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O'Connor's Firsts

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O'CONNOR'S FIRSTS

*Phyllis L. Crocker**

I.	First Woman	79
II.	First Call to Address Ohio's Death Penalty.....	80
	A. The 2007 ABA Ohio Death Penalty Report	81
	B. Joint Task Force to Review the Administration of Ohio's Death Penalty	83
	1. Charge of the Joint Task Force.....	84
	2. Composition of the Joint Task Force.....	86
	3. Final Report and Recommendations.....	87
III.	Conclusion	89

Chief Justice Maureen O'Connor will make her mark on the Ohio court system and on the laws of Ohio in many ways. She made two significant marks her first day as Chief Justice: she was the first woman elected to the position of Chief Justice in Ohio and in her swearing-in speech she called for review of the death penalty in Ohio.¹ Both were meaningful to me personally and as a citizen of Ohio. I appreciated her acknowledging her place in history and her willingness to tackle, right from the beginning of her tenure, the important topic of the death penalty in our state.

I. FIRST WOMAN

Being the first woman elected to serve as the Chief Justice is

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1. Chief Justice Maureen O'Connor, Swearing-in Ceremony at the Supreme Court of Ohio (Jan. 7, 2011) (transcript available at http://www.supremecourt.ohio.gov/PIO/Speeches/2011/CJOSwearingIn_010711.asp).

notable in and of itself.² I am especially proud of Chief Justice O'Connor's accomplishment because she is also a graduate of Cleveland-Marshall College of Law, where I was a law professor.³ As Chief Justice O'Connor noted in her swearing-in speech, while she was the first woman, she hoped she would not be the only woman to serve in this role.⁴ She was right – being the first woman in a leadership role continues to be noteworthy and important. Chief Justice O'Connor rightly identified other women on the Court and in state government who had also been firsts as “trailblazers.”⁵ She has joined that group. I applaud her statement that she does not want to be the only one. We need to have a second, a third, a tenth woman serve as Chief Justice.⁶ They will represent even more significant marks of progress and of Chief Justice O'Connor's legacy.

II. FIRST CALL TO ADDRESS OHIO'S DEATH PENALTY

In her swearing-in speech, Chief Justice O'Connor also called for a review of the administration of the death penalty in Ohio.⁷ She stated, “[o]ther areas of focus on the horizon include . . . reviewing and selecting for implementation the appropriate recommendations contained in the recent report on Ohio's compliance with the ABA death penalty review”⁸ This announcement was a welcome surprise. I was the

2. Currently, 19 of the state supreme court chief justices are women. *Female Chief Justices of State Supreme Courts*, JUDGEPEdia, http://judgepedia.org/Female_chief_justices_of_state_supreme_courts (last visited Nov. 16, 2014).

3. She was not the first Cleveland-Marshall graduate to serve as Chief Justice of the Ohio Supreme Court. Two other Cleveland-Marshall graduates also served as Chief Justice of the Ohio Supreme Court: Frank Daniel Celebrezze (1978-1986) and Eric Brown (2010). *See Justices of the Supreme Court of Ohio*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/SCO/formerjustices/> (last visited Nov. 16, 2014).

4. O'Connor, *supra* note 1.

Never before in the 207-year history of the Ohio Supreme Court has a woman served as Chief Justice. While I am humbled to be the first, I certainly hope that I won't be the first and only.

I follow in the footsteps of those women that have come before, on this Court and elsewhere in state government:

Florence Allen, the first woman Justice not just in Ohio but anywhere in the United States. She also was the first woman to ever serve on the federal bench when appointed by FDR to the 6th Circuit.

Jo Ann Davidson, the first woman Speaker of the Ohio House of Representatives.

Betty Montgomery, the first woman Ohio Attorney General and Ohio Auditor.

Trailblazers all, and I thank them for leading the way.

5. *Id.*

6. *See generally* SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013) (examining women in leadership roles).

7. O'Connor, *supra* note 1.

8. *Id.*

Chair of the American Bar Association (ABA) Ohio Death Penalty Assessment Team that published a 500-page report in 2007 titled, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report (ABA Ohio Death Penalty Report)*.⁹ Chief Justice O'Connor's reference to that report and her commitment to consider its recommendations was the first substantive public recognition from any government official since the report was issued in 2007.¹⁰ I also served, at the request of Chief Justice O'Connor and the Ohio State Bar Association, on the Joint Task Force to Review the Administration of Ohio's Death Penalty. I discuss the work of both bodies below.

