



Findings and Recommendations

Chapter 1: Overview

Overall Recommendation:

In light of the extensive information gathered from this year-long, in-depth study, the Commission members unanimously recommend that the current moratorium on the death penalty be extended until significant reforms have been accomplished.

Chapter 2: Forensics Recommendations

Recommendation 1:

Oklahoma should adopt the forensics reform recommendations of the 2013 Oklahoma Justice Commission report that have not yet been implemented.

Recommendation 2:

Oklahoma should follow best practices with respect to certification of forensics experts.

Recommendation 3:

With respect to capital cases, the Legislature should amend Oklahoma law to require that all biological evidence, and any evidence that may be the source of biological evidence, be retained until 60 days after the death of the inmate. Sources of biological evidence that may fall outside of the existing statute include, but are not limited to, clothing, ligatures, bedding, drinking containers, and cigarettes.

Recommendation 4:

The Oklahoma Supreme Court's judicial training sessions for judges should include forensics training, including updates regarding developments in commonly used forensics fields.

Recommendation 5:

Oklahoma should provide an avenue for post-conviction relief based on changing science that casts doubt on either the accuracy of an inmate's conviction or the evidence used to obtain a sentence of death.

Chapter 3: Innocence Protection Recommendations

Recommendation 1:

Courts should exercise their gatekeeping authority to permit, in appropriate cases, qualified expert testimony on the limitations and use of eyewitness testimony.

Recommendation 2:

In cases in which expert testimony on eyewitness identification is allowed, the Oklahoma Uniform Jury Instructions should be amended to direct the jury to consider such expert testimony.

Recommendation 3:

Law enforcement agencies should have written procedures that follow best practices techniques called for by current scientific research. These best practices techniques should, at a minimum, include the following:

- (a) Law enforcement agencies should use double-blind procedures or the official should be “blinded” when conducting photo arrays and live lineups.
- (b) In lineups and photo arrays, non-suspect fillers should resemble the suspect (clothing, build, characteristics, etc.).
- (c) In lineups and photo arrays, officials should be required to document the procedure (by video, or if video is not possible, by audio recording), and the procedure should include written instructions for the official to read to the eyewitness. The written instructions should seek a statement from the eyewitness (either a written or recorded verbal statement) noting his or her degree of confidence at the time of any identification.
- (d) Law enforcement agencies should use sequential—not simultaneous—lineups and photo arrays.
- (e) Law enforcement agencies should eliminate the use of show-ups (when a single suspect is presented).

Recommendation 4:

Training on the limitations of eyewitness identification should be required of law enforcement, prosecutors, and defense counsel. Law enforcement agencies should regularly schedule ongoing training and update procedures (at least annually) according to the latest studies and research regarding eyewitness identification.

Recommendation 5:

Law enforcement officials should record the entire interrogation of any suspect or potential suspect in a homicide case, including any representations or promises made to the person interviewed. There should be a rebuttable presumption of inadmissibility if an entire interrogation is not recorded.

Recommendation 6:

Law enforcement officials should receive training that is consistent with best practices for interrogation techniques to help prevent wrongful convictions, such as “information gathering” interrogation methods, and should encourage a culture that enforces following best practices.

Recommendation 7:

When the state intends to offer testimony from a jailhouse informant, the trial court should hold a pre-testimony reliability hearing to determine the admissibility of the jailhouse informant’s testimony. Such testimony should be excluded in its entirety if it is found to be unreliable by the trial court. If the trial court finds that the proposed jailhouse informant testimony is reliable and admissible, the judge should still give the appropriate cautionary jury instruction.

Recommendation 8:

Training on reliability issues surrounding jailhouse informant testimony and the discovery requirements for jailhouse informants—as set forth by the Oklahoma Court of Criminal Appeals in *State v. Dodd*—should be provided for defense attorneys, prosecutors, and judges.

Recommendation 9:

The Legislature should create a system of adequate compensation, separate from The Governmental Tort Claims Act, for those who have been convicted of murder and sentenced to death and who are subsequently exonerated. Compensation for those wrongfully convicted and placed on death row should be indexed to the federal level. The current cap on compensation should be eliminated. The compensation should be available regardless of the plea entered in the case, and the compensation should be exempt from state taxes. The compensation should apply to future exonerations, regardless of the date of conviction. Any compensation for a wrongful conviction should be filed as a public record.

Recommendation 10:

Legislation should be enacted to require the immediate update of an exonerated defendant’s government records, including immediate expungement of any conviction that has been vacated, set aside, or overturned, notwithstanding existing statutes.

Chapter 4: Role of the Prosecution Recommendations**Recommendation 1:**

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

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.

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.

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.

Chapter 5: Role of the Defense 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.

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.

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.

Recommendation 4:

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

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.

Chapter 6: Jury Issues Recommendations

Recommendation 1:

In a capital case, the state and the defendant should be guaranteed the right to individual voir dire upon request.

Chapter 7: Role of the Judiciary Recommendations

Recommendation 1:

Oklahoma judges should receive regular training on the trial of capital cases.

Recommendation 2:

Oklahoma law should be amended to clearly provide that failure to raise extra-record claims within a direct capital appeal will not constitute waiver of those same claims on capital post-conviction review.

