Ohio Rules of Practice and Procedure shall be amended so that a properly presented motion must be accepted for filing for a ruling by the court in a death penalty case.	18-0	12	None
23)	Amend Sup.R. 20, adding Section (E). Section (E) would read as follows: E. Post-Conviction Counsel. Post-conviction counsel shall satisfy all of the following qualifications: 1. Be admitted to the practice of law in Ohio or admitted to practice pro hac vice; 2. Have at least three years of civil or criminal litigation or post-conviction experience in Ohio; 3. Have specialized training, as approved by the committee, on subjects that will assist counsel in the post-conviction of cases in which the death penalty was imposed in the two years prior to making the application; 4. Have experience as counsel in the post-conviction proceedings of at least three felony convictions in the seven years prior to making the application.	18-0	12	None
24)	The time frame for filing a post-conviction motion should be extended from one hundred eighty (180) days after the filing of the trial record to three hundred sixty five (365) days after the filing of the trial record.	17-0	13	H.B. 663 Effective 3/23/15
25)	The judge hearing the post-conviction proceeding must state specifically why each claim was either denied or granted in the findings of fact and conclusions of law.	19-0	13	Proposed S.B. 139
26)	The common pleas clerk shall retain a copy of the original trial file in the common pleas clerk's office even though it sends the originals to the Supreme Court of Ohio in connection with the direct appeal.	19-0	13	Proposed S.B. 139

27)	There shall be no page limits in post-conviction petitions for death penalty cases in either the petition filed with the common pleas court or on appeal from the denials of such petition.	14-3	13	Proposed S.B. 139
28)	Amend R.C. §2953.21, as attached to this final report in Appendix C, to provide for depositions and subpoenas during discovery in post-conviction relief.	13-3	13	Proposed S.B. 139

29)	Mandate through the Rule 20 Committee that all attorneys who practice capital litigation must take a certain number of CLE hours on the issue of racial bias. Mandate mandatory CLE for prosecutors who prosecute death penalty cases to educate them on how to protect against racial bias in the arrest, charging and prosecution of death penalty cases. Mandate that Judges assigned to death penalty cases must also attend specialized training regarding racial bias in death cases and how to protect against it.	12-2	13	None
30)	Mandate that any judge who reasonably believes that any state actor has acted on the basis of race in a capital case be reported to the Office of Disciplinary Counsel or, if not an attorney, to the appropriate supervisory authority.	12-2	14	None
31)	Mandate through the Rule 20 Committee that all Rule 20 approved trainings must include at least one hour of training regarding the development of discrimination claims in death penalty cases and how to preserve Batson issues for appellate review.	13-1	14	None
32)	Mandate that an attorney must seek the recusal of any judge where “a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors” and should the judge not recuse, if the attorney still believes there is a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors, then the attorney shall file an affidavit of bias with the Chief Justice of the Supreme Court of Ohio.	8-5	14	None
33)	Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary.	12-2	14	None

34)	To address cross jurisdictional racial disparity, it is recommended that Ohio create a death penalty charging committee at the Ohio Attorney General's Office. It is recommended that the committee be made up of former county prosecutors, appointed by the Governor, and members of the Ohio Attorney General's staff. County prosecutors would submit cases they want to charge with death as a potential punishment. The Attorney General's office would approve or disapprove of the charges paying particular attention to the race of the victim(s) and defendant(s).	8-6	14	None
35)	Enact legislation allowing for racial disparity claims to be raised and developed in state court through a Racial Justice Act with such a claim being independent of whether the client has any other basis for filing in that court.	13-1	15	None
36)	To ensure a more representative jury pool, enact legislation that requires every jurisdiction to create jury pools from the lists of all registered voters and all licensed drivers, who are U.S. citizens, rather than only the voter registration list.	12-2	15	None
37)	Enact a court rule that allows prosecutors and defendant's attorneys in death penalty cases full and complete access to all documents, statements, writings, photographs, recordings, evidence, reports or any other file material in possession of the state, any agent or agency of the state, or any police agency involved in the case, or in the possession of the defendant's attorneys which is known to exist or which, with due diligence, can be determined to exist and to allow the attorneys to inspect, test, examine, photograph or copy the same. This shall not be construed to require the disclosure of attorney work product or privileged matters, nor to the disclosure of inculpatory information possessed by the defendant's attorneys described in Crim.R. 16 (H) (3), nor to materials protected by Crim.R. 16.	17-0	15	None
38)	Enact legislation to require a prosecutor to present to the Grand Jury available exculpatory evidence of which the prosecutor is aware.	10-9	16	None