A. *The 2007 ABA Ohio Death Penalty Report*

The 2007 ABA study of Ohio's death penalty system was part of a larger undertaking of the ABA Death Penalty Due Process Review Project (ABA Death Penalty Project).¹¹ From 2006 through 2013, the ABA Death Penalty Project conducted assessments of death penalty systems in the 12 states that are responsible for approximately 65% of all executions in this country since 1976.¹² It made sense to include Ohio in this group because it has one of the largest death rows in the country and is one of the most active northern death penalty states in terms of executions.¹³

9. See generally AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT (2007) [hereinafter ABA OHIO DEATH PENALTY REPORT], available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/ohio.html.

10. The Governor's office, the Attorney General's office, and Ohio Supreme Court Chief Justice Moyer each said that they would review the report. See Reginald Fields, *Ohio Death Penalty Called Unfair*, PLAIN DEALER, Sept. 25, 2007, available at 2007 WLNR 18825325.

11. The project was originally known as the "ABA Death Penalty Moratorium Implementation Project." See ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, THE STATE OF THE MODERN DEATH PENALTY IN AMERICA 3 (2013) [hereinafter MODERN DEATH PENALTY], http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf. This name caused many to assume that the goal of the Project was to obtain moratoriums on the death penalty in each state that conducted a study, with the ultimate goal of abolishing the death penalty. The ABA takes no position on the death penalty. *Id.* at 2.

12. *Id.* at 3 (listing Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia).

13. Ohio has the seventh largest death row in the country. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (last updated Nov. 12, 2014) [hereinafter FACT SHEET], <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. In 2012, Ohio executed nine individuals on death row. *Execution List 2012*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2012> (last visited Nov. 16, 2014). This was the fourth highest number in the country, after Texas, Arizona, and Missouri. *Id.* In 2013, Ohio

The purpose of the ABA study was to determine whether state death penalty systems were fair and accurate.¹⁴ The ABA Death Penalty Project examined 12 areas in each state studied: the collection and preservation of biological evidence, law enforcement practices, crime labs, prosecutorial policies and practices, defense services, direct appeals and post-conviction review, clemency, jury instructions, judicial independence, race, and mental illness and mental retardation.¹⁵ Within each area, the ABA Ohio Death Penalty Assessment Team assessed whether Ohio met standards and recommendations established by the ABA as benchmarks for a fair and just death penalty system.¹⁶

The ABA Ohio Death Penalty Assessment Team's study concluded that serious problems existed with Ohio's death penalty system and that implementing the ABA recommendations would improve it.¹⁷ The team identified the following areas as those most in need of reform: inadequate procedures to protect the innocent; inadequate qualification standards and insufficient compensation for defense counsel, as well as inadequate access to experts and investigators for defense counsel; inadequate appellate review of claims of error; lack of meaningful proportionality review of death sentences; inadequate discovery in post-conviction proceedings; racial and geographic disparities in Ohio's

executed three individuals on death row. FACT SHEET at 3. This was also the fourth highest number in the country, after Texas, Florida, and Oklahoma. *Id.* In 2010, Ohio was second only to Texas in the number of executions. *The Death Penalty in 2010: Year End Report*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf> (last visited Dec. 9, 2014).

14. MODERN DEATH PENALTY, *supra* note 11, at 1.

15. These areas were ones the ABA Section on Individual Rights and Responsibilities identified in *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* in 2001, as supplemented by the ABA Death Penalty Project in 2006. *See* MODERN DEATH PENALTY, *supra* note 11, at 3 (citing ABA Sec. Individual Rts. & Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487 (2001)).

16. For example: "the State should preserve all biological evidence for as long as the defendant remains incarcerated"; "law enforcement agencies should adopt guidelines for conducting lineups and photo spreads in a manner that maximizes their likely accuracy"; "each prosecutor's office should have written policies governing the exercise of prosecutorial discretion" in seeking the death penalty; indigent defendants should receive competent counsel who are adequately compensated and provided adequate funding for experts; "jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it"; "the jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability." *See* ABA OHIO DEATH PENALTY REPORT, *supra* note 9, at ix-xxxvii. The team concluded that of the 93 recommendations, Ohio fully complied with 4, partially complied with 37, failed to comply with 28, and because of limited access to information, were unable to determine compliance with 23. *See id.* at i. The report, while comprehensive, could not be complete. We were a private group of individuals with no authority to make anyone answer our questions or provide us with information.