Recommendation 3:

To obtain discovery by order of the Oklahoma Court of Criminal Appeals within either a direct appeal or a post-conviction proceeding, counsel for a death-sentenced inmate should be required to show only good cause for the requested discovery.

Recommendation 4:

The Legislature should amend Oklahoma law so that capital direct appeals and state post-conviction proceedings run consecutively, rather than concurrently; and a defendant's initial application for post-conviction relief should be filed with the Oklahoma Court of Criminal Appeals within one year from the date on which the Oklahoma Court of Criminal Appeals issues its decision and mandate on the defendant's direct appeal in the case.

Chapter 8: Death Eligibility Recommendations

Recommendation 1:

Because it is unconstitutional to execute a defendant who is intellectually disabled/mentally retarded, a defendant should be required to prove his or her intellectual disability/mental retardation only by a preponderance of the evidence, regardless of whether the determination is made by a judge or a jury and regardless of whether the determination is made before or during the defendant's murder trial.

Recommendation 2:

In light of *Hall v. Florida*, Oklahoma law and the Oklahoma Uniform Jury Instructions should be amended to clarify that capital defendants must be permitted to attempt to establish their ineligibility for a death sentence on the basis of intellectual disability/mental retardation if they have at least one IQ score in the range of 71–75 or lower. In addition, capital defendants with at least one IQ score of 75 or less should be permitted to attempt to establish intellectual disability/mental retardation regardless of whether they have one or more IQ scores of 76 or higher.

Recommendation 3:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to permit persons other than the warden to raise the issue of the condemned inmate's competency to be executed. The prosecution, the condemned inmate's counsel, the inmate's legal guardian, the warden of the facility where the inmate is incarcerated, or a court sua sponte should all be allowed to raise the issue of the inmate's competency to be executed, pursuant to the standards set forth in *Ford v. Wainwright* and *Panetti v. Quarterman*.

Recommendation 4:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to provide that if it can be shown by a preponderance of the evidence that a condemned inmate is incompetent/insane, the state should not be allowed to execute that inmate. If such a finding is made, the state should only be subsequently allowed to execute the inmate if it is able to show, by a preponderance of the evidence at a later evidentiary hearing, that the defendant has become competent to be executed.

Chapter 9: Clemency Recommendations

Recommendation 1:

The composition of the Oklahoma Pardon and Parole Board should be more open and should not be restricted to individuals with experience in the criminal justice field.

Recommendation 2:

The Oklahoma Pardon and Parole Board should compose, adopt, and publish substantive guidelines on the exercise of its clemency powers.

Recommendation 3:

The Oklahoma Pardon and Parole Board should create guidelines for recusal of any member who may have a conflict of interest in evaluating a condemned inmate's petition for clemency.

Recommendation 4:

Condemned inmates should have the option to listen to and watch (via closed-circuit television) the entire presentation of their clemency petition to the Oklahoma Pardon and Parole Board.

Recommendation 5:

The members of the Oklahoma Pardon and Parole Board should engage in a deliberative process before voting on a condemned inmate's petition for clemency.

Chapter 10: Execution Process Recommendations

Recommendation 1:

Oklahoma should adopt the most humane and effective method of execution possible, which currently appears to be the one-drug (barbiturate) lethal injection protocol. Oklahoma should develop a process for continuous review of its execution protocol to ensure that the state is using the most humane and effective method possible.

Recommendation 2:

The Oklahoma Department of Corrections should revise its execution protocol to provide clear direction to department personnel involved in preparing for and carrying out executions. These revisions should, at minimum, provide comprehensible definitions for potentially ambiguous terms within the protocol and specify who within the department's chain of command has the authority and responsibility to perform critical steps in the execution process.

Recommendation 3:

With respect to lethal injection as an execution method, the Oklahoma Department of Corrections should amend its written execution protocol to require verification—at the point of acquisition and at all stages of the execution process—that the proper drug(s) for carrying out the execution have been obtained and will be used in any execution. The protocol should prohibit drug substitutions not specified within the protocol itself and should require that all drug purchases be in writing. If necessary to protect the confidentiality of suppliers, the Legislature should amend Oklahoma law to exempt the order form and related documents from disclosure.

Recommendation 4:

All government personnel involved in carrying out an execution, as well as those individuals contracted with the government to provide services related thereto, should be thoroughly trained and evaluated on all relevant aspects of the Oklahoma Department of Corrections' execution protocol.

Recommendation 5:

The director of the Oklahoma Department of Corrections (ODOC) should deliver to the governor, at least 48 hours prior to any scheduled execution, a written, signed certification that the director has confirmed that all aspects of the execution protocol have been followed, including: ensuring that all personnel who will participate in the upcoming execution have been adequately trained and prepared; ensuring that the necessary equipment and facilities that will be used are adequate and satisfy the standards promulgated within ODOC's execution protocol; and ensuring that any drugs that will be used have been obtained pursuant to and are consistent with ODOC's execution protocol.

Recommendation 6:

In the event that lethal injection will be used to carry out the execution of a condemned inmate, the inmate should be provided written notice as to which drug(s) will be used at least 20 days prior to the scheduled execution.

Recommendation 7:

Following any execution, an independent third party should conduct a thorough quality assurance review to