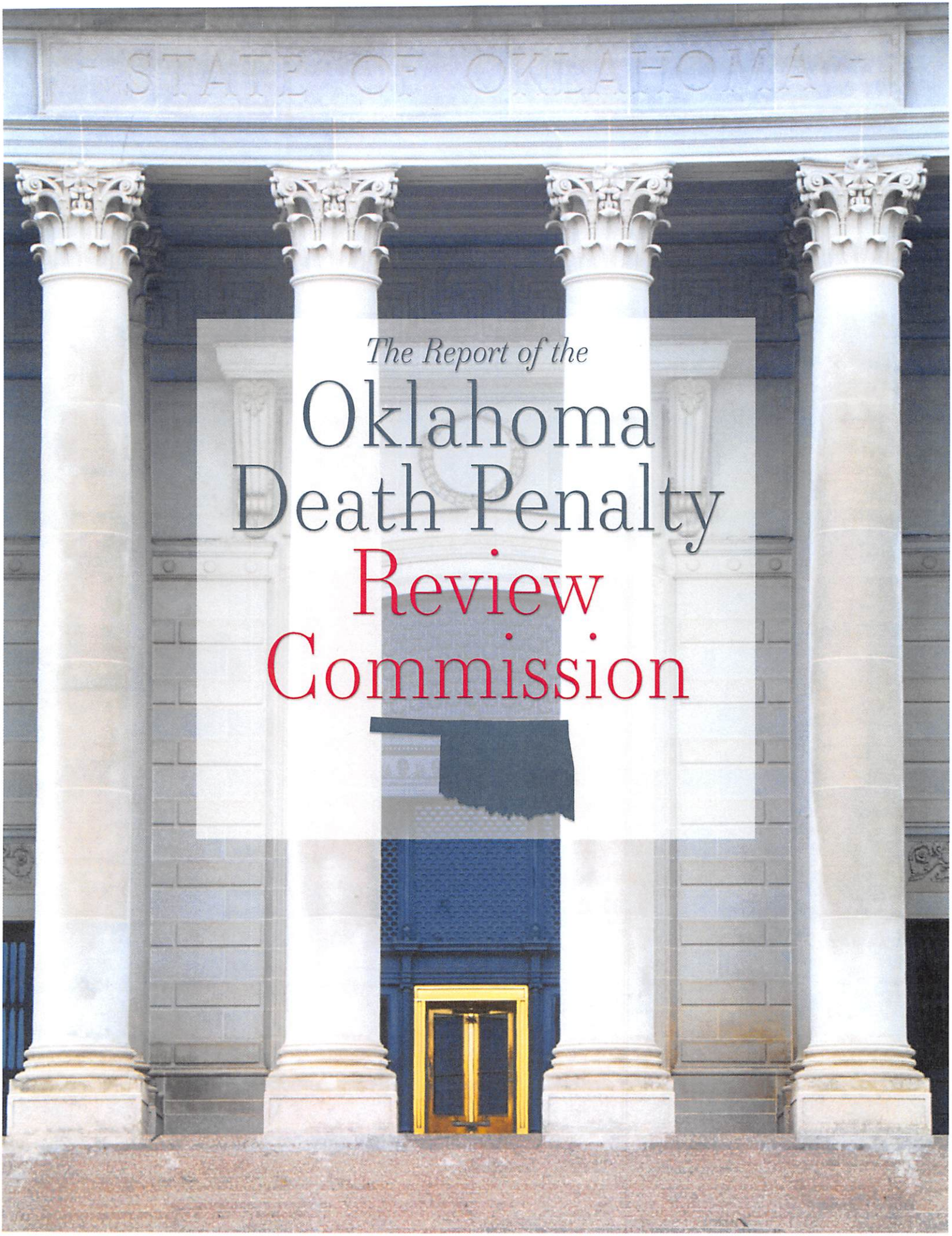

The Report of the

Oklahoma Death Penalty Review Commission

4

Role of the Prosecution

I. Introduction

In *Gregg v. Georgia*, which ended the national moratorium on the death penalty, the United States Supreme Court rejected "the defendant's challenge to what he called the 'unfettered authority' afforded prosecutors by the Georgia death penalty statute."[1] This reluctance on the part of the Court to diminish the considerable nature of prosecutorial discretion is generally attributed to separation of powers doctrine.[2] Prosecutors have an ethical responsibility not merely to convict, but to ensure that justice prevails.[3]

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[4]

As "administrators of justice,"[5] prosecutors possess a considerable advantage within the adversarial system, in part because of their authority to make charging decisions and to direct law enforcement to gather evidence. Prosecutors have unique control over material that may be favorable to the defendant or that may demonstrate that a defendant did not commit the crime for which he or she was accused.[6] Prosecutors, therefore, have a unique duty to disclose such evidence that may exonerate a defendant or suggest that the appropriateness of a punishment is less than death.[7]

The limited checks on prosecutorial power and the ethical responsibilities of prosecutors are discussed in this chapter, which includes research and interviews with criminal justice stakeholders and district attorneys in Oklahoma.

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[1] Gregg v. Georgia, 428 U.S. 153, 199 (1976); *see also* Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987) (citations omitted) (noting that the argument that a death penalty statute is unconstitutional due to unbridled prosecutorial discretion "has been explicitly rejected by the Supreme Court."), cert. denied, 488 U.S. 948 (1988).

[2] John Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571, 2593-94 (1997), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5577&context=flr.

[3] *ABA-AALS Joint Conference Report on Professional*, 44 A.B.A.J. 1159, 1218 (1958).

[4] Berger v. United States, 295 U.S. 78, 88 (1935).

[5] A.B.A., A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 5 (3d ed. 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

[6] Lisa Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 Fordham L. Rev. 1205, 1209 (2000), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5689&context=flr.

[7] MODEL RULES OF PROF'L CONDUCT 3.8(d), (g), (h) (A.B.A. 2016).

II. Duty to Disclose Evidence in Capital Cases

A. Law Governing Disclosure of Evidence in Capital Cases

In *Brady v. Maryland*[8] and *Giglio v. United States*,[9] the U.S. Supreme Court held that the government has a constitutional obligation to produce exculpatory and impeachment evidence to the defense. Specifically, under *Brady*, the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.[10]

The prosecution has a duty, irrespective of good or bad faith, to obtain *Brady* material from law enforcement.[11] In *Allen v. District Court of Washington County*, the Oklahoma Criminal Court of Appeals (OCCA) held that prosecutors must disclose "any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons."[12] In addition to the prosecutor's obligation under *Brady* and its progeny, discovery at the pretrial and trial stages in Oklahoma criminal cases is governed by the Oklahoma Criminal Discovery Code (OCDC).[13] The provisions of the code have remained substantially unchanged since its enactment by the legislature in the early 1990s.[14] Upon the request of the defense, per Oklahoma law, the prosecution is required to disclose:

a. the names and addresses of witnesses which the state intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement;

b. law enforcement reports made in connection with the particular case;

c. any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant;

d. any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

e. any books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused;

f. any record of prior criminal convictions of the defendant, or of any codefendant; and

g. Oklahoma State Bureau of Investigation (OSBI) rap sheet/records check on any witness listed by the state or the defense as a witness who will testify at trial, as well as any convictions of any witness revealed through additional record checks if the defense has furnished social security numbers or date of birth for their witnesses, except OSBI rap sheet/record checks shall not provide date of birth, social security number, home phone number or address.[15]

[8] Brady v. Maryland, 373 U.S. 83 (1963).

[9] Giglio v. United States, 405 U.S. 150 (1972).

[10] Browning v. Trammell, 717 F.3d 1092, 1094 (10th Cir. 2013).

[11] *See* Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

[12] Allen v. Dist. Court, 805 P.2d 1164 (Okla. Crim. App. 1990).

[13] OKLA. STAT. tit. 22, § 2001; see also Dodd v. State, 993 P.2d 778 (2000) (imposing specific discovery requirements on the governments when using jailhouse informant testimony).

[14] Compare OKLA. STAT. tit. 22, §§ 2001-02 (2016) with 1994 version of same statute.

[15] OKLA. STAT. tit. 22, § 2002(A)(1).

The OCDC also codifies the state's burden of disclosure under *Brady*: "The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment."[16] The statute imposes this burden on the prosecutor not only with respect to materials "in the possession or control of members of the prosecutor's staff" but also to materials in the possession of "law enforcement agencies that regularly report to the prosecutor" and "law enforcement agencies who have reported to the prosecutor with reference to the particular case."[17] In other words, evidence must be disclosed, irrespective of whether the prosecutor has actually collected the information from law enforcement agencies and/or investigators.

In addition, the Oklahoma Rules of Professional Conduct require prosecutors to:

> Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[18]

As discussed in the *Role of the Judiciary* chapter, Oklahoma law does not recognize a right to discovery during subsequent post-conviction stages of litigation, including in capital cases. Instead, the OCCA has stated that, absent a threshold showing of particularized need, an appellant or habeas petitioner's motion for discovery should be denied.[19] A prosecutor's *Brady* obligations, however, do not cease at trial.[20] There remains a continuing obligation to disclose any exculpatory information to the defense.[21] Yet, in the absence of a particularized need or a prosecutor's disclosure, a defendant has limited avenues to discover whether a *Brady* violation—which could have impacted the outcome of the case—has occurred.

B. Discovery Practices in Oklahoma Capital Cases

Open or full discovery permits defense counsel access to all unprivileged material that is in the possession of or known to the prosecution about a defendant's case.[22] In the absence of statutory guidance regarding open-file discovery during the trial and post-conviction phases, Oklahoma district attorneys have varying policies for open-file discovery practices in capital cases. Several prosecutors reported that their offices have formal open-file discovery policies.[23] One prosecutor reported that it is his policy to informally permit trial, appellate, and post-conviction counsel access to their files on a continuing basis.[24] Several district attorneys also reported that

[16] OKLA. STAT. tit. 22, § 2002(A)(2).

[17] OKLA. STAT. tit. 22, § 2002(A)(5). Concerning the latter two provisions, a prosecutor's obligations turn on whether "the prosecutor should reasonably know" that such favorable evidence is in the possession of these other agencies. *Id.* The importance of *Brady*—and Oklahoma prosecutors' adherence to it—are discussed in the next section of this chapter.

[18] OKLA. RULES PROF'L CONDUCT 3.8(d) (2014).

[19] Brown v. State, 955 P.2d 516, 526 (Okla. Crim. App. 1997). *See also* Fields v. State, 946 P.2d 266, 272-73 (Okla. Crim. App. 1997) (requiring litigants to demonstrate in their requests for post-conviction discovery that the requested materials are "necessary to present any specific issue on post-conviction" or "contain information relevant to any material, previously unresolved factual issue"). The court further presumes compliance with all previous discovery orders. *Id.*

[20] MODEL RULES OF PROF'L CONDUCT 3.8(d), (g), (h) (A.B.A. 2016).

[21] *Id.*

[22] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 2 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

[23] Interview with Mike Fields, Dist. Att'y for Dist. 4 (Blaine, Canadian, Garfield, Grant, and Kingfisher Counties) (Sept. 26, 2016) (reporting that he has always had an open file policy. This formal open file discovery policy was adopted in 2015. Prior to that, his district operated under an informal open file policy.) (on file with author) [hereinafter Fields Interview]; Interview with Jason Hicks, Dist. Att'y for Dist. 6 (Caddo, Grady, Jefferson, and Stephens Counties) (reporting that the formal open-file policy was established January 5, 2011, the day he was sworn in. Reporting that his staff knows there is an open-file policy; and notification of the policy is often put on charging documents.) (Sept. 28, 2016) (on file with author) [hereinafter Hicks Interview].

[24] Interview with Craig Ladd, Dist. Att'y for Dist. 20 (Carter, Johnston, Love, Marshall, and Murray Counties) (Sept. 27, 2016) (on file with author) [hereinafter Ladd Interview].

defense counsel will receive all discoverable material but are not permitted such open-file discovery.[25] Defense attorneys in Oklahoma relayed that access to prosecutors' files could prove difficult and open-file policies varied by jurisdictions and district attorneys.[26]

In addition to the question of *how much* information is turned over by the prosecution to the defense, there is an issue regarding *when* that information is turned over. Although the statute[27] calls for motions for discovery to be "made at the time of the district court arraignment or thereafter," several district attorneys who were interviewed reported that it is their policy, at least in capital cases, to turn over discoverable materials either prior to or at the preliminary hearing—that is, before a defendant has been formally arraigned and typically before a bill of particulars has been filed announcing the state's intent to seek the death penalty.[28]

The OCDC also requires payment of "[r]easonable cost[s]" by the requesting party to the party providing discovery. Several district attorneys reported that it is not their practice to seek payment from the defense; in these districts, discovery is provided electronically, which minimizes reproduction costs.[29] In addition—though not an issue of cost—one district attorney reported that discovery is handed over in person and defense counsel must physically sign the back of every page of discovery they receive from the prosecution.[30]

Of the district attorneys interviewed, none require their staff to prepare privilege logs listing materials withheld from capital defense counsel.[31] However, one district attorney reported he notifies defense counsel that certain material has not been tendered so that counsel may, if they choose, litigate the issue pretrial.[32]

District attorneys of 19 counties (17 rural counties and Oklahoma and Tulsa Counties) stated in interviews that the District Attorneys Council (DAC) provides regular and ongoing training to prosecutors concerning their discovery obligations.[33] Some district attorneys further indicated that they provide in-house training to their assistants as to their obligations under the OCDC, *Brady*, and related authorities.[34]

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[25] Comm'n Panel Discussion with Steve Kunzweiler, Dist. Att'y for Dist. 14 (Tulsa County) (October 26, 2016) [hereinafter Kunzweiler Panel]. The district attorney jointly serving Cleveland, Garvin, and McClain Counties (District 21) confirms that defense counsel receives all discoverable material but are not permitted open-file discovery. Interview with Greg Mashburn, Dist. Att'y for Dist. 21 (Cleveland, Garvin, and McClain Counties) (Sept. 26, 2016) (on file with author) [hereinafter Mashburn Interview].