39)	Adoption of an order requiring implementation of mandatory on the record pre-trial conferences. Further, the Joint Task Force recommends appropriate Judicial College education to emphasize the necessity for conducting such conferences, all of which must be on the record, to begin at the earliest stages of the case and to address issues pertaining to discovery, Brady disclosures, and appointment of experts. The pre-trial conference shall be ex parte upon the request of defense counsel and upon good cause shown as to matters related to defense experts but shall be on the record. After inquiry by Court as to status of discovery, counsel for state and defendant shall be ordered to declare their compliance with all discovery obligations and the State shall affirmatively assert disclosure of all exculpatory matters pursuant to Brady.	10-5	16	None
40)	The Ohio statute providing for attorney-client privilege should be amended to provide that a claim of ineffective assistance waives the privilege in order to allow full litigation of ineffectiveness claims. The waiver will be limited to the issue raised.	18-0	16	H.B. 663 Effective 3/23/15
41)	The Task Force voted to urge all parties involved to work on procedures to remove any impediments to a fair and timely resolution of death penalty cases in the Ohio courts.	12-6	16	None
42)	There should be a codification of the right to have counsel present at the clemency hearing.	15-0	17	None
43)	Enact legislation or administrative regulation to provide that death penalty clemency proceedings in Ohio include: A. The parole board hearing must be recorded by audio, video or court stenographer and be a public record. B. The interview of the condemned inmate must be recorded by audio, video or court stenographer and be a public record. C. The inmate’s counsel must be allowed to counsel the client in the interview; D. The parole board must reveal to counsel for the defendant and the state all documents, witnesses and information it will consider in reaching its decision; E. The inmate’s “master file” must be released to his/her counsel at least 6 months before the parole board hearing; F. Counsel for the inmate and the State must	17-1 16-2 11-8 18-1 18-0 18-0	17	None

	<p>disclose and exchange all information to be relied upon at the parole hearing at least 30 days before the hearing with attorney certification and a continuing duty to disclose.</p> <p>G. Identify a funding mechanism, such as a capital litigation fund, for inmate’s mental health expert or state expert so that an expert can be hired in a timely manner for the parole board hearing.</p> <p>H. The legislature should ensure adequate funding, such as a capital litigation fund, for private counsel who prepare for and represent a condemned inmate at a Parole board hearing;</p> <p>I. Require annual mandatory training of all Parole Board members for a minimum of six hours by mental health and forensic science experts and by other experts relevant to death penalty issues.</p>	12-2		
		11-1		
		18-0		
44)	The Ohio Judicial Conference shall, on an annual basis, work with attorneys and judges to review and revise, as necessary, the jury instructions in death penalty cases to ensure that jurors understand applicable law. In particular, the Conference shall request, on an annual basis, input from the Ohio Prosecuting Attorney’s Association, the Ohio Association of Criminal Defense Lawyers, Ohio Public Defender, and the members of the Ohio Judicial Conference.	16-0	19	None
45)	The Ohio Judicial Conference shall review and revise as necessary the Ohio Jury Instructions to institute the use of “plain English” and “plain English” shall be used throughout capital trials.	14-1	20	None
46)	In capital cases, jurors shall receive written copies of “court instructions” (the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.	16-0	20	H.B. 663 Effective 3/23/15
47)	The Ohio Judicial Conference shall study the Ohio Jury Instructions to make clear that a jury must always be given the option of extending mercy that arises from the evidence as cited in Justice Scalia’s dissent in Morgan v. Illinois, 504 U.S. 719, 751 citing to Woodson v. North Carolina, 428 U.S. 303-305.	10-8	20	None
48)	The Ohio Judicial Conference shall ensure the Ohio Jury Instructions make clear the weighing process for considering aggravating	13-4	20	None