17. *Id.* at iv-vi.

capital sentencing; and not exempting the severely mentally ill from death sentences or execution.¹⁸

When issued in September 2007, the *ABA Ohio Death Penalty Report* received attention across the state.¹⁹ Unfortunately, much of the press focused not on the ABA Ohio Death Penalty Assessment Team's findings regarding the serious flaws in the Ohio death penalty system, but on the composition of the team.²⁰ The ABA Ohio Death Penalty Assessment Team was comprised of ten individuals: one state and one federal judge, one state and one federal legislator, two lawyers, and four academics.²¹ Among the members were individuals who had sought the death penalty as prosecutors, judges who had upheld death sentences on appeal, and lawyers who had defended those facing the death penalty.²² Despite this breadth of experience, the team was criticized for not including a current prosecutor.²³ Due to this criticism, the team's recommendations were considered easy to ignore. That is, until Maureen O'Connor became Chief Justice.

B. *Joint Task Force to Review the Administration of Ohio's Death Penalty*

Having stated, in January 2011, her intention to review the ABA recommendations, Chief Justice O'Connor announced the formation of a task force to study Ohio's death penalty at her first address to the Ohio Judiciary in September 2011.²⁴ This new task force – formally, “the Joint

18. See *id.* at iv-v (the Executive Summary).

19. See, e.g., Laura A. Bischoff, *Strickland Asked to Halt Execution—For Now*, DAYTON DAILY NEWS, Sept. 25, 2007, available at 2007 WLNR 19220077; see also Fields, *supra* note 10; *Suspend Executions, Bar Group Urges Ohio*, CINCINNATI ENQUIRER, Sept. 25, 2007, available at 2007 WLNR 27414879 [hereinafter ENQUIRER]; Alan Johnson, *State's System Called Unjust: Bar Association Seeks Moratorium in Ohio*, COLUMBUS DISPATCH, Sept. 25, 2007, available at 2007 WLNR 18800686; Jim Provance, *Ohio Asked to Suspend Executions*, BLADE (Sept. 25, 2007), available at 2007 WLNR 18796125.

20. See, e.g., ENQUIRER, *supra* note 19 (“This commission is a liberal defense attorney dream team. . . . There is not one single active prosecutor on the committee.”); see also Provance, *supra* note 19 (“It's a hatchet job on our death penalty statutes. . . . If there's one person identified as being a prosecution person, it's still heavily weighted the other way. It's a wish list for defense lawyers.”); Fields, *supra* note 10 (“the report was one-sided and authored by . . . a pro-defense organization”).

21. ABA OHIO DEATH PENALTY REPORT, *supra* note 9, at 3-6.

22. *Id.*

23. We tried to have a member of the Ohio Attorney General's office join the team, but were unsuccessful.

24. Chief Justice Maureen O'Connor, *First State of the Judiciary Address at the Supreme Court of Ohio* (Sept. 8, 2011) (transcript available at http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ_090811.asp).

Finally, there is work to be done on the death penalty.

Task Force to Review the Administration of Ohio's Death Penalty" – was undertaken jointly by the Ohio Supreme Court and the Ohio State Bar Association.²⁵ This section discusses three noteworthy features of the Joint Task Force: its charge; its membership; and the most significant of its recommendations as presented in the *Final Report and Recommendations*, issued in April 2014.²⁶

1. Charge of the Joint Task Force

The charge to the Joint Task Force was straightforward: “assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible.”²⁷ As Chief Justice O'Connor stated at the first meeting of the Joint Task Force: “What you are being asked to do is provide to the Court and the state bar guidance on the current laws on the subject, the practices in other jurisdictions, the data, the costs, and many other aspects associated with the death penalty.”²⁸ She was also

If we are to support trust and confidence in the judicial system, there is arguably no issue more important than ensuring that justice is served when the state imposes the ultimate form of punishment.

That's why I am announcing today that the Supreme Court of Ohio and the Ohio State Bar Association are forming a Joint Task Force to Review the Administration of Ohio's Death Penalty.

The impetus for the formation of this Joint Task Force is a desire on the part of the Court and the Ohio State Bar to ensure that Ohio's death penalty is administered in the most fair, efficient, and judicious manner possible.

Examination of the process by a broad-based task force of judges, prosecuting attorneys, criminal defense counsel, legislative leaders, and academics is appropriate to determine if the criteria, laws, and procedures regarding the imposition of the death penalty in Ohio are in need of attention. Is the system we have the best we can do? Convening persons with broad experience on this subject will produce a fair, impartial, and balanced analysis.