[26] Comm'n Panel Discussion with Craig Sutter, Deputy Executive Director, Oklahoma Indigent Defense System (OIDS); Patti Palmer Ghezzi, Assistant Federal Defender, Capital Habeas Unit (CHU), W. District of Oklahoma; Robert Ravitz, Chief Public Defender, Oklahoma County (Oct. 27, 2016) [hereinafter Defense Panel] (reporting generally that access to the prosecution and law enforcement files often depend upon the district attorney's office and that there is not a uniform policy statewide).

[27] OKLA. STAT. tit. 22, § 2002(D) (2006).

[28] Fields Interview, *supra* note 23 (reporting that the bulk of discoverable material is disclosed to the defense at the preliminary hearing); Mashburn Interview, *supra* note 25 (same); Ladd Interview, *supra* note 24 (reporting that discoverable material is disclosed to the defense before the preliminary hearing. Also reporting that there may be supplemental discovery with specific requests through discovery practice or in cases when evidence is discovered at a later date.); Hicks Interview, *supra* note 23 (reporting that usually by the time they file a capital case the discovery packet is ready for defense counsel).

[29] Districts 4, 6, and 20; *see* Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24.

[30] District 21; *see* Mashburn Interview, *supra* note 25.

[31] Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25.

[32] District 4; *see* Fields Interview, *supra* note 23 ("The way we handle issue is we turn over everything. If something is not discoverable, we will notify defense that we don't think it is discoverable. Then they can file motion and litigate that. Typically, that scenario plays out with law enforcement personnel files. They will often litigate those files.").

[33] Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Interview with Steve Kunzweiler, Dist. Att'y for Dist. 14 (Tulsa County) (October 28, 2016) [hereinafter Kunzweiler Interview]. The District Attorneys Council exists partly to "provide a professional organization for the education, training, and coordination of technical efforts of all state prosecutors, and to maintain and improve prosecutor efficiency and effectiveness in enforcing the laws of this state." *Inside the Office*, DIST. ATT'YS COUNCIL, https://www.ok.gov/dac/About_the_DAC/Inside_the_Office/index.html (last visited Dec. 14, 2016).

[34] *See, e.g.*, Fields Interview, *supra* note 23; Ladd Interview, *supra* note 24.

C. The Import of Discovery in Capital Cases

The second most common reversible error identified on appellate or post-conviction review of capital cases was the "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty."[35] This section details several Oklahoma cases in which prosecutors either intentionally withheld or failed to turn over evidence favorable to capital defendants.

In Michael Allen Browning's case, two victims were shot to death in their home in Tulsa County, and their house burned to the ground.[36] The victims' daughter—also shot—survived and later identified her former boyfriend, Mr. Browning, and another man, Shane Pethel, as the perpetrators.[37] Several months later, the surviving victim's attorney inadvertently faxed two psychiatric reports to the prosecutors who were seeking the death penalty against Mr. Browning. The reports indicated that the surviving victim displayed "magical thinking" and a "blurring of reality and fantasy," and that, in assessing her, "[a]n assaultive, combative or even homicidal potential must be carefully considered."[38]

The prosecution notified defense counsel that they had received the reports from the victim's attorney, but refused to disclose the reports' contents. A Tulsa County district court judge examined the reports *in camera* and concluded that they "contained no material exculpatory or impeaching information."[39] After conducting its own review of the reports, the OCCA agreed.[40] A federal court later rejected the trial court's assessment, stating, "[I]t is difficult to see how the Oklahoma courts could reasonably conclude there was nothing material about a recent diagnosis of a severe mental disorder that made [the sole surviving victim] hostile, assaultive, combative, and even potentially homicidal, or that [she] was known to blur reality and fantasy and project blame onto others."[41] Browning's case was reversed on appeal.[42] The current district attorney struck the Bill of Particulars—abandoning the state's intent to seek the death penalty—and stated that the prosecution will move forward seeking a sentence of life or life without parole.[43]

In another case—that of Alfred Brian Mitchell—the prosecution withheld DNA evidence from Mitchell's defense counsel. Mitchell was convicted and sentenced to death in Oklahoma County for the 1991 murder of Elaine Scott.[44] At trial, prosecutors presented the testimony of forensic chemist Joyce Gilchrist to establish that sperm had been found on the victim through anal and vaginal swabs when, in fact, pretrial DNA testing established that no sperm was present.[45] Ms. Gilchrist also testified that sperm found on the victim's undergarments was consistent with Mr. Mitchell's profile and that of the victim's boyfriend.[46] However, test results provided by the FBI to the state before trial indicated that that the DNA evidence was a match only to Ms. Scott's boyfriend, not to Mr. Mitchell.[47] In its review of Mr. Mitchell's federal habeas petition, the federal

[35] James S. Liebman et al., *Restructuring Federal Courts: Habeas: Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (finding that 16 percent of state post-conviction reversals are attributable to prosecutors' suppression of favorable evidence).

[36] Browning v. Trammell, 717 F.3d 1092, 1095 (10th Cir. 2013).

[37] *Id.* at 1095.

[38] *Id.* (internal quotations omitted).

[39] *Id.* at 1096; Browning v. State, 154 P.3d 816, 837 (Okla. Crim. App. 2006)

[40] *Id.* (footnotes omitted).

[41] *Trammell*, 717 F.3d at 1106.

[42] *Id.* at 1094.

[43] Stacy Ryburn, *State No Longer Seeking Death Penalty against Man in 2001 Glenpool Double-Murder*, TULSA WORLD (Nov. 14, 2015, 12:01 AM), http://www.tulsaworld.com/news/courts/state-no-longer-seeking-death-penalty-against-man-in-glenpool/article_18774b82-29b7-5455-afc0-60dd6e9f195d.html.

[44] Mitchell v. Gibson, 262 F.3d 1036, 1044 (10th Cir. 2001).

[45] *Id.*

[46] *Id.* at 1063.

[47] *Id.*

district court observed that the prosecution had "labored extensively at trial to obscure the true DNA test results" and instead, "highlight[ed] Gilchrist's test results."[48] The federal district court ruled that there was sufficient evidence to uphold Mitchell's conviction and death sentence, despite Gilchrist's testimony.[49] The U.S. Court of Appeals for the Tenth Circuit, however, granted Mitchell a new sentencing trial.[50] That new trial resulted in another death sentence, which the OCCA overturned in 2006 due to errors by the trial judge and prosecutors.[51] In 2008, at a new sentencing trial, an Oklahoma County jury again Mitchell sentenced to death.[52]

In separate but related cases out of Oklahoma County—those of Yancy Lyndell Douglas and his co-defendant, Paris LaPriest Powell—prosecutors failed to disclose to defense counsel a deal between the state and its key witness in the cases against Mr. Douglas and Mr. Powell. The attorney who prosecuted Mr. Douglas denied offering the witness assistance on pending parole revocation proceedings.[53] However, "the day after Mr. Douglas was sentenced to death, [the prosecutor] wrote a letter recommending that [the witness] receive parole."[54] The federal district court reviewing Mr. Powell's case during federal habeas review found that the witness was "the key to the successful prosecution of Mr. Powell" and summarized the facts underlying the *Brady* claim: "[A]t a minimum, [the witness] used his identification testimony in an effort to benefit himself, [the prosecutor] was aware of [the witness's] requests for assistance, had acted on his request, and that this information was not known by or conveyed to [Mr. Powell's] trial counsel."[55] Both convictions were vacated by the Tenth Circuit Court of Appeals, and the attorney who prosecuted both cases was suspended for 180 days, further discussed *infra*.[56]

More recently, the ongoing case of Donnie Lee Harris Jr. raises concerns about prosecutors' adherence to the requirements of the OCDC. Mr. Harris was sentenced to death in LeFlore County in December 2013 for allegedly pouring gasoline from a bottle of Crown Royal on his girlfriend, Kristi Ferguson, and then igniting the gasoline with a cigarette lighter. Through the course of the investigation, the state fire marshal collected portions of a liquor bottle and articles of clothing from Mr. Harris's bedroom, where the crime was alleged to have taken place. That evidence was subsequently lost, prior to trial, although photographs of the evidence were admitted at Mr. Harris's capital trial.[57] On post-conviction review, and following an evidentiary hearing, the district court found that "[t]rial counsel never actually viewed these items" and that the fire marshal had "violated the policies of the State Fire Marshall's [*sic*] Office" by "fail[ing] to obtain a receipt for these items."[58] The district court later found, following a second evidentiary hearing, that other physical evidence—a lighter, admitted at trial as the prosecution's exhibit—also had been lost.[59] No chain of custody documents concerning the evidence could be located.[60]

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[48] *Id.* at 1064. The court also found that the prosecution had mischaracterized the FBI report in their closing argument to the jury, a mischaracterization which the court described as "entirely unsupported by evidence" and "misleading." *Id.*

[49] Mitchell v. Ward, 150 F. Supp. 2d 1194 (Okla. W.D. 1999); *see also* Ed Godfrey & Diana Baldwin, *DA says no evidence hidden in murder trial*, NEWSOK, Aug. 15, 2011, http://newsok.com/article/2751601.

[50] Ron Jackson, *17 Years After Daughter's Murder, Family Awaits Peace*, NEWSOK, Jan. 6, 2008, http://newsok.com/article/3189525.

[51] *Id.*

[52] *Id.*

[53] Douglas v. Workman, 560 F.3d 1156, 1185 (10th Cir. 2009) (per curiam).

[54] *Id.*

[55] *Id.* at 1175 (internal quotations omitted).

[56] *Yancy Douglas*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3187 (last visited Dec. 14, 2016). "Former Oklahoma County prosecutor Brad Miller has been suspended from practicing law for 180 days for 'reprehensible' misconduct in a 1993 murder case." *See* Nolan Clay, *Former Oklahoma County prosecutor suspended from practicing law for 180 days*, THE OKLAHOMAN, June 26, 2015, http://newsok.com/article/5856251.

[57] Notice Ct. Req. Evid'ry Hr'g Regard. Missing Evid., Harris v. Oklahoma, No. D-2014-153 (Okla. Crim. App. Nov. 25, 2015).

[58] Order Remand Ct. Crim. Appeals, Harris v. Oklahoma, No. D-2014-153 (16th Dist. Ct., LeFlore County, Okla. Jan. 8, 2016).

[59] *Id.*

[60] *Id.*

Later discovery of exculpatory evidence withheld by prosecutors—whether intentional or not— has led to the wrongful convictions of capital defendants.[61] It is difficult to know just how many wrongful convictions have stemmed from withheld exculpatory evidence. However, it is notable that in the five years after the 1996 passage of a North Carolina law granting capital defendants full access to law enforcement and prosecution files post-conviction, five death row inmates had their convictions overturned.[62] All five were granted new trials and eventually exonerated.[63] In each of the five cases, prosecutors had suppressed evidence including witness statements and deals with jailhouse informants, according to one report.[64] North Carolina later granted full, open-file access to defendants in felony cases in 2004.[65] Other states—recognizing that robust criminal discovery policies may prevent wrongful convictions and ultimately save the state costs on appeal—have passed legislation to that effect. For example, Texas (2014)[66] and Ohio (2010)[67] have passed open-file legislation for criminal cases. Florida, Colorado, New Jersey, and Arizona have also passed legislation granting criminal discovery to varying degrees.[68]

III. Exercise of Prosecutorial Discretion in Death Penalty Cases

In Oklahoma, 27 district attorneys represent 77 counties. The 27 district attorney's offices are dependent upon funds from each respective county and the state (with state appropriations funding roughly half of expenditures for all counties in 2015).[69] Legislative appropriations for the DAC—which oversees Oklahoma's 27 elected district attorneys—were roughly $38 million in 2016, down from appropriation levels 10 years ago (despite cost increases).[70] The average salary for the 27 district attorneys in 2016 was $128,752.[71] The average starting salary of a prosecutor in Oklahoma is $44,543—below the national average—with workloads averaging roughly 297 new cases a year, in addition to pre-existing cases.[72] The "[h]igh caseloads leave insufficient time for legal review, meetings with victims, and case preparation," according to a recent presentation.[73] Almost half of the 310 assistant district attorneys have 5 or fewer years of experience; with a turnover rate of 70% between 2011 and 2014.[74]

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[61] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 3 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

[62] *Id.* at 15.

[63] *Id.*

[64] *Id.*

[65] G.S. § 15A-905; THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 2 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/www-pewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

[66] Tex. Code Crim. Pro. 39.14

[67] Ohio Crim. R. 16

[68] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 15-16 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

[69] OKLA. STAT. tit. 19, §§ 215.56, 215.57B, 215.58 (cited in Handbook for County Commissioners of Oklahoma (January 2014), p. 2-14, http://agecon.okstate.edu/ctp/files/2014%20County%20Commissioner%20Handbook.pdf (last visited October 10, 2016)) ("The county initially pays for certain expenses for the District Attorney, but the state, through the District Attorneys Council, reimburses the county for certain expenses that the county is not required to provide, such as maintenance, operation, and capital outlay. Counties must provide the District Attorney with office space, including heating, cooling, and maintenance of that space; a law library and necessary legal subscriptions; and funds for investigation, prosecution, or defense of any action where the county is a party."); *see also* OKLA. STAT. tit. 26, §§2-118, 2-119, 2-121 ("The county initially pays salaries and fringe benefits for each election board secretary, but the state, through funds appropriated by the state legislature, reimburses the county at a rate not to exceed 135% of the specified salaries. The county files claims for this reimbursement with the Secretary of the State Election Board. . . . . The county may receive reimbursements for ad valorem exemptions such as additional homestead exemptions; exemptions granted for new or expanded manufacturing or research and development facilities; and state owned agricultural land for which no state agency is making an in-lieu ad valorem payment.").

[70] Mike Boring & Suzanne McLaine Atwood, Oklahoma District Attorneys Budget Presentation, PowerPoint Presentation, http://www.oksenate.gov/Committees/Cmte_Meeting_Notices%20%202016/2016%20Budget%20Presentation%20SMA%20update%2012-11-15.pdf (last visited Dec. 14, 2016).