	circumstances and mitigating factors should not be conducted by determining whether there are a greater number of aggravating circumstances than mitigating factors.			
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49)	Implementation of enhanced mandatory, educational and minimum experience and/or certification requirements for all participating legal counsel (appointed and retained) and all Ohio judges (including Common Pleas, Appellate, and Supreme Court) to allow for their participation in a capital case. The Ohio Judicial College could be utilized as the vehicle to implement the mandatory educational requirements for judges. Certain minimum standards for the appointment and performance of legal counsel (appointed and retained) in capital cases should be set forth in the rules and could, in exceptional circumstances, be waived, with the consent of the Supreme Court of Ohio, if it is determined that the attorney's ability or the judge's qualification otherwise exceeds the standards required by the rule. The adoption of this rule would require some amendment or modification to Sup.R. 20.	21-0	21	Partial Court adopted Rules for Appointment of Counsel in Capital Cases
50)	The Joint Task Force recommends implementation of educational guidance for presiding judges as to when and how to intervene in situations of potential ineffective lawyering. Additional guidance should also be emphasized to assure effective utilization of the recusal process by participating legal counsel, when incurring issues of preconceived opinions or otherwise prejudicial positions of trial judges. For clarification, the education guidance would highlight procedures for recognizing these issues in such a way that the trial court would not damage or undermine the client's confidence in his or her legal counsel; however, the Joint Task Force also recognizes that if ineffective assistance of counsel is found, the court has a duty to step in and address the issue.	17-4	21	None
51)	Adoption of a rule directing that a presiding trial judge, or the Administrative Judge, in conformity with Sup.R. 20, is the appropriate authority to appoint legal counsel in a capital case.	14-5	21	None
52)	Adoption of a rule directing that the trial judge is the appropriate authority for the appointment of experts for indigent defendants. The rule should further provide that the decision pertaining to the appointment of experts shall be made, on the record, at one of the prescribed Pre-Trial	13-5	21	None

	<p>Conferences. If defense counsel requests, the demand for appointment of the expert shall be made in-camera ex parte, and the order concerning the appointment shall be under seal. Upon establishing counsels’ respective compliance with discovery obligations, the question of the appointment of experts (including determination of projected expert fees based upon analysis of expert’s time to be applied to the case as well as consideration of incremental payment of expert fees as case progresses) would be decided by the court, which decision would be subject to immediate appeal, under seal, to the appropriate Court of Appeals. The trial court judge shall make written findings as to the basis for any denial. Although concerns have been raised as to the ability of the Appellate Court to provide the anticipated, necessary expedited hearing within a reasonable time-frame, the Joint Task Force suggests that this issue be elevated to the status of a final appealable order and that the necessary expedited appellate process be spelled out in the statute.</p>			
<p>53)</p>	<p>The Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule, all of which would be included in the proposed Criminal Rule for Capital Cases (discussed below).</p>	<p>20-0</p>	<p>22</p>	<p>Partial H.B. 663 Effective 3/23/15 Requires Court to adopt a uniform fee schedule for appointed counsel</p>
<p>54)</p>	<p>Should the present process of appointment of indigent counsel by the judiciary continue, the main objective should always be to assure the best educationally experienced and qualified candidate, who is available (within the county or outside the county), and who is otherwise willing to take on the responsibilities associated with the case for an appropriate fee and accompanying expenses, is appointed. A uniform fee schedule for such services across the State of Ohio must be a necessary consideration to assure the equal protection and due process for the accused in a capital case.</p>	<p>21-0</p>	<p>22</p>	<p>Partial H.B. 663 Effective 3/23/15 Requires Court to adopt a uniform fee schedule for appointed counsel</p>

55)	Adoption of reporting standards to provide complete transparency of record, including requirements to ensure better record keeping by the trial judge and the provision of additional, detailed resource information necessary to assure strict compliance with due process, which information shall be submitted to the Supreme Court upon completion of the case. Such resource information may include unique Constitutional issues, unique evidentiary issues, significant motions, plea rationale, pre-sentence investigation, and any additional information required by the Rule 20 Committee or the Supreme Court of Ohio. Additional types of resource information could be developed as part of the mandated educational process conducted by the Ohio Judicial College.	16-0	22	None
56)	The Joint Task Force believes that some of the recommendations above could be accomplished by the adoption of a separate Criminal Rule for Capital Cases. The Joint Task Force recommends that such a rule be adopted and provide for the mandatory training of attorneys and judges (Recommendation 49), the selection and appointment of indigent counsel in capital cases (Recommendation 51), and the enforcement of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams (Recommendations 11 and 12).	16-0	22	Partial Court adopted Rules for Appointment of Counsel in Capital Cases