It should be made perfectly clear that the exercise to be undertaken is in no way a judgment on whether Ohio should or should not have the death penalty. This will not be in the charge to the Joint Task Force. The Task Force will examine the current laws on the subject, the practices in other jurisdictions, the data, costs, etc. It will review the ABA Death Penalty Report and identify areas in need of action and recommend the course of action.

We anticipate a Joint Task Force of approximately 20 members with diverse backgrounds in the criminal justice system, with expertise and experience in death penalty prosecution, defense, adjudication, and scholarship. The Joint Task Force will be chaired by Retired Judge James A. Brogan of the Second District Court of Appeals.

25. *Id.*

26. See generally JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY, FINAL REPORT AND RECOMMENDATIONS (2014) [hereinafter FINAL REPORT AND RECOMMENDATIONS],

<http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

27. *Id.* at 2.

28. Kenneth A. Brown, *Death Penalty Task Force Receives Charge*, OHIO ST. BAR ASS'N (Nov. 3, 2011), <http://www.ohiobar.org/ForPublic/PressRoom/Pages/Article-809.aspx>.

explicit that the Joint Task Force was to consider the *ABA Ohio Death Penalty Report* and recommend a course of action for the future.²⁹

Chief Justice O'Connor was adamant that the Joint Task Force not consider whether Ohio should or should not have the death penalty. She stated this in her remarks to the judiciary,³⁰ in the written invitation to join the Joint Task Force³¹ and written thanks for agreeing to serve on the Joint Task Force,³² and in her opening remarks to the Joint Task Force: "It should be made perfectly clear that the exercise to be undertaken is in no way a judgment on whether Ohio should or should not have the death penalty. This will not be in the charge to the Joint Task Force and not on the table for discussion."³³

Whether to continue having a death penalty is a critical question that many states have considered over the past ten years, since Chief Justice O'Connor first joined the Court. Several states abolished the death penalty in that time: New York, New Jersey, Illinois, New Mexico, Connecticut, and Maryland.³⁴ Notably, in Illinois, the Governor's Commission on Capital Punishment – formed to identify how to make the Illinois death penalty fair, just, and accurate – concluded by taking a vote on whether the death penalty should be abolished.³⁵

Chief Justice O'Connor's proscription against the Joint Task Force considering whether to abolish the death penalty is understandable. The ABA Ohio Death Penalty Assessment Team did not consider whether to abolish the death penalty: the charge to the ABA state assessment teams was to examine whether the individual state process was fair and accurate.³⁶ Further, an examination of whether to retain the death penalty

29. O'Connor, *supra* note 24.

30. *Id.*

31. Letter from Chief Justice Maureen O'Connor and Carol Seubert Marx, Pres., Ohio State Bar Ass'n, to author (Aug. 25, 2011) (on file with author).

32. Letter from Chief Justice Maureen O'Connor and Carol Seubert Marx, Pres., Ohio State Bar Ass'n, to author (Oct. 12, 2011) (on file with author).

33. O'Connor, *supra* note 24; Letter, *supra* note 31; Letter, *supra* note 32; Brown, *supra* note 28.

34. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Nov. 16, 2014).

35. REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT iii (2002). The report notes that the members focused on reforms to the death penalty because the punishment was lawful at the time in Illinois. *Id.* The Commission considered and voted on whether to abolish the death penalty "at the close of our work." *Id.* A narrow majority voted in favor of abolishing the death penalty. *Id.*

36. This focus was consistent with ABA policy which does not oppose the death penalty but maintains that if a state has the death penalty it must ensure that the system is fair and accurate. *See MODERN DEATH PENALTY*, *supra* note 11, at 1-2. Based on this policy, in 1997 the ABA called for a nationwide moratorium on executions until the identified flaws were eliminated. *Id.* at 2. Some

can distract from a serious conversation about how to make the current system fairer and more just. This presumes that the death penalty system can be made fair – and many would dispute that. But the fact of the matter is that Ohio has the death penalty.³⁷ Focusing only on the possible abolition of the death penalty could result in the persistence of unfair practices within the death penalty system instead of addressing how to fix those practices.