[71] Computed from data obtained at *District Attorneys Council*, OKLA. WATCH DATA, http://oklahomawatchdata.org/state-salaries/220 (last visited Dec. 14, 2016).

[72] Boring, *supra* note 70.

[73] *Id.*

[74] *Id.*

Most district attorneys in Oklahoma represent more than one county.[75] Constituents from each county elect one district attorney every four years.[76] Incumbent prosecutors are rarely voted out of office, and win reelection 95 percent of the time, typically running unopposed.[77] In a 2001 national survey of state prosecutors, 40 percent of chief prosecutors served 12 or more years, and 72 percent served five years or more.[78]

Several district attorneys reported to the Commission that they felt no political or public pressure to seek the death penalty, and that such pressure would not factor in their charging decisions.[79] However, in a video available online, at least one current Oklahoma district attorney can be heard discussing his support and lobbying for aggressive use of the death penalty.[80]

One scholar argues that as crime became a dominant issue in American politics, the death penalty became "the ultimate vehicle for politicians to demonstrate just how tough they are on crime."[81]

> Candidates for governor of Texas in 1990 argued about which of them was responsible for the most executions and who could do the best job in executing more people. One candidate ran television advertisements in which he walked in front of photographs of the men executed during his tenure as governor and boasted that he had 'made sure they received the ultimate penalty: death.' Another candidate ran advertisements taking credit for thirty-two executions. In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during his tenure as governor. The governor stated that he had signed over ninety death warrants in his four years in office.[82]

Robert "Bob" Macy, district attorney of Oklahoma County for 21 years (1980-2001) sought more death sentences than any individual district attorney in the U.S.[83] The 54 cases he brought ending in a death sentence totaled "more than the current death row populations of Colorado, Indiana, New Mexico, Utah, Virginia, Washington, and Wyoming combined."[84] Macy won elections by large margins and campaigned on his use of the death penalty, and even ran unopposed in his last election in 1998.[85]

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[75] OKLA. STAT. tit. 19, § 215.1; District attorneys for District 7 (Oklahoma County); District 14 (Tulsa County); and District 15 (Muskogee County) serve only one county.

[76] OKLA. STAT. tit. 19, § 215.1.

[77] Ronald Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592 (2009), http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/Wright-FinalPDF.pdf.

[78] *Id.*

[79] Interview with David Prater, Dist. Att'y for Dist. 7 (Oklahoma County) (Sept. 16, 2016) [Hereinafter *Prater Interview*] (stating that there is "zero political pressure to pursue or not pursue the death penalty. I don't make political decisions when it comes to the death penalty."); Hicks Interview, *supra* note 25 ("He says he doesn't let public pressure effect his charging decision. He gives an example of such a case, and that although people were asking for 'a pound of flesh' he didn't file a Bill of Particulars, because it was not appropriate based on the facts of the case."); Ladd Interview, *supra* note 25 ("Went thru two elections and it never came up... I think death penalty is an appropriate punishment. I am obligated to do it, because it's the law."); Interview with Steven Kunzweiler, Dist. Att'y for Dist. 14 (January 6, 2016) (reporting that he knows he has lawyers in his office that are against the death penalty. Also reporting that he does not hire prosecutors based on their opinions on the death penalty) [hereinafter *Kunzweiler Phone Interview*].

[80] *The Devil's in the Details - The Death Penalty by DA Rex Duncan - 04/09/2014*, YOUTUBE (May 10, 2014), https://www.youtube.com/watch?v=c-MD4hXPutI.

[81] Stephen Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (with Keenan)*, 75 B.U. L. REV. 759, 770-72 (1995), http://digitalcommons.lawyale.edu/cgi/viewcontent.cgi?article=4501&context=fss_papers.

[82] *Id.* at 772.

[83] Ziva Branstetter, *Was 'Cowboy' Bob Macy product of his time or 'deadliest' DA?*, THE FRONTIER (July 5, 2016), https://www.readfrontier.com/spotlight/cowboy-bob-macy-called-2-deadliest-prosecutor/.

[84] FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 8 (Jun. 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf [hereinafter FAIR PUNISHMENT PROJECT].

[85] Nolan Clay & Bryan Dean, *Former Oklahoma County District Attorney Bob Macy dies*, NEWSOK (Nov. 19, 2008), http://newsok.com/article/3624881.

Macy's exercise of his discretion to frequently seek the death penalty contributed to a significant portion of the death row population of Oklahoma, as well as the nation. One study found Macy to be one of just five prosecutors who account for 15 percent of the death row population nationwide as of January 2016.[86] This is equivalent to each of the 5 prosecutors being responsible one out of seven prisoners sentenced to death nationwide. Moreover:

> [E]ven as death sentences have declined nationally, a small group of individuals continue to drive up the total number of death sentences nationwide, which has contributed to a misperception that the death penalty is a common practice, when in reality, most of America's prosecutors have abandoned it.[87]

Once these prosecutors leave office, jurisdictions like Macy's often experience a dramatic decrease in the use of the death penalty.[88] During Macy's term, death sentences in his jurisdiction averaged 2.6 every year, whereas during the last six years Oklahoma County has sentenced just three defendants to death.[89] For murder cases that were filed in the last ten years, only nine counties in Oklahoma have imposed death sentences, a decline from previous periods.[90]

Even though a prosecutor's use of the death penalty is circumscribed by a state's capital sentencing statute—usually through the use of aggravating factors that must be present—district attorneys still possess wide discretion in their charging decisions regarding whether to pursue the death penalty. The U.S. Supreme Court has never required the promulgation of procedures or guidelines to govern how prosecutors reach the decision to pursue death.[91] As one report notes, "In states where the vast majority of capital cases are adjudicated, charging decisions are decentralized, discretionary, and largely un-reviewed by courts."[92] An Oklahoma law journal described Macy's tenure as an example of how a judicial system can be "overpowered" by a zealous district attorney.[93]

The U.S. Department of Justice (DOJ) Attorney's Manual for federal prosecutors requires that all charging decisions that carry a death sentence be submitted to the DOJ for a pre-indictment review—a model that may be replicated in the states.[94] In Oklahoma, one district attorney reported that his office has a formal death penalty review team comprised of multiple senior attorneys who conduct reviews of all death penalty decisions.[95] Several district attorneys reported to the Commission that they have informal, unwritten protocols in their offices for reviewing death penalty decisions, which include consultations with their first assistants, senior counsel, and sometimes law enforcement officers.[96] Such protocols reportedly include both a review of the state's death penalty statute, as well as factual and evidentiary thresholds. If those thresholds are met, then they may

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[86] FAIR PUNISHMENT PROJECT, *supra* note 84.

[87] *Id.*; *see also* Branstetter, *supra* note 83 (quoting Oklahoma County District Attorney David Prater, "If you look at the popularity of Macy during that period of time it sure seems to me that his decisions were reflecting community standards that our county was willing to pursue...I think Mr. Macy was a product of the times.").

[88] FAIR PUNISHMENT PROJECT, *supra* note 84 ("Under Macy, Oklahoma County had more death sentences than it had seen in the previous 40 years. The number dropped precipitously after he retired: Oklahoma County has only had three death sentences in the past six years.").

[89] *Id.*

[90] Oklahoma County (5); Cleveland (3); Comanche (1); Tulsa (1); Garvin (1); Grady (1); Leflore (1); McClain (1); and Stephens (1); *see also Overview* chapter and Appendix I.

[91] Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URBAN L. J. 767, 767 (1998), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1740&context=ulj.

[92] THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR 119 (2014).

[93] Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 491 (Fall 2006), http://adams.law.ou.edu/olr/articles/vol59/501Alford4articleblu.pdf.

[94] U.S. ATTY'S MANUAL tit. 9, § 10.060, at https://www.justice.gov/usam/usam-9-10000-capital-crimes#9-10.060 (last visited Dec. 14, 2016).

[95] Kunzweiler Phone Interview, *supra* note 79.

[96] Fields Interview, *supra* note 25; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25; Prater Interview, *supra* note 79; Kunzweiler Interview, *supra* note 55.

review other factors including the victim's role in his or her own death;[97] the suffering of the victim;[98] the age of the defendant;[99] what drove the accused to commit the crime;[100] criminal histories of the accused;[101] mitigation evidence;[102] and the desires of the victim's family.[103] Several district attorneys emphasized that the wishes of victims' family members weighed heavily in their consideration.[104]

These informal deliberations, however, vary among district attorneys' offices.[105] One district attorney indicated that the death penalty is only used in the most heinous cases;[106] in another county, a death sentence was considered appropriate in cases of pre-meditated murder provided that other statutory aggravators were present.[107]

Similarly, the solicitation of mitigation evidence from the defense prior to seeking death was not a formally established protocol by most district attorneys interviewed by the Commission. These district attorneys relayed, however, that public defenders knew that such evidence would be welcome and carefully reviewed and considered.[108] One district attorney reported that his office formally solicits mitigation evidence from defense counsel and invites them to present such evidence prior to filing of a Bill of Particulars seeking death.[109]

IV. Handling Prosecutorial Error and Misconduct

One study reports a correlation between reversal rates due to state conduct and the zealous use of the death penalty by counties.[110] The study found that "[t]he higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error."[111] It also found that "[c]apital error rates more than triple when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant."[112] In instances where "death sentencing increases from a quarter of the national average to the highest rate for a state. . . the predicted increase in reversal rates is six fold—to about 80%."[113] Finally, the "lower the rate at which a state imposes death sentences—and the more it confines those verdicts to the worst of the worst—the less likely it is that serious error will be found."[114]

A 2016 study found that prosecutorial misconduct occurred in a third of death penalty cases during the 21-year tenure (1980-2001) of Oklahoma County District Attorney Robert Macy. Prosecutorial misconduct in the death penalty cases brought by Macy contributed to the exoneration of three individuals subsequently freed from

[97] Prater Interview, *supra* note 79; Fields Interview, *supra* note 25.

[98] Hicks Interview, *supra* note 23.

[99] Kunzweiler Interview, *supra* note 55.

[100] Prater Interview, *supra* note 79; Ladd Interview, *supra* note 24; Kunzweiler Interview, *supra* note 55.

[101] Prater Interview, supra note 79; Hicks Interview, supra note 25; Kunzweiler Panel, supra note 25.

[102] Prater Interview, *supra* note 79; Fields Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Kunzweiler Panel, *supra* note 25.

[103] Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Kunzweiler Interview, *supra* note 55.

[104] Mashburn Interview, *supra* note 25.

[105] Prater Interview, *supra* note 79; Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 23.

[106] Panel discussion with David Prater, Dist. Att'y for Dist. 7 (Oklahoma County) (October 26, 2016) [hereinafter *Prater Panel*].

[107] Ladd Interview, *supra* note 24.

[108] Prater Interview, *supra* note 79; Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 23; Kunzweiler Panel, *supra* note 25.

[109] Kunzweiler Phone Interview, *supra* note 79.

[110] RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE THE MOST DEATH CASES AT ENORMOUS COST TO ALL (Oct. 2013), http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

death row.[115] Twenty-three of Macy's 54 capital convictions relied on the testimony of disgraced police chemist Joyce Gilchrist.[116] According to a recent report, courts reversed almost half of the death sentences imposed in Oklahoma County under Macy's tenure.[117]

A 2001 report described cases in which Oklahoma prosecutors have invoked inflammatory language to minimize the jurors' sense of responsibility in capital cases, such as invoking God and the Bible in arguing for the death penalty.[118] The OCCA called one such statement by prosecutors "rank misconduct" that "has no place in a criminal trial in the State of Oklahoma."[119] The OCCA ruled in that case that while such a statement rose to the level of misconduct, it was "harmless" and had not prejudiced the trial.[120] The court stated, however, that:

> Criminal procedure goes to extreme lengths to remove all possibility of a jury verdict or sentence even partially based on bias or prejudice. We call on jurors to perform the difficult task in a capital murder trial of deciding whether another human being lives or dies. For the prosecutor to attempt to make this task somehow easier by implying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law of this State.[121]

Several district attorneys reported to the Commission that training and continuing education on *Brady*, discovery obligations, and ethics are provided at the DAC summer and fall conferences.[122] While one district attorney relayed that prosecutors are required to have 12 hours of continuing education annually to maintain their licenses, another district attorney explained that certification specifically tailored for capital prosecutors was not mandatory in Oklahoma and that requirements for such death penalty training or continuing education was established within each county's office of the district attorney.[123]

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[115] FAIR PUNISHMENT PROJECT, *supra* note 84.

[116] *History of Misconduct Chronicled in Oklahoma County with 41 Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/6292 (last visited Dec. 14, 2016).

[117] FAIR PUNISHMENT PROJECT, *supra* note 84, at 9.

[118] Parks v. Brown, 840 F.2d 1496, 1503-04 (10th Cir. 1987) (noting the prosecutors closing argument, in which he stated, "You're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law... so it's not on your conscience. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know."); Long v. State, 883 P.2d 167, 177 (Okla. Crim. App. 1994) (finding improper—but ultimately harmless and not reversible error—the prosecutor reading to jurors a quote from the Bible during his closing statement).

[119] *Long*, 883 P.2d at 177.

[120] *Id.*

[121] *Id.*

[122] *See, e.g.*, Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25; Kunzweiler Interview, *supra* note 33. *See also* A "Prosecutors Boot Camp" in 2015, according to a flyer available on the DAC website, provided an opportunity for assistant district attorneys to discussed "topics related to legal and ethical standards for prosecuting criminal offenses." *Prosecutor Bootcamp*, OK.GOV, https://www.ok.gov/dac/documents/2015%20Prosecutor%20Boot%20Camp.pdf (last visited Dec. 14, 2016); two 2015 "Featured Webinars" entitled "Brady and Discovery" and "Prosecutors Ethics" are listed on a flyer available on the DAC website at https://www.ok.gov/dac/documents/2015%20Featured%20Webinars.pdf (last visited Sept. 28, 2016).

[123] Prater Panel, *supra* note 106 (reporting that he sent capital prosecutors for training at the National District Attorneys Association); Kunzweiler Interview, *supra* note 33 (reporting that he helped start the DAC boot camp and there is a DAC conference in the Spring, Summer, and Fall; and that all prosecutors need to have 12 hours of continuing education to keep law license).

The American Bar Association outlines the special responsibilities of prosecutors in criminal cases in its "Model Rules of Professional Conduct" for lawyers. Prosecutors are advised to:

a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

1) the information sought is not protected from disclosure by any applicable privilege;

2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

3) there is no other feasible alternative to obtain the information;

f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

1) promptly disclose that evidence to an appropriate court or authority, and

2) if the conviction was obtained in the prosecutor's jurisdiction,

i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.[124]

Misconduct is further defined as to include "violat[ing] or attempt[ing] to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.[125]

In its 2013 report, the Oklahoma Justice Commission recommended that "misconduct of a prosecutor that is willful, deliberate and made in bad faith or egregious be reported" for disciplinary proceedings.[126] Prosecutorial misconduct may include the following actions:[127]

- Charging a suspect with more offenses than is warranted;
- Withholding exculpatory evidence from defense;
- Purposefully mishandling, mistreating or destroying evidence;
- Allowing witnesses, who prosecutors know (or should know) are not truthful to testify;
- Pressuring defense witnesses not to testify;
- Relying on fraudulent forensic experts;
- During plea negotiations, overstating the strength of the evidence;
- Making statements to the media that are designed to arouse public indignation;
- Making improper or misleading statements to the jury;
- Making misleading arguments that overstate the probative value of testimony; and
- Failing to report prosecutor misconduct when it is discovered.

While some legal stakeholders have described the issue of prosecutorial misconduct using terms like "rampant," "pervasive," "common," and "ingrained,"[128] and one federal appellate judge has described *Brady* violations as "epidemic,"[129] disciplinary actions rarely follow findings of prosecutorial misconduct.[130] The issue of whether

[124] MODEL RULES OF PROF'L CONDUCT 3.8 (A.B.A. 2016).

[125] MODEL RULES OF PROF'L CONDUCT 8.4 (A.B.A. 2016).

[126] OKLA. JUSTICE COMM'N, OKLAHOMA JUSTICE COMMISSION REPORT TO THE OKLAHOMA BAR ASSOCIATION (FEB. 2013), AT 51, HTTP://WWW.OKBAR.ORG/PORTALS/15/PDF/2013/COMMISSION_FINAL_REPORT.PDF [HEREINAFTER OKLA. JUSTICE COMM'N].

[127] *Government Misconduct*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/government-misconduct/; CTR FOR PROSECUTORIAL INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 2-3 (2013), http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf.

[128] *Id.* at 4.

[129] United States v. Olsen, 737 F.3d 625 (9th Cir. 2015) ("Brady violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend").

[130] *See* AMERICAN BAR ASSOCIATION, CROSSING THE LINE: RESPONDING TO PROSECUTORIAL MISCONDUCT (2008) (citing a report by the California Commission on the Fair Administration of Justice: "Of those 2,150 cases, 443 resulted in findings that prosecutorial misconduct actually occurred. In 53 of the 443 cases, a reversal of conviction was the result—the rest concluding that the misconduct was harmless error. Perhaps the most disturbing statistic is that a follow-up study looking at half of the cases resulting in a reversed conviction concluded that the prosecutor was not referred to the California State Bar for discipline, which is required under California law."); *see also* Matt Ferner, *Prosecutors Are Almost Never Disciplined For Misconduct*, HUFFINGTON POST, (Feb. 11, 2016, 4:16 pm ET), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c5c55050748a.

prosecutors who commit prosecutorial misconduct should be disciplined by the bar is a contentious one. There is no consensus on exactly what constitutes prosecutorial misconduct sufficient to warrant disciplinary action.

Bar disciplinary bodies tend to be restrained before acting upon any such charges. According to a recent study that examined 3,625 instances of prosecutorial misconduct—pulling from analysis in nine separate studies—that occurred at the state and national levels between 1963 and 2013, public sanctions were imposed in just 63 cases (or less than 2 percent of the time).[131]

The district attorneys who provided information to the Commission indicated that staff violations of *Brady* obligations would, depending on the severity, lead to termination of the employee,[132] with lesser sanctions (e.g., leave without pay) available for less than egregious breaches.[133]

In April 2012, for example, Oklahoma County District Attorney David Prater fired two assistant district attorneys, Pam Kimbrough and Stephanie Miller, for withholding a witness statement from defense attorneys in a non-capital first-degree murder trial.[134] Kimbrough was an experienced attorney who had been appointed as conflict counsel in a first-degree murder case[135] prior to her employment as a prosecutor in the district attorney's office.[136] Kimbrough represented the state in both capital[137] and non-capital[138] first degree murder cases. According to Prater, the withheld statement in question was "potentially exculpatory."[139] Prater forwarded information from his office's internal investigation to the attorney general's office and the Oklahoma Bar Association (OBA), which brought separate disciplinary proceedings against both Miller and Kimbrough in 2014.[140] Upon review of those proceedings the following year, the Supreme Court of Oklahoma ruled that both Kimbrough and Miller be publicly censured and ordered to pay for the cost of proceedings.[141]

In 2013, the Oklahoma Supreme Court declined to disbar a former assistant district attorney in Oklahoma County, Robert Bradley Miller, who was responsible for *Brady* violations in the capital trials of Powell and Douglas, discussed *supra*, and other transgressions, including the use of "fake subpoenas to force two minors to become witnesses" in a separate case.[142] Miller's disbarment had been recommended by the OBA.[143] The Oklahoma Supreme Court disagreed, stating: "Reprehensible though Miller's conduct might have been, and even if such misconduct is punished more harshly when it occurs now, Miller's actions took place decades ago, and it would be unfair to hold him to a harsher standard than he would have been subjected to when his actions took place." Miller was suspended from practicing law for 180 days, and ordered to pay court costs.[144]

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[131] CTR. FOR PROSECUTORIAL INTEGRITY, *supra* note 127, at 8.

[132] Fields Interview, *supra* note 25; Hicks Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25. *See also* Tim Willert, *Oklahoma County District Attorney Fires Two Assistants*, NEWSOK (Apr. 11, 2012, 12:00 AM), http://newsok.com/article/3665479 (reporting on the firing of two Oklahoma County assistant district attorneys who were found to have withheld eyewitness impeachment evidence in a non-death first-degree murder case).

[133] *See* Hicks Interview, *supra* note 25.

[134] Willert, *supra* note 132.

[135] *Oklahoma v. Lila Jean Bartlett et al.*, OKLA. ST. CTS. NETWORK, http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-04-1424 (last visited Dec. 14, 2016).

[136] *Elected Officials of Oklahoma County*, OKLA. COUNTY, https://www.oklahomacounty.org/electedofficialshistory.htm; Willert, *supra* note 132.

[137] *See Oklahoma v. Levi Craig Griffith*, OKLA. ST. CTS. NETWORK, http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-04-2949.

[138] *See Oklahoma v. Miller*, OKLA. ST. CTS. NETWORK, HTTP://WWW.OSCN.NET/DOCKETS/GETCASEINFORMATION.ASPX?DB=OKLAHOMA&NUMBER=CF-2008-5685.

[139] Willert, *supra* note 132.

[140] *Id.; see also* State ex rel. Oklahoma Bar Association v. Miller and State ex rel. Oklahoma Bar Association v. Kimbrough, No. SCBD-6104 (Okla. Oct. 20, 2015) (http://law.justia.com/cases/oklahoma/supreme-court/2015/scbd-6104.html).

[141] *Id.*

[142] Terry Carter, *Misconduct in two 1990s death-penalty cases gets ex-prosecutor suspended*, ABA JOURNAL (June 28, 2016, 6:56 PM), http://www.abajournal.com/news/article/misconduct_in_two_1990s_death-penalty_cases_gets_ex-prosecutor_suspended/.

[143] *Id.*

[144] *Id.*

V. Consular Notification

Prosecutorial discretion in capital cases is a local matter that may have international consequences. Article 36 of the Vienna Convention on Consular Relations (VCCR) provides that when a foreign national is "arrested or committed to prison or to custody, pending trial or is detained in any other manner," appropriate authorities within the receiving State must inform him or her "without delay" of his right to have his or her native country's local consular office notified of his or her detention.[145]

In 2005, the U.S. withdrew from the Optional Protocol to the VCCR ("Optional Protocol"), which granted jurisdiction to the International Court of Justice (ICJ) over such disputes with respect to the VCCR. Withdrawal was in response to the ICJ decision in *Mexico v. United States of America*, where Mexico sought to halt the execution of 54 Mexican nationals in the U.S., who had not been informed of their consular rights. ICJ ruled that the U.S. had to review and reconsider 51 of those convictions.[146]

Violations of the VCCR have led to extensive litigation in national and international courts, including courts in the United States.[147] Consular notification in capital cases is particularly important because consulates can provide resources and oversight to ensure fair treatment.[148]

In 2008 the U.S. Supreme Court ruled in *Medellin v. Texas* that states were not obligated to comply with the Vienna Convention absent a federal law implementing the Convention's Optional Protocol.[149] As a result, the ICJ no longer had jurisdiction over claims from foreign countries whose citizens have been convicted in the U.S. in violation of the VCCR. Moreover, the U.S. can no longer use the ICJ to enforce the rights of U.S. citizens convicted abroad without the benefit of consular access.[150]

In July 2011, the U.S. Supreme Court denied a stay of execution for a Mexican national, Humberto Leal Garcia, Jr., despite opposition from the Obama administration and the Mexican government.[151] Leal was sentenced to death for murdering a 16-year-old girl in Texas in 1994,[152] but he was not informed of his right to contact the Mexican consulate upon his arrest.[153] The stay would have permitted Congress to deliberate on pending legislation requiring states to comply with the Vienna Convention and inform foreign nationals about their right to consular notification.[154] Leal was executed on July 7, 2011, and Texas has since executed two more Mexican nationals who had also been denied consular assistance.[155]

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[145] Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 596 U.N.T.S. 261, http://www.fucch.eu/pdf/viennaconvention.pdf.

[146] THE CONSTITUTION PROJECT, *supra* note 92, at 122.

[147] *Foreign Nationals*, CORNELL CTR. ON THE DEATH PENALTY, http://www.deathpenaltyworldwide.org/foreign-nationals.cfm (last visited Dec. 14, 2016).

[148] John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION (Sept./Oct. 1998), https://www.nacdl.org/champion/articles/98sep01.htm (last visited October 15, 2016).

[149] Medellin v. Texas, 552 U.S. 491 (2008).

[150] THE CONSTITUTION PROJECT, *supra* note 92, at 125.

[151] Bill Mears, *Mexican National Executed in Texas*, *CNN* (July 7, 2011) http://www.cnn.com/2011/CRIME/07/07/texas.mexican.execution/.

[152] Eyder Peralta, *Mexican National Is Executed, Despite White House's Appeal to High Court*, NPR (July 7, 2011, 1:10 PM), http://www.npr.org/blogs/thetwo-way/2011/07/07/137675450/as-mexican-national-awaits-execution-white-house-pleads-for-delay.

[153] Mears, *supra* note 151.

[154] *Id.*

[155] Mark Warren, *Foreign Nationals, Part III: Executive Clemency for Death-sentenced Foreign Nationals*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/foreign-nationals-part-iii#innocence (last updated Jan. 18, 2017).

In addition to Mexico, several other countries including the United Kingdom, Paraguay, and Germany have all asserted that they might have been able to help their citizens avoid a death sentence in the U.S. had they been informed before trial that their citizens had been arrested and faced the death penalty.[156]

Since 1976, 32 foreign nationals have been executed in the U.S. (24 of whom raised VCCR claims during their appellate or clemency proceedings).[157] Oklahoma has executed three foreign nationals,[158] two of whom raised such VCCR claims.[159]

Four additional foreign nationals have been sentenced to death in Oklahoma and raised similar VCCR claims, but each of their sentences have been subsequently amended. Gilberto Hernandez Martinez, a Cuban national, was sentenced to death in Oklahoma in 1997, and had not been informed upon arrest of his right to contact his consulate. In Martinez's case, the OCCA rejected his appeal on the grounds that he was denied consular notification, stating that Martinez had "failed to show he made any 'request' to state authorities to inform Cuban authorities of his arrest."[160] After the prosecution stipulated Martinez's intellectual disability in exchange for a waiver of further appeals, a life sentence was negotiated in lieu of death.[161]

Three other Mexican nationals, Geraldo Valdez Maltos, Osvaldo Torres Aguilera, and Isidro Marquez Burrola, also had their death sentences amended.[162] Maltos had his death sentence vacated on appeal, and he was later resentenced to life.[163]

In 2005, the OCCA stayed the execution of Osvaldo Torres Aguilera and remanded his case for an evidentiary hearing in the district court on the question of whether the state had violated his Vienna Convention rights by "failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate."[164] In addition, the OCCA found that the VCCR was binding on Oklahoma. Two hours after the ruling was issued, Governor Brad Henry commuted Torres's sentence.[165] In commuting the death sentence to life without parole, the governor cited the failure of the government to notify Mexico that one of its foreign nationals had been arrested as a basis for granting clemency.[166]

Burrola also had his death sentence modified to life without parole by the OCCA for ineffective assistance of counsel, "where trial counsel failed to seek court funding for mitigation investigation and refused assistance offered by [the] Mexican government through [the] Mexican Capital Legal Assistance Program."[167]

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[156] Maurice Chammah, *How Mexico Saves Its Citizens from the Death Penalty in the U.S.*, THE MARSHALL PROJECT (Sept. 22, 2016, 6:00AM), https://www.themarshallproject.org/2016/09/22/how-mexico-saves-its-citizens-from-the-death-penalty-in-the-u-s#.fXGCkjwzi.

[157] Mark Warren, *Confirmed Foreign Nationals, Part II: Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CTR. (last updated Apr. 12, 2016).

[158] Tuan Nguyen (1998) and Hung Thanh Le (2004) of Vietnam; and Sahib al-Mosawi (2001) of Iraq. Both Le and al-Mosawi raised VCCR claims. *See* Mark Warren, *Confirmed Foreign Nationals, Part II: Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/foreign-nationals-part-ii (last updated Apr. 12, 2016).

[159] *Id.*

[160] Martinez v. State, 984 P.2d 813, 818 (Okla. Ct. Crim. App. 1999).

[161] Warren, *supra* note 155.

[162] *Id.*

[163] Foreign Nationals, Part III, DPIC, http://www.deathpenaltyinfo.org/news/56?page=5 ("Sentence vacated for ineffective assistance; later resentenced to life.").

[164] Torres v. State, 120 P. 3d 1184 (Okla. Crim. App. 2005).

[165] *Foreign Nationals*, *supra* note 147.

[166] *Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Dec. 14, 2016).

[167] Warren, *supra* note 155.

VI. Conclusion and Recommendations

Given the wide latitude in decision-making afforded to prosecutors in our criminal justice system, abuses in the exercise of that authority can and do occur. Public trust in the criminal justice system is vital, and prosecutorial misconduct undercuts that trust. The duties of a prosecutor to act in the interest of justice and to ensure due process are even more important when a life hangs in the balance. Indeed, the Oklahoma's Rules of Professional Conduct states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[1]

In its review and discussions with stakeholders, the Commission was pleased to learn of and applauds the leadership of many district attorneys who have been actively combatting prosecutorial misconduct. It is necessary that the rules governing prosecutors' conduct be enforced to rein in aberrant and inappropriate conduct. The Commission found that aberrations can flourish in the absence of enforcement by responsible entities. When the system—through its supervising bodies—fails to hold accountable those who engage in misconduct, the system itself fails. In light of these concerns, the Commission recommends the following:

Recommendation 1:

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

The Oklahoma Justice Commission studied the causes of wrongful conviction and recommended that prosecutors receive training regarding risks associated with testimony elicited from jailhouse informants, accomplice witnesses, or by means of unreliable interrogation protocols. This Commission agrees fully with that recommendation. Further, this Commission adopts the recommendation that prosecutors also receive training in critical safeguards against wrongful convictions, such as proper police and investigative methods, discovery practices and *Brady* requirements, forensic evidence, mental health evidence, and the retention of evidence.

Recommendation 2:

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

Violations of the Vienna Convention on Consular Relations have led to extensive litigation in national and international courts, including courts in the United States. Consular notification in capital cases is particularly important because consulates can provide resources and oversight to ensure fair treatment of their own citizens.

[1] OKLA. RULES PROF'L. CONDUCT 5.8, Cmt. 1.

Recommendation 3:

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

In hearing from defense attorneys and prosecutors in Oklahoma, the Commission learned that there is no uniform, statewide policy regarding discovery and that access to important law enforcement files may be hindered due to lack of clear policies in some jurisdictions. Further, even when clear policies are in place for open-file discovery, such policies are limited to the trial stage. As the Commission learned during its review of wrongful convictions, the possibility that exculpatory evidence may be uncovered extends beyond the trial phase. Thus, meaningful discovery cannot be limited to the trial stage and should extend to appellate stages and clemency proceedings.

Prosecutors have a unique duty to disclose evidence that may exonerate a defendant or suggest that death is not an appropriate punishment. Rule 3.8(d) of the Oklahoma Rules of Professional Conduct directs the "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

Recommendation 4:

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

Given the gravity and irreversible nature of the death penalty, district attorneys must ensure the condemned are afforded the highest standards of evidence retention.

5

Role of the Defense

I. Introduction

Among the most significant factors that influence outcomes in capital cases is the quality of a defendant's attorney.[1] The Sixth Amendment to the United States Constitution guarantees capital defendants more than mere representation. Instead, capital defendants are entitled to "reasonably effective assistance,"[2] which depends upon defense counsel undertaking a thorough pretrial investigation of their client's background.[3] Such effective assistance is also contingent upon the skilled use of experts before and during trial. Moreover, capital defense attorneys are expected to employ trial strategies that advance client interests on both the question of culpability and on the appropriateness of the death penalty as punishment for the offense.[4] "[G]ood defense counsel at trial is the most potent weapon against prosecutorial misconduct,"[5] and effective defense counsel act as a safeguard against wrongful convictions.[6] Effective representation requires specialized training and experience in the complex legal framework that governs capital cases. To provide effective assistance in these high-stakes cases, counsel must be adequately compensated and funded.

This chapter examines defense counsel's role in Oklahoma's capital punishment system. It also evaluates whether defense attorneys in Oklahoma are qualified and whether they have been provided the necessary resources and independence to offer adequate representation to persons either facing a death sentence or awaiting execution.

[1] *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. This statistical study—published in 2000—examined 4,578 capital appeals from 1973 through 1995. The authors found that "the overall rate of prejudicial error in the American capital punishment system was 68%" and that the most common errors traced back to ineffective defense counsel and police and prosecutors who failed to disclose exculpatory evidence.

[2] Strickland v. Washington, 466 U.S. 687 (1984).

[3] Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 522–23 (2003).

[4] Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 926 (2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf [hereinafter *ABA Guidelines*] (commentary appended to Guideline 1.1 states that "trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase"); *id.* at Guideline 10.10.1 cmt. ("[I]t is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages."); *see also* MOLLY TREADWAY JOHNSON & LAURA I. HOOPER, RESOURCE GUIDE FOR MANAGING CAPITAL CASES: VOLUME I: FEDERAL DEATH PENALTY TRIALS 13–14 (2004), http://www.fjc.gov/public/pdf.nsf/ lookup/dpen0000.pdf/$file/dpen0000.pdf (noting that a capital case "inevitably includes appointing experts and investigators").

[5] Fredrick E. Vars, *Prosecutorial Misconduct: The Best Defense Is a Good Defense*, 73 WASH. & LEE L. REV. ONLINE 465, 468 (2016), http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/21.

[6] As one academic observes, "innocence protection is not in tension with due process", and "[r]aising the standard for effective assistance of counsel would aid all defendants." Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO STATE J. OF CRIM. L. 413, 433 (2009).

II. Prevailing Standards for Capital Counsel

In the decades following *Strickland v. Washington*—the landmark U.S. Supreme Court case establishing a criminal defendant's Sixth Amendment right to effective counsel (and how effectiveness of counsel is to be evaluated)[7]—courts have routinely turned to the American Bar Association's (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) to assess a defense counsel's performance in death penalty cases.[8]

The *ABA Guidelines* establish "a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing or convicted of death penalty offenses."[9] As of March 2014, at least ten death penalty jurisdictions had adopted, in substantial measure, the *ABA Guidelines*.[10] The Oklahoma Court of Criminal Appeals (OCCA) has "recognize[d] the utility of guidelines for effective capital counsel," including those promulgated by the ABA.[11]

The *ABA Guidelines*—formally adopted by the ABA in 2003—are substantively significant and establish practice standards for capital counsel at all stages of the proceedings. The *ABA Guidelines* speak to the qualifications and training of defense counsel, their workload, their funding and compensation, and the several duties they owe their clients (e.g., the duty to investigate, the duty to assert legal claims, and the duty to facilitate the work of successor counsel).

According to the *ABA Guidelines*, "the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master."[12] Indeed, "the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ

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[7] *See Strickland*, 466 U.S. 687 (1984) (holding that, to establish that counsel's representation fell below the requirements of the Sixth Amendment, a petitioner must "show both that his counsel provided deficient assistance and that there was prejudice as a result."); *see also* Harrington v. Richter, 562 U.S. 86, 104 (2011). The Supreme Court has described these two prongs as follows:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.
>
> With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (internal quotations and citations omitted).

[8] A list of cases citing the *ABA Guidelines* is available online at the ABA's website., *Summaries of Cases Citing to the 2003 ABA Guidelines*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/2011 build/ death penalty representation/2003summary.authcheckdam.pdf (last visited Sept. 20, 2016). For full text of the *ABA Guidelines*, *see supra* note 4, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_ penalty_representation/2003guidelines.authcheckdam.pdf; *see also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, AM. BAR ASS'N , 36 HOFSTRA L. REV. 677 (2008) (*ABA Mitigation Guidelines*), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_ Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf.

[9] *American Bar Association Guidelines*, FED'L CAPITAL HABEAS PROJECT, https://www.capdefnet.org/2235/pubmenu.aspx?menu_id=55&id=48 (last visited Sept. 20, 2016).

[10] These jurisdictions include Alabama (by resolution of the Alabama Circuit Court Judge's Association), Arizona (by rule of the Arizona Supreme Court and by administrative regulation of the Arizona Superior Court of Maricopa County), Georgia (as policy of the Georgia Public Defender Standards Council), Kentucky (as policy of the Department for Public Advocacy for the Commonwealth of Kentucky), Louisiana (by administrative regulation of the State of Louisiana), Nevada (by order of the Nevada Supreme Court), Ohio (by rule of the Ohio Supreme Court), Oregon (as policy of the Oregon Office of Public Defense Services), Texas (as practice standards by the Texas State Bar Board of Directors), and Wyoming (as policy of Wyoming's Office of the Public Defender). *See Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Implementation%20Fact%20Sheet%20March%202014.authcheckdam.pdf (last visited Oct. 10, 2016).

[11] Torres v. State, 120 P.3d 1184, 1189 (Okla. Crim. App. 2005). The Court has declined, however, to find capital counsel ineffective "simply because counsel's representation differed from current capital practice customs, even where the differences are significant." *Id.; see also* Coddington v. State, 259 P.3d 855, 859–40 (Okla. Crim. App. 2011) (holding that capital counsel would not be found per se ineffective for failing to adhere to the *ABA Guidelines* because, inter alia, appellant had not been prejudiced by counsel's allegedly deficient performance).

[12] *ABA Guidelines*, *supra* note 4, Guideline 1.1 cmt.

from those required in any other area of law."[13] It therefore is imperative that attorneys representing capital clients "be qualified by training and experience to undertake such representation and provide high quality advocacy."[14]

In 2008, the ABA's 27 guidelines adopted in 2003 were augmented with nine additional guidelines specific to mitigation specialists, in recognition of the fact that, in capital cases, "the mitigation function is of utmost importance."[15] As discussed in the *Death Eligibility* chapter, capital trials are bifurcated. If a defendant is convicted of a capital offense and the state has chosen to seek the death penalty, the trial proceeds to the penalty phase, wherein defense counsel can present a wide range of mitigating evidence to convince the jury to spare their client's life.

Because defense counsel can never be certain of acquittal, and because a timely and robust mitigation investigation may persuade district attorneys to forego seeking death in a case,[16] mitigation specialists often play a pivotal role in the defense of capital cases.[17] In fact, the *ABA Guidelines* explicitly require that a mitigation specialist be made part of any capital defense team,[18] particularly since "[m]itigation investigation can be extremely difficult, time-consuming and costly, especially when the defendant, witnesses and documentation come from different and multiple states or countries."[19]

The *ABA Guidelines* and Supreme Court cases[20] require counsel to investigate thoroughly both the facts of the crime and any evidence that may be marshaled by the prosecution in support of a death sentence. This obligation to investigate exists even before the state announces its intent to seek a death sentence, since the presentation of mitigation evidence may help to dissuade the prosecution from seeking death in a capital-eligible case.[21]

III. Capital Counsel in Oklahoma

In Oklahoma, the vast majority[22] of indigent capital defendants are represented at the trial level by one of three government agencies: the Oklahoma County Public Defender's Office, the Tulsa County Public Defender's Office, or—if the case falls outside of Oklahoma County and Tulsa County—by one of the two capital trial divisions of the Oklahoma Indigent Defense System (OIDS).[23] The Oklahoma County Public Defender's Office and the

[13] *Id.* at 963–64, Guideline 5.1 cmt.

[14] Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1124 (2003).

[15] *ABA Mitigation Guidelines*, *supra* note 8, at 677.

[16] *See generally Role of the Prosecution* chapter.

[17] *See ABA Guidelines*, *supra* note 4, Guideline 11.4.1(C) (obligating counsel to investigate evidence "to rebut any aggravating evidence that may be introduced by the prosecutor" during the penalty phase); *see also Wiggins*, 539 U.S. at 524.

[18] *ABA Guidelines*, *supra* note 4, Guideline 4.1(A)(1).

[19] PETER A. COLLINS, ROBERT C. BORUCHOWITZ, MATTHEW J. HICKMAN & MARK A. LARRANAGA, AN ANALYSIS OF THE ECONOMICS OF SEEKING THE DEATH PENALTY IN WASHINGTON STATE 60 (2015).

[20] *See Strickland*, 466 U.S. 687 (1984); *see also* Rompilla v. Beard, 545 U.S. 374 (2005).

[21] *ABA Guidelines*, *supra* note 4, Guideline 10.9.1 cmt ("In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.").

[22] Conflict counsel may be appointed in those rare instances when the public defenders and OIDS are not able to represent a defendant.

[23] OKLA. STAT. tit. 19, § 138.7 ("[I]f the court determines that a conflict of interest exists between a defendant and the county indigent defender, the case may be re-assigned by the court to another county indigent defender, an attorney who represents indigents pursuant to contract, or a private attorney who has agreed to accept such appointments."); *see also* Interview with Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Sept. 22, 2016) (on file with author) [hereinafter Ravitz Interview]; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Mar. 24, 2016) (on file with author) [hereinafter Nigh Interview I]. At one time, Canadian County also operated its own public defender's office. *See* Holt v. State, 538 P.2d 1127, 1975 Okla. Crim. App. LEXIS 402, at *1 (Okla. Crim. App. 1975) (noting that appellant was represented by the public defender of Canadian County). That office is not required by statute and is no longer in operation.

Tulsa County Public Defender's Office were formed pursuant to state law, which provides for the creation of such offices in counties with populations of more than 300,000 persons.[24]

As of 2016, the Oklahoma County Public Defender's Office's criminal division comprises 34 attorneys, including attorneys whose work mainly involves appeals.[25] Just three of these 34 attorneys regularly perform capital defense trial services, and together they form the office's capital trial division.[26] The Tulsa County Public Defender's Office does not have a comparable division but has on staff three attorneys—including the office's director—who are qualified to handle capital cases at the trial level. Like the Oklahoma County Public Defender's Office, the Tulsa County Public Defender's Office represents its capital clients on direct appeal.[27] In 2015, the Tulsa office comprised 22 felony lawyers who were appointed to 5,647 cases, or an average caseload of 256 per lawyer.[28]

OIDS handles both trial and appellate level capital litigation in the 75 counties other than Tulsa and Oklahoma counties. OIDS began as an appeals-only indigent defense service but, as of 1991, the system has existed "to provide indigents with legal representation comparable to that obtainable by those who can afford counsel and to do so in the most cost effective manner possible."[29] By the mid-1990s, OIDS began to represent capital defendants at the trial stage through its Norman Capital Trial Division, which represents indigent capital defendants in 46 counties in the western part of the state, and its Sapulpa Capital Trial Division, which represents these defendants in Oklahoma's remaining 29 counties (located in the eastern part of the state).[30]

Currently, the OIDS office in Norman has three attorneys and three investigators; in the fiscal year ending on June 30, 2016, the office carried over 12 cases, received appointments in five cases, and concluded its representation in four cases (none of which resulted in a death sentence).[31] The office in Sapulpa has five attorneys and four investigators; in that same fiscal year, the office carried over 20 cases, received appointments in seven cases, and concluded its representation in six cases (similarly, none of them resulted in a death sentence).[32]

A. Appointment of Counsel

The Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office are appointed to homicide cases soon after a suspect is taken into custody—within three days in Oklahoma County and within five days in Tulsa County.[33] However, attorneys with the public defender's offices reach out to individuals arrested in connection with a homicide case as soon as they learn of the arrest—typically, through local news

[24] OKLA. STAT. tit. 19, § 138.1a. The most recent federal decennial census records Oklahoma County's and Tulsa County's respective populations as 718,633 and 603,403. *State & County QuickFacts: Oklahoma County*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/40109 (last visited Sept. 28, 2016); *see also State & County QuickFacts: Tulsa County*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/40143 (last visited Sept. 28, 2016). The 2010 population of Oklahoma's third largest county, Cleveland County, was 255,755; *see also State & County QuickFacts: Cleveland County*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/ PST045215/40027 (last visited Sept. 28, 2016). Cleveland County recently established a public defender agency but does not undertake capital representation at any stage. Interview with Jamie Pybas, Div. Chief, Homicide Dir. App. Div., Okla. Indigent Def. Sys. (Sept. 30, 2016) (on file with author) [hereinafter Pybas Interview].

[25] Ravitz Interview, *supra* note 23.

[26] *Id.*

[27] Nigh Interview I, *supra* note 23.

[28] *See* App. II, p. 25.

[29] *Home Page*, OKLA. INDIGENT DEF. SYS., https://www.ok.gov/OIDS (last visited Oct. 1, 2016).

[30] Interview with Gretchen Mosley, Sapulpa Capital Tr. Div., Okla. Indigent Def. Sys. (Sept. 30, 2016) (on file with author) [hereinafter Mosley Interview]; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 8–9 (2016).

[31] Pybas Interview, *supra* note 24; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 8 (2016).

[32] Mosley Interview, *supra* note 30; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 9 (2016).

[33] Ravitz Interview, *supra* note 23; Nigh Interview I, *supra* note 23. E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

reporting—to apprise the arrestees of their rights (to counsel, to remain silent, etc.).[34] The offices' formal appointment occurs at a probable cause hearing held within days of a homicide suspect's arrest.[35]

The OIDS capital trial divisions actively monitor the counties that they serve to ensure that, if a homicide is committed and a suspect is arrested, OIDS will be appointed as counsel to that suspect at the earliest opportunity.[36] Upon appointment, both the Tulsa County Public Defender's Office and OIDS immediately assign two attorneys to homicide cases.[37] In Tulsa County, a mitigation specialist also is assigned to the case if the facts support a possible death sentence (because one or more aggravating factors are present).[38] The Oklahoma County Public Defender's Office initially assigns one attorney to every homicide case.[39] It is that attorney's responsibility to assemble the necessary team—i.e., an additional attorney and an investigator—to investigate and litigate the case.[40] When the two public defender offices or attorneys employed by OIDS are unable to represent a capital client because of a conflict of interest—as, for example, when a case involves co-defendants—conflict counsel are appointed.[41]

B. Appeals Process

At the direct appeal stage, capital litigation outside of Oklahoma County and Tulsa County is undertaken by the OIDS Homicide Direct Appeals Division, which also represents indigent appellants convicted of murder but not sentenced to death. The division is staffed by seven attorneys, who began fiscal year 2016 with five pending capital cases and 42 non-capital (felony) cases and ended that same fiscal year with five pending capital cases and 38 non-capital (felony) cases.[42] Approximately 40% of the division's caseload involves non-capital conflict cases from Oklahoma County and Tulsa County.[43] The division also is responsible, pursuant to Oklahoma law,[44] for investigating and raising claims of ineffective assistance of trial counsel.[45]

In addition to its trial and appellate work, OIDS represents all death-sentenced inmates in their state post-conviction proceedings through its Capital Post-Conviction Division.[46] The division comprises four attorneys, two investigators, and a legal secretary.[47] When the Homicide Direct Appeals Division has a conflict of interest, the Capital Post-Conviction Division undertakes the representation at this stage of the proceedings.[48] The office began fiscal year 2016 with 29 active cases—seven of which were capital post-conviction cases and one of which was a capital direct appeal—and ended that same fiscal year with 28 active cases, six of which were

[34] E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

[35] *Id.*

[36] Mosley Interview, *supra* note 30.

[37] Nigh Interview I, *supra* note 25; Mosley Interview, *supra* note 30.

[38] E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

[39] Ravitz Interview, *supra* note 25.

[40] E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author).

[41] Ravitz Interview, *supra* note 25; Nigh Interview I, *supra* note 25; Mosley Interview, *supra* note 30; *see also* OKLA. STAT. tit. 19, § 138.7 (governing conflicts of interest specific to the public defender offices); OKLA. STAT. tit. 22, § 1355.7 (governing conflicts of interest specific to OIDS).

[42] *See* OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 12 (2016).

[43] Pybas Interview, *supra* note 24.

[44] *See* Okla. Crim. App. R. 3.11(B)(3)(b); Dewberry v. State, 954 P.2d 774, 775 (Okla. Crim. App. 1998).

[45] As is discussed in the *Role of the Judiciary* chapter, this aspect of Oklahoma's system for adjudicating capital cases on direct appeal and in post-conviction proceedings—the fact that ineffective assistance of counsel must be raised for the first time on direct appeal—is unusual among capital jurisdictions.

[46] Interview with Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Sept. 28, 2106) (on file with author) [hereinafter Christopher Interview].

[47] *Id.*

[48] *Id.*

capital post-conviction cases and one of which was a capital direct appeal.[49]

Representation of death-sentenced inmates at the federal level—which occurs after an inmate has been denied relief on direct appeal and in state post-conviction proceedings—is primarily undertaken by the Capital Habeas Unit (CHU) of the Federal Public Defender for the Western District of Oklahoma, located in Oklahoma City.[50] If the CHU cannot be assigned to a case due to a conflict of interest, the federal district court will appoint conflict counsel from a panel of qualified lawyers.[51]

Currently, capital caseloads appear manageable for the attorneys handling capital cases at the Tulsa County and Oklahoma County public defenders' offices. However, those attorneys are also managing non-capital cases, and the heavy caseloads for noncapital cases *are* an issue for public defenders statewide. When a capital case is assigned to a defense attorney with a heavy caseload, at least one office indicated that it prioritizes the capital case and would attempt to minimize that attorney's non-capital caseload.[52] However, the defense attorneys who spoke with the Commission indicated that if capital cases increase, the caseloads could become burdensome and difficult to manage.[53]

IV. Oklahoma's Adherence to Professional Standards in Capital Cases

A. Oklahoma Capital Counsel: Funding and Compensation

1. Funding

The Oklahoma Legislature directly appropriates funds to the indigent defense system. For the fiscal year ending on June 30, 2016, the total budget for OIDS was $15.4 million.[54] As detailed in the agency's annual report, OIDS was not adequately funded in fiscal year 2016: its budget was reduced mid-year by $710,732 and was set at $1.1 million less than the amount appropriated in the previous fiscal year, even as its caseload has nearly doubled in the past seven years.[55] Attorney costs for the agency's capital work for the fiscal year ending on June 30, 2015—the most recent year for which data are available—averaged $36,710 per case.[56]

The majority of funding for the public defender offices of Oklahoma County and Tulsa County comes from the respective "court fund[s]" of those counties.[57] However, the budget for these offices is set by the Oklahoma Supreme Court in consultation with each office's respective chief.[58] Each county's court fund is financed through

[49] *See* OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 15 (2016).

[50] Interview with Randy Bauman, Dir., Capital Habeas Unit, Fed'l Pub. Defender, W.D. Okla. (Mar. 18, 2106) (on file with author) [hereinafter Bauman Interview].

[51] *Id.*

[52] Ravitz Interview, *supra* note 23.

[53] Nigh Interview I, *supra* note 25.

[54] *See* OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 1–2 (2016), https://www.ok.gov/OIDS/documents/2016%20Annual%20Report.pdf. The agency was appropriated $16,079,722 for the fiscal year but, "due to a statewide revenue failure, OIDS, along with other state agencies, received funding reductions totaling $1,125,581." *Id.* at 2. Approximately 57 percent of that amount ultimately was restored. *Id.*

[55] *See id.*

[56] *See* OKLA. OFFICE OF MGMT. & ENTERPRISE SERVS., COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2015, at 199 (2015), https://www.ok.gov/OSF/documents/cafr15.pdf. This figure is commensurate with the capital trial level costs in Oklahoma and Tulsa Counties for defense reported in the cost study, which were $56,467. *See Appendix IB*, PETER A. COLLINS, MATTHEW J. HICKMAN & ROBERT C. BORUCHOWITZ, CAPITAL PUNISHMENT IN OKLAHOMA: AN ANALYSIS OF THE ECONOMIC COSTS (2017).

[57] *See* OKLA. STAT. 19, §§ 138.4 (making chief public defender and assistant public defender salaries "payable monthly, from the court fund of such county"), 138.6 (making investigator and secretary salaries "payable monthly, from the court fund of such county"), 138.8 (making expert witness compensation payable "by the court fund pursuant to procedures established by the governing board of the court fund").

[58] E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

"fees, fines, costs and forfeitures . . . collected by the court clerk,"[59] but the chief public defenders of both the Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office report that their budgets do not fluctuate based on changes to the county court fund.[60]

For fiscal year 2013, Oklahoma County's public defender programs totaled $4,633,853 with an additional $11,871 spent on public defender travel expenses.[61] For fiscal year 2009, which provides the most recent publicly-available data, Tulsa County's public defender programs totaled $3,752,743, with an additional $10,300 spent on public defender travel expenses.[62] The chief public defender for Tulsa County reports that his office did receive a budget increase in the past two years, as requested and in spite of the fact that the court fund was lower than in previous years. The chief public defender is, however, unable to replace employees who retire or leave for other reasons without the Supreme Court's authorization to hire a replacement.[63] His office currently is short one investigator and awaiting approval to fill this vacancy.[64]

In addition to the court fund, the general fund of each county also is used to finance these offices—specifically, Oklahoma law requires counties with a public defender's office to "provide for necessary office supplies and equipment and arrange for sufficient office space in the county building . . . to permit the efficient and effective operation of the office of public defender."[65] In Oklahoma County, fiscal year 2017 estimates for these costs totaled $51,420.[66] In Tulsa County, fiscal year 2016 estimates for these costs totaled $54,500.[67]

2. Compensation

Oklahoma law requires chief public defenders and assistant public defenders to "receive a salary commensurate with the range of salaries of assistant district attorneys in their districts."[68] The same holds true for the investigators and secretaries employed by these offices.[69] Furthermore, in *Earl v. Tulsa County District Court*, the Oklahoma Supreme Court held that "commensurate with" in the statute is to be read as "equal to" to avoid, by way of the governing board, "[j]udicial exercise of managerial discretion over public defenders' salaries," a proposition the Court recognized as "of doubtful legal efficacy" and "fraught with hazards of constitutional infirmity."[70]

By contrast, the salaries of OIDS attorneys and support staff are set by OIDS's executive director, subject to the salary schedules adopted by the OIDS board.[71] Each member of the board is appointed by the governor (with the advice and consent of the Oklahoma Senate) and serves a five-year term; at least three members of the

[59] OKLA. STAT. tit. 20, § 1301.

[60] E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author). Although it is encouraging that Oklahoma's public defender offices have not faced budget shortfalls when their respective county's court fund has been lower than expected or as needed, other states have encountered difficulties tying the funding for their indigent defense services to fees, fines, costs, and forfeitures. *See* Dylan Walsh, *On the Defensive*, THE ATLANTIC (June 2, 2016), http://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165 ("Louisiana, uniquely, funds the majority of indigent defense through court fees. . . . These local revenues constitute almost 70 percent of the public-defense system's budget, with the bulk of them assessed on traffic tickets. Because the number of tickets written in a given month bears no relationship to the ebb and flow of criminal activity or prosecution, this setup results in a dismal state of uncertainty and repeated budgetary shortfall.").

[61] OKLA. STATE AUD. & INSP., OKLAHOMA COUNTY COURT CLERK STATUTORY REPORT 3 (2014).

[62] OKLA. STATE AUD. & INSP., TULSA COUNTY COURT CLERK STATUTORY REPORT 3 (2010).

[63] E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

[64] *Id.*

[65] OKLA. STAT. tit. 19, § 138.1a.

[66] OKLA. COUNTY CLERK, ANNUAL ADOPTED BUDGET: OKLAHOMA COUNTY, OKLAHOMA: FISCAL YEAR 2016–2017, at 10, 23, 95 (2016).

[67] BUDGET BD. OF TULSA COUNTY, BUDGET AND FINANCIAL PLAN FOR APPROPRIATED FUNDS: FISCAL YEAR 2015–2016, at 79 (2015).

[68] OKLA. STAT. tit. 19, § 138.4.

[69] *Id.* at § 138.6.

[70] 606 P.2d 545, 548 (Okla. S. Ct. 1979); *see also* Nigh Interview I, *supra* note 23 (confirming that salaries at the Tulsa County Public Defender's Office are equal to those in the Tulsa County District Attorney's Office).

[71] OKLA. STAT. tit. 22, §§ 1355.3, 1355.4.

board must be attorneys licensed to practice law in the state of Oklahoma "who have experience through the practice of law in the defense of persons accused of crimes."[72] Board members serve without compensation and may be reappointed.[73]

A review of publicly available data on compensation rates at district attorney's offices and OIDS reveals noticeable disparities. For example, the division chiefs of the two capital trial divisions of OIDS earn approximately $90,000 per year—less than the majority of salaries listed for assistant district attorneys and less than the majority of salaries listed for district attorneys and their first assistants.[74] Other capital counsel at OIDS likewise are paid notably less than their counterparts working on behalf of the state in capital cases.[75]

When conflict attorneys are appointed in a capital case, their compensation is subject to the fee structure established under Oklahoma law. Currently, compensation for lead counsel in a capital case is capped at $20,000 per case; compensation for co-counsel is capped at $5,000 per case.[76] In exceptional cases—specifically, those cases "requir[ing] an extraordinary amount of time to litigate"—these caps may be exceeded "upon a determination" by OIDS's executive director, with approval by the OIDS Board.[77]

Even if conflict counsel's compensation were significantly higher than the cap established under Oklahoma statutory law, such compensation would still fall far short of the typical cost to zealously litigate a capital case.[78] In Florida, for example, experienced capital counsel successfully (and accurately) argued to the Florida Supreme Court that an $84,000 cap on compensation for post-conviction litigation services failed to account for "complex and unusual capital post-conviction proceedings" and, if applied, would amount to a denial of "meaningful access to counsel."[79] Further, a significant number of national, state, and local reports have condemned compensation shortfalls as jeopardizing the constitutional right to effective assistance of counsel.[80]

In all criminal cases, but especially capital ones, expert services are crucial to effective representation, regardless of whether those experts will consult on or testify to issues pertaining to culpability (e.g., DNA analysis,

[72] OKLA. STAT. tit. 22, § 1355.1. There are no other statutory qualifications to serve on the Board. *Id.*

[73] *Id.*

[74] *See Compare State Pay: District Attorneys Council*, OKLA. WATCH, http://oklahomawatchdata.org/state-salaries/220 (last visited Sept. 18, 2016); *see also State Pay: Indigent Defense System*, OKLA. WATCH, http://oklahomawatchdata.org/state-salaries/047 (last visited Sept. 18, 2016).

[75] *Id.* The salaries of OIDS capital counsel listed on Oklahoma Watch's website range from $54,475 to $75,850. *See State Pay: Indigent Defense System*, OKLA. WATCH, http://oklahomawatchdata.org/state-salaries/047 (last visited Sept. 18, 2016).

[76] OKLA. STAT. tit. 22, § 1355.13(A).

[77] OKLA. STAT. tit. 22, § 1355.13(B). In one recent Oklahoma County capital case, the second chair defense attorney was paid $15,000. *See* Collins, *supra* note 56, at 25. In most conflict cases in Tulsa and Oklahoma Counties, second chair defense counsel are paid less than $7,500. *See id.*

[78] *See, e.g.*, Collins, *supra* note 19, at 49 tbl.5 (estimating that the average cost to provide trial-level defense services in Washington State capital cases is $848,948 and that the median cost to provide these services is $608,496). It also should be noted that caps on compensation are inconsistent with the *ABA Guidelines*. *ABA Guidelines*, *supra* note 4 (Guideline 9.1(B)(1)).

[79] Maas v. Olive, 992 So. 2d 196, 204–05 (Fla. 2008). Because representation during post-conviction review involves the same investigative effort as occurs (or should occur) pretrial, as well as a substantial number of hours engaged in legal research and writing, the costs to provide constitutionally adequate representation pre-conviction and on post-conviction review are, in capital cases, comparable. *See ABA Guidelines*, *supra* note 4 (Guideline 9.1 cmt. ("Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decision-maker at trial made a fully informed resolution of the issues of both guilt and punishment.").

[80] *See, e.g.*, *ABA Guidelines*, *supra* note 4 (Guideline 9.1 cmt.); AM. BAR ASS'N, THE TEXAS DEATH PENALTY ASSESSMENT REPORT, at xvii to xviii (2013); AM. BAR ASS'N, THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT, at xxi (2015); Commonwealth v. McGarrell, No. 77 EM 20011, 2012 Pa. LEXIS 2854, at 2–5 (Pa. Feb. 12, 2012), http://standdown.typepad.com/PA-SupCt-LernerReport.pdf (concluding that "the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate" and that "[t]he existing compensation system unacceptably increases the risk of ineffective assistance of counsel in individual cases"); AM. BAR ASS'N, THE KENTUCKY DEATH PENALTY ASSESSMENT REPORT, at v (2011); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 31 (2009); Am. Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990); *see also* THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT, at xxxvi (2014) (noting that cuts in the federal budget in 2015 jeopardized federal public defenders' ability "to provide constitutionally guaranteed representation"); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1119–20 (2006) (noting that regular shortfalls in OIDS's funding have "hindered the agency's ability to effectively represent its clients" (internal quotations omitted)).

ballistics, forensic pathology), to the jury's sentencing-phase decision (e.g., developmental trauma, mental illness, PTSD), or to the defendant's eligibility for a death sentence (e.g., sanity and intellectual disability).[81] In Oklahoma County and Tulsa County, funding for experts comes from the district courts, whether as a lump sum transfer for use during the fiscal year, through the filing of requests for funding in particular cases, or both.[82] In Oklahoma County, specifically, the public defender's office's most recent budget for all expert services totaled $85,000, the vast majority of which was used to fund expert services in first-degree murder cases (between 40 and 50 cases per year).[83] This amount is appreciably lower than would be required to fund even four or five capital cases: for cases without guilt/innocence defenses, costs for penalty-phase expert services total no less than $20,000; when guilt/innocence defenses are available and a need arises to hire independent forensic experts to test the state's evidence, the costs for expert services range from $28,000 to $35,000 per case.[84] If the district courts do not have the resources to finance supplemental funding requests by the public defender offices, they may seek those resources directly from the Supreme Court of Oklahoma.[85]

OIDS funds expert services in capital cases—including experts needed in capital appeals—directly from its annual budget, subject to the approval of the executive director.[86] Although requests for supplemental funding from the district courts are almost universally denied, these funds are greatly needed to provide high-quality representation in capital cases.[87]

As the following sections detail, adequately funding defense services in capital cases is necessary to ensure that counsel can provide high-quality representation by, for example, enlisting the support of much-needed expert services. Moreover, without sufficient resources, Oklahoma's public defender offices and OIDS could not recruit, train, and retain qualified counsel, as required by the *ABA Guidelines*. Accordingly, it is of the utmost importance that these agencies receive consistent and adequate funding so they may provide their capital clients the level of representation required by the Sixth Amendment.

B. Oklahoma Capital Counsel: Qualifications and Training

Oklahoma law does not require capital counsel to satisfy the qualification and training requirements established by the *ABA Guidelines*, nor is this Commission independently assessing the competence of Oklahoma capital defense attorneys overall. However, as indicated in the preceding section, the chief public defenders of the Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office report that members of their staff are qualified, by training and experience, to represent capital clients. This includes all the capital counsel in these offices: four of the 34 attorneys in the Oklahoma County Public Defender's Office's criminal

[81] *See ABA Guidelines*, *supra* note 4 (Guideline 4.1 cmt.).

[82] Ravitz Interview, *supra* note 25; Nigh Interview I, *supra* note 23.

[83] Ravitz Interview, *supra* note 25; E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 17, 2016) (on file with author).

[84] *Id.*

[85] *Id.*; Nigh Interview I, *supra* note 25. (a) Supreme Court Revolving Fund (OKLA. STAT. tit. 20, § 1510.1), (b) the State Judicial Revolving Fund (*id.* at § 1510.2), or (c) the Supreme Court Administrative Revolving Fund (*id.* at § 1510.5).]

[86] Mosley Interview, *supra* note 30; Christopher Interview, *supra* note 46; OKLA. STAT. tit. 22, § 1355.4(D)(2); *see also* Pybas Interview, *supra* note 24 (explaining that the process is the same for all OIDS attorneys regardless of whether they work in the trial or appellate divisions: When an attorney believes she needs an expert in her capital case, she will use a standard form called a Professional Services Request Form (PSRF) and will identify the particular type of expert needed and the anticipated cost, along with a detailed explanation of why the facts of the case justify the expert services. This form goes to the Division Chief for discussion and approval. If the Division Chief approves the request, it is then sent to the finance department to confirm whether funds are available in the amount requested. From there, it goes to the Executive Director who approves or denies the request. Each division has a separate expert services budget and must theoretically stay within that budget. If, however, a division exhausts its own budget and still has a need for an expert, the Executive Director has the discretion to move available funds from other budgets within OIDS.)

[87] Mosley Interview, *supra* note 30. Some capital defense attorneys in the state surmise that, whereas the district courts of Oklahoma County and Tulsa County recognize that it is their role to provide supplementary resources to ensure indigent defendants receive a constitutionally adequate defense, the courts in less populous jurisdictions presume that OIDS can and must pay all defense costs, even though the court fund in each of these counties exists partly for the purpose of financing indigent defense services.

division and three of the 40 attorneys employed by the Tulsa County Public Defender's Office.[88] Specifically, because of the criteria imposed by the heads of these offices, these seven attorneys' qualifications align with the criteria established in ABA Guideline 5.1 (Qualifications of Defense Counsel):

- License to practice law;[89]
- Demonstration of a commitment to provide zealous advocacy and high quality legal representation in the defense of capital cases;[90]
- Training in (1) relevant state, federal, and international law; (2) pleading and motion practice; (3) pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; (4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations particular to capital defense representation; (7) preservation of the record and of issues for post-conviction review; (8) counsel's relationship with the client and the client's family; (9) post-conviction litigation in state and federal courts; and (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;[91]
- Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;[92]
- Skill in the management and conduct of complex negotiations and litigation;[93]
- Skill in legal research and analysis, and the drafting of litigation documents;[94]
- Skill in oral advocacy;[95]
- Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;[96]
- Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;[97]
- Skill in the investigation, preparation, and presentation of mitigating evidence;[98] and
- Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.[99]

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[88] Ravitz Interview, *supra* note 23; Nigh Interview I, *supra* note 23; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Sept. 28, 2016) (on file with author) [hereinafter Nigh Interview II].

[89] *ABA Guidelines*, *supra* note 4, Guideline 5.1(B)(1)(a).

[90] *Id.* at Guideline 5.1(B)(1)(b).

[91] *Id.* at Guidelines 5.1(B)(1)(c), 8.1(B); *see also* Interview with Andrea Miller, Div. Chief, Appeals Div., Okla. County Pub. Defender (May 13, 2016) (on file with author) [hereinafter Miller Interview] (noting that, while there is little to no capital case-specific training in state, attorneys have had the opportunity to travel to out-of-state trainings).

[92] *Id.* at Guideline 5.1(B)(2)(a).

[93] *Id.* at Guideline 5.1(B)(2)(b).

[94] *Id.* at Guideline 5.1(B)(2)(c).

[95] *Id.* at Guideline 5.1(B)(2)(d).

[96] *Id.* at Guideline 5.1(B)(2)(e).

[97] *Id.* at Guideline 5.1(B)(2)(f).

[98] *Id.* at Guideline 5.1(B)(2)(g).

[99] *Id.* at Guideline 5.1(B)(2)(h).

By contrast, although several of the eight attorneys within the two capital trial divisions of OIDS—the Norman Capital Trial Division (three attorneys) and the Sapulpa Capital Trial Division (five attorneys)—satisfy these qualification and training requirements, not all of them do.[100] This partly is a function of inadequate funding: unlike their counterparts in the two public defender's offices, which by law must "receive a salary commensurate with the range of salaries of assistant district attorneys in their districts," OIDS attorneys are not guaranteed parity in compensation and, therefore, do not receive salaries commensurate with their counterparts working on behalf of the state.[101]

Resource constraints also limit the extent to which all Oklahoma-based capital defense attorneys can access training to become qualified—and remain qualified—to represent capital clients, as the *ABA Guidelines* advise.[102] As reported by the chief public defender for Oklahoma County—the state's most populous county and the jurisdiction responsible for 36.8 percent of the state's 318 death sentences—training programs that carry a cost for attendance simply are unaffordable.[103] Likewise, the chief public defender for Tulsa County reports that his office's resources are inadequate to send his assistants to vital external training programs, and the county itself has acknowledged that its public defender's office "has no internal or external formal training regimen."[104] And while both public defender offices facilitate in-house training and regularly seek scholarships from non-governmental sources (e.g., the Oklahoma Coalition to Abolish the Death Penalty), additional funding is necessary to ensure compliance with prevailing national standards.[105]

The capital attorneys employed by OIDS face similar limitations on their opportunities for capital representation training. Because OIDS is not adequately funded—as mentioned above, the agency's funding for fiscal year 2017 is $1.1 million less than the amount appropriated in the previous fiscal year[106]—it is unable to maintain a budget for training its employees.[107]

C. Oklahoma Capital Counsel: Independence and Defense Team Composition

Independence from political pressures is a cornerstone of effective representation.[108] Because Oklahoma capital defense counsel largely work within governmental agencies, the oversight of which is limited to budgetary

[100] Mosley Interview, *supra* note 30.

[101] *See* OKLA. STAT. tit. 22, § 1355.4 (empowering the executive director of OIDS to "set the salaries of [personnel necessary to carry out the duties imposed upon the System], subject to the salary schedules adopted by the [Oklahoma Indigent Defense System] Board"), OKLA. STAT. tit. 22, § 1355.5 (empowering the Oklahoma Indigent Defense System Board to "adopt salary schedules for the System" without additional legislative guidance); *see also id.* (noting that starting salaries for attorneys in the Sapulpa Capital Trial Division are substantially less than the salaries of their counterparts in district attorney's and public defender's offices across the state).

[102] *See ABA Guidelines, supra* note 4, Guideline 8.1(C) ("Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program . . . that focuses on the defense of death penalty cases.").

[103] Ravitz Interview, *supra* note 23; *see, e.g., Death Penalty College: Tuition*, Santa Clara Univ. L. Sch., http://law.scu.edu/dpc/tuition (last visited Sept. 22, 2016) (attorney tuition ranging from $915 to $995).

[104] BUDGET BD. OF TULSA COUNTY, BUDGET AND FINANCIAL PLAN FOR APPROPRIATED FUNDS: FISCAL YEAR 2015–2016, at 227 (2015); *see also* Nigh Interview II, *supra* note 88. It is well established that capital counsel must regularly attend specialized training programs so as to "keep[] abreast of new developments in a volatile and highly nuanced area of the law," Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 358 (1995); moreover, and as the *ABA Guidelines* note, "many capital defense counsel have discovered that they must attend training programs more frequently [than is required by their respective Bar] in order to provide effective legal representation." *ABA Guidelines, supra* note 4 (Guideline 8.1 hist.). *See also* Jud. Conf. of the United States, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (1998) (observing that "[a]ll of the defense counsel interviewed by the Subcommittee stressed the importance of participating in specialized death penalty training programs," and further observing that "[t]here are, however, very few training programs anywhere in the country specializing in the defense of death penalty cases," a situation that has improved nationally since 1998 but not with respect to Oklahoma, specifically).

[105] Ravitz Interview, *supra* note 23; Nigh Interview II, *supra* note 88.

[106] OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 2 (2016).

[107] Mosley Interview, *supra* note 30. *See also* STATE OF OKLA., FISCAL YEAR EXECUTIVE BUDGET: HISTORICAL DATA: 2017, at 215 (2016), https://www.ok.gov/OSF/documents/bud17hd_tagged.pdf (listing OIDS's actual expenditures by category for fiscal years 2014 and 2015).

[108] *Accord ABA Guidelines, supra* note 4, Guideline 2.1(C) (requiring each capital jurisdiction's legal representation plan for implementing the *Guidelines* to be "structured to ensure that counsel defending death penalty cases are able to do so free from political influence").

matters, their work is appropriately independent of the state regarding the quality of representation, insofar as it might be affected by political decisions.

On the other hand, and as was discussed above, funding limits set by politicians can create serious challenges to independence. Limits to state and local governments' efforts to fund the public defender's offices in Oklahoma County and Tulsa County and OIDS present serious difficulties to these organizations' capacity to comport with national standards for capital cases, particularly as those standards pertain to training and qualifications. Moreover, the consensus among practitioners at these organizations is that a return to higher rates of seeking the death penalty by prosecutors would seriously prejudice their clients facing capital charges or seeking relief from a death sentence.[109]

Furthermore, whereas the *ABA Guidelines* require each capital defense team to include, at every stage of the proceedings, two qualified attorneys, an investigator, and a mitigation specialist,[110] as discussed in great detail in the cost study—attached as *Appendix 1B*—OIDS cannot satisfy this requirement at its present funding levels and caseload.[111] On state post-conviction review, for example, each case typically is assigned to only one attorney in the Capital Post-Conviction Division. Moreover, the division's two investigators must divide between themselves approximately 30 capital and non-capital cases and, on these cases, serve as both fact investigator and mitigation specialist.[112]

V. The Importance of Competent Counsel in Capital Cases

Since the reinstatement of the death penalty in the late 1970s, capital representation nationally and in Oklahoma has been markedly uneven. Both state and federal courts in Oklahoma have often found the representation of counsel in capital cases to be 'ineffective,' meaning a condemned prisoner's trial lawyer's performance was constitutionally deficient and that deficiency prejudiced the outcome of the case.

In James Fisher's capital case, for example, a federal appellate court found it "beyond question" that Mr. Fisher's court-appointed attorney—not a lawyer working for one of the state's public defender offices—rendered ineffective assistance throughout the representation.[113] Mr. Fisher was arrested for the 1982 murder of Terry Gene Neal. Mr. Neal had been stabbed in the neck with a broken bottle in his Oklahoma City apartment.[114] "The nature of the trial itself," the U.S. Court of Appeals for the Tenth Circuit held, "indicates a singular lack of preparation on [defense counsel's] part. The trial transcript reveals that throughout most of [his] examination of witnesses, including his own client, he had no idea what answers he would receive to his questions and was not pursuing any particular strategy of defense."[115] The Court also faulted Mr. Fisher's trial counsel for:

> [F]ailing through apparent ineptitude to act as a reasonably diligent and professional advocate; failing through his hostility to his client and his client's interests, and his apparent sympathy and assistance for the state's case, to act as his client's loyal advocate; failing to advance any defense theory, even that of holding the state to its burden of proof; and, under the circumstances, failing to make a closing argument.[116]

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[109] Ravitz Interview, *supra* note 25; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Aug. 17, 2016) (on file with author) [hereinafter Nigh Interview III]; Mosley Interview, *supra* note 30; Miller Interview, *supra* note 91; Pybas Interview, *supra* note 24; Christopher Interview, *supra* note 46.

[110] *ABA Guidelines*, *supra* note 4, Guideline 4.1(A)(1).

[111] Mosley Interview, *supra* note 30; Christopher Interview, *supra* note 47; *see also* App. II.

[112] Christopher Interview, *supra* note 46.

[113] Fisher v. Gibson, 282 F.3d 1283, 1295 (10th Cir. 2002).

[114] Fisher v. State, 206 P.3d 607, 608 (Okla. Crim. App. 2009).

[115] *Fisher*, 282 F.3d at 1294.

[116] *Id.* at 1307.

Upon retrial, Mr. Fisher was again convicted and sentenced to death,[117] and his new court-appointed trial attorney was again found to have rendered ineffective assistance of counsel.[118] Evidence presented at an evidentiary hearing demonstrated that counsel had "failed to properly investigate, prepare and present relevant and readily available evidence at trial."[119] Approximately eighteen boxes of materials related to Mr. Fisher's case were in counsel's possession, yet counsel never reviewed them. Instead, the boxes were placed in storage and their contents examined only after Mr. Fisher was sentenced to death and was appointed successor counsel (through OIDS).[120] Counsel also failed to make use of the services of "an experienced investigator [] assigned [by the district court] to assist him."[121] At the evidentiary hearing, counsel "admitted that he did not track down any defense witnesses and he did not recall interviewing any of the State's witnesses before trial."[122] Partly on the basis of these deficiencies, the OCCA reversed Mr. Fisher's conviction.[123] He ultimately was released from custody on the stipulation that he leave, and never return to, Oklahoma.[124]

Similarly, in *Cargle v. Mullin*, also out of Oklahoma County, defense counsel—who had been hired by Marcus Cargle's parents to represent their son at his 1994 capital trial for the shooting death of two individuals during a drug transaction—failed to "properly confer with and advise his client," "interview and prepare even obvious defense witnesses," "develop available exculpatory/mitigating evidence," "investigate sources for impeachment of the crucial prosecution witnesses," and "expose the State's relatively weak case to meaningful adversarial testing."[125] And as in Mr. Fisher's case, counsel also "disloyally impeached his own client" by suggesting that Mr. Cargle had lied in a video-recorded police interview "in a case that was all about credibility."[126] On retrial, Mr. Cargle was convicted and sentenced to life without possibility of parole.[127]

Both Mr. Fisher's and Mr. Cargle's cases illustrate—as do others[128]—the serious consequences of a capital defense counsel's failure to provide adequate representation. Furthermore, because the standard established in *Strickland* for granting relief based on inadequate representation is a notably difficult one to satisfy,[129] cases such as Mr. Fisher's and Mr. Cargle's necessarily present an incomplete picture as to the quality of capital representation in the state of Oklahoma. Other defendants may present similarly egregious deficiencies but be unable to meet the *Strickland* standard. Such cases, when reversed for ineffectiveness of counsel, also produce substantial costs to retry them. Mr. Fisher's conviction and death sentence were reversed and litigated twice following his 2005 trial. These costs are worth reflection when considering the adequacy of Oklahoma's present arrangement for supplying indigent capital defendants and death-sentenced inmates with trial, appellate, and post-conviction counsel.

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[117] Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES, Aug. 11, 2010, at A1.

[118] *Fisher*, 206 P.3d at 613.

[119] *Id.* at 611.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 613.

[124] Barry, *supra* note 117.

[125] 317 F.3d 1196, 1211 (10th Cir. 2003).

[126] *Id.* at 1211, 1217.

[127] Nick Trougakos, *Man Spared Death Penalty at Retrial*, NEWSOK, Feb. 3, 2005 (The court cited "prejudicial conduct" and "misrepresentation by prosecutors" and a "grossly deficient defense attorney").

[128] *See, e.g.*, Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007) (finding defense counsel ineffective for "wholly fail[ing] to investigate potential mitigation evidence, instead focusing almost exclusively on the guilt phase of the trial"); Marquez-Burrola v. State, 157 P.3d 749 (Okla. Crim. App. 2007) (finding defense counsel ineffective for failing to "investigate, develop, and present an acceptable mitigation case").

[129] *See* Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 11-13 (1996) (discussing *Strickland's* relatively modest demands of capital counsel).

VI. Conclusion and Recommendations

The integrity of our capital punishment system depends upon an accused being afforded competent and effective counsel. Capital defense relies on adequate funding and resources to ensure that trial, appellate, and post-conviction counsel can meet the standards outlined by both professional and legal standards. In capital cases, where the defendant's life is at stake, ineffective or underfunded defense counsel have repeatedly failed to meet those standards. Indeed, Oklahoma's experience with wrongful convictions demonstrates the importance of ensuring justice in the first instance, rather than cutting corners in the early stages of a case. Oklahoma policymakers should ensure that all persons accused of the worst offenses are zealously and effectively represented throughout their criminal proceedings. In light of the critical role defense counsel plays in capital cases, the Commission makes the following recommendations:

Recommendation 1:

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

While the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) are helpful in assessing counsel's conduct, they were not drafted with any particular jurisdiction in mind. Both practitioners and judges may be too quick to disregard these commonsense standards, to the detriment of capital defendants and death-sentenced inmates seeking relief on appeal or in post-conviction proceedings.

Due to these limitations to the *ABA Guidelines*, the Commission recommends that the Oklahoma Bar Association (OBA) promulgate its own set of advisory guidelines for the performance of Oklahoma capital counsel—guidelines that would consider those characteristics that make Oklahoma capital representation different from other jurisdictions. In Texas, for example, the state bar association used the *ABA Guidelines* as a template to create standards for Texas capital counsel. The Commission is confident that adoption of capital case guidelines specific to Oklahoma will help to elevate the quality of representation of indigent capital defendants.

Recommendation 2:

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

Counsel must be trained if they are to undertake the serious and complex work of representing individuals accused of a capital crime or sentenced to death. As noted in the *ABA Guidelines*:

> [P]roviding high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.[130]

[130] *ABA Guidelines*, Guideline 8.1 cmt.

The offices in this state that provide capital defense services should continue to finance their staff members' attendance at capital training seminars and programs outside of Oklahoma. However, as the expenses for out-of-state travel may be considerable and may prevent many attorneys and investigators from attending, the OBA could provide a valuable service to the capital defense bar by facilitating in-state training for attorneys and their teams.

Recommendation 3:

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

The Commission was encouraged to learn that, in contrast to other jurisdictions, public defenders, investigators, and support staff in Oklahoma and Tulsa counties who represent or work on behalf of capital clients are compensated at levels commensurate with their prosecutorial counterparts. This framework helps to ensure that attorneys who are interested in a career in criminal law will not favor working for the state purely for financial reasons. It also has the benefit of being fair and, therefore, the right thing to do.

By contrast, attorneys, investigators, and support staff employed by the Oklahoma Indigent Defense System (OIDS) are paid less than their prosecutorial counterparts. This situation is unfair to the dedicated attorneys, investigators, and support staff who choose to support our criminal justice system through defense-oriented work. Accordingly, the Commission calls upon Oklahoma's policymakers to correct this disparity so that OIDS's capital case staff receives salaries commensurate with their state counterparts.

Recommendation 4:

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

Conflict counsel are sometimes necessary to ensure a capital defendant's constitutional right to competent, conflict-free counsel. As this chapter explains, conflict counsel in Oklahoma are assigned when public defender agencies and OIDS are unable to take the case without entering into a conflict of interest. Currently, compensation for lead conflict counsel in a capital case is capped at $20,000 per case, whereas compensation for co-counsel is capped at $5,000 per case. These funding limits are not reflective of compensation levels afforded to qualified capital attorneys. Compensation caps discourage competent attorneys from accepting work, even though their services are sorely needed—or worse, from accepting a case but failing to take the time needed to effectively represent a capital defendant.

Recommendation 5:

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

If conflict counsel find it necessary to seek funding over and above the statutory caps, the responsibility for approving and providing this funding should not fall on OIDS. Such a fee arrangement places OIDS in the position of allocating portions of its limited funding to conflict counsel. Rather than competing with OIDS for funding, conflict counsel should receive compensation from another source, such as from the court fund of the county where the representation takes place.