2. Composition of the Joint Task Force

The composition of the Joint Task Force was as important as the charge. The Joint Task Force began with 22 members: sitting and retired state appellate and common pleas judges, current county and state prosecutors, private and public defense attorneys, professors, state legislators, a representative from the Ohio Department of Rehabilitation and Correction, a county sheriff, and the Chair of the Ohio Public Defender Commission.³⁸ As Chief Justice O'Connor anticipated, this was a group with “diverse backgrounds in the criminal justice system, with expertise and experience in death penalty prosecution, defense, adjudication, and scholarship.”³⁹ In addition to representing all relevant players in the criminal justice system, the Joint Task Force had a broad geographic distribution – from the major cities of Cincinnati, Columbus, Cleveland, Dayton, and Toledo, to smaller towns like Batavia, St. Clairsville, Warren, and Urbana.

The participation of current prosecutors made the Joint Task Force distinctly different from the ABA Ohio Death Penalty Assessment

state assessment teams, based on their findings of a serious lack of fairness, recommended that the state temporarily suspend executions until the identified problems had been addressed. The Ohio team made this recommendation, although it was not unanimous. ABA OHIO DEATH PENALTY REPORT, *supra* note 9, at iii.

37. See OHIO REV. CODE ANN. § 2929.04 (West, Westlaw through Files 1 to 146 and Statewide Issue 1 of the 130th GA (2013-2014)).

38. The composition of the Joint Task Force changed over time—legislators lost seats in elections or resigned from the legislature, one member died, one member resigned for personal reasons. Some members were replaced, others were not. Two members were added from Cuyahoga County—a prosecutor and a common pleas judge—which made sense since Cuyahoga County accounts for a significant portion of Ohio’s and the country’s death row population. See Alan Johnson, *Hamilton, Cuyahoga Among 2% of U.S. Counties that fill up Death Row*, COLUMBUS DISPATCH (Oct. 3, 2013), <http://www.dispatch.com/content/stories/local/2013/10/02/majority-of-executions-from-2-percent-of-counties.html>; see also ANDREW WELSH-HUGGINS, NO WINNERS HERE TONIGHT: RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY’S BUSIEST DEATH PENALTY STATES 106-07, 109-14 (2009) (discussing Cuyahoga County prosecutors’ practices in seeking death sentences).

39. O’Connor, *supra* note 24.

Team.⁴⁰ The ABA Ohio Death Penalty Assessment Team did not have any power or influence to convince a current prosecutor to join the ABA's effort. However, as Chief Justice of the Ohio Supreme Court, O'Connor had the gravitas to influence current prosecutors to join the Joint Task Force. While the *ABA Ohio Death Penalty Report* presented a measured assessment of the Ohio death penalty system, I appreciated Chief Justice O'Connor's statement that "[c]onvening persons with broad experience on this subject will produce a fair, impartial and balanced analysis."⁴¹

3. Final Report and Recommendations

I am hopeful that the combination of the charge and the composition of the Joint Task Force will ensure that its recommendations will be taken seriously by all of the relevant bodies of law: the Court, the legislature, the Ohio Judicial College, prosecutors, and defense attorneys. Chief Justice O'Connor was eager to learn of the recommendations – she told me that chief justices of other state supreme courts were paying attention to the work of the Joint Task Force.

The Joint Task Force made 56 recommendations⁴² that touch on almost every aspect of the death penalty system. To protect the innocent, it recommends limits on when the prosecution may seek the death penalty.⁴³ To improve the quality of representation for defendants facing the death penalty, it proposes enhanced qualifications and training for defense attorneys as well as adequate funding for defense teams.⁴⁴ To

40. See *supra* notes 21-23 and accompanying text.

41. O'Connor, *supra* note 24. As became clear at the final meeting of the Joint Task Force, this was easier said than effectuated. At the last meeting, one prosecutor indicated that some of the prosecutors had agreed to participate as members of the Joint Task Force with the understanding, from the beginning, that they would file a dissenting report. Some, but not all, of the prosecutors did just that. See generally JOE DETERS, RON O'BRIEN & STEPHEN SCHUMAKER, DISSENTING REPORT FROM MEMBERS OF THE JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY (2014), <http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/dissentingReport.pdf>.

42. See generally *id.*

43. *Id.* at 10.

[17] Enact legislation that maintains that a death sentence cannot be considered or imposed unless the state has either: 1) biological evidence or DNA evidence that links the defendant to the act of murder; 2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or 3) a video recording that conclusively links the defendant to the murder; or 4) other like factors as determined by the General Assembly.

[18] Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently corroborated at the guilt/innocence phase of the death penalty trial.

44. *Id.* at 7-9.

eliminate racial and geographic disparities, it recommends changing how prosecutors may seek the death penalty and in which cases they may do so.⁴⁵ Finally, to address protections for those who should not be subject to the death penalty, it recommends excluding those who are mentally ill.⁴⁶

[11] Adopt the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

[12] Adopt the Supplementary Guidelines for the Mitigation Function of Defense Team in Death Penalty Cases. This recommendation is not meant, however, to alter the standard adopted in *Strickland v. Washington*.

[14] It is specifically recommended that increased funding be provided to the Office of the Ohio Public Defender, by statute, to allow for additional hiring and training of qualified capital case defense attorneys, who could be made available to all Ohio counties, except in circumstances where a conflict of interest occurs, at which time a separate list of prospective appointed counsel would be provided.

[15] The Ohio legislature and Supreme Court of Ohio should implement and fund a statewide public defender system for representation of indigent persons in all capital cases for trials, appeals, post-conviction, and clemency except where a conflict of interest arises. In cases of conflicts of interest, qualified Rule 20 counsel shall then be appointed.

[16] Enact legislation to provide that private defense counsel appointed to represent death eligible defendants or those sentenced to death are equally paid throughout the state regardless of the location of the offense.

45. *Id.* at 14-15.

[33] Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts seven percent of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary.

[34] To address cross jurisdictional racial disparity, it is recommended that Ohio create a death penalty charging committee at the Ohio Attorney General's Office. It is recommended that the committee be made up of former county prosecutors, appointed by the Governor, and members of the Ohio Attorney General's staff. County prosecutors would submit cases they want to charge with death as a potential punishment. The Attorney General's office would approve or disapprove of the charges paying particular attention to the race of the victim(s) and defendant(s).

[35] Enact legislation allowing for racial disparity claims to be raised and developed in state court through a Racial Justice Act with such a claim being independent of whether the client has any other basis for filing in that court.

46. *Id.* at 6.

[8] Enact legislation to consider and exclude from eligibility for the death penalty defendants who suffered from "serious mental illness," as defined by the legislature, at the time of the crime.

Appropriate questions for the legislature to consider include:

1. Whether "serious mental illness" is causally related to the crime?
2. Whether the determination of "serious mental illness" should be considered before trial or at some other time as determined by the legislature?
3. Whether this issue is already adequately addressed by current law?

[9] Enact legislation to exclude from eligibility for the death penalty defendants who

I anticipate that Chief Justice O'Connor will agree with many, but not all, of our recommendations. Regardless, I applaud her leadership in calling for this examination of the death penalty in Ohio.

III. CONCLUSION

Maureen O'Connor is the first woman Chief Justice in Ohio. She is also the first and, to date, the only chief justice of a state supreme court to call for an examination of a state's death penalty system in light of findings made by an ABA state assessment team.⁴⁷ These two facts are not necessarily related. But I believe they show Chief Justice O'Connor's willingness to confront, from the very beginning of her tenure, the difficult issue of the death penalty in Ohio and, thus, her willingness and ability to lead as a woman and as the Chief Justice of a state supreme court.

suffer from "serious mental illness" at the time of execution.

47. In other states, other governmental bodies and statewide organizations have called for further inquiry into the state death penalty systems. In Tennessee, the legislature created a commission to further study the state's death penalty. *See Death Penalty Reform Bills Introduced in Tennessee*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-reform-bills-introduced-tennessee> (last visited Nov. 16, 2014). The Florida Supreme Court referred to findings of the ABA Florida Death Penalty Assessment Report when it promulgated revised jury instructions. *See In Re: Standard Jury Instructions in Criminal Cases-Report No. 2005-2 / In Re: Standard Jury Instructions in Criminal Cases-Penalty Phase of Capital Trials*, Nos. SC05-960 & SC05-1890, slip op. at 3 (Fla. Oct. 29, 2009). The Florida Bar Association has also called for a study in light of the report. E-mail from Sarah Turberville, former Dir., ABA Death Penalty Due Process Review Project, to author (Feb. 11, 2014, 10:09 AM) (on file with author). In Kentucky, the state Human Rights Commission called on the state to repeal the death penalty in light of the ABA Kentucky Death Penalty Assessment Report; the Kentucky Criminal Rules Committee is reviewing the report to identify court rules that should be changed; and the Kentucky Criminal Defense Association called for a suspension of executions in light of the report. *Id.* In Indiana, the legislature established the Bowser Commission to study applying the death penalty to the mentally ill in light of the ABA Indiana Death Penalty Assessment Report. *Id.*; *see also Intolerable Executions*, J. GAZETTE, Jul. 12, 2007, available at 2007 WLNR 13345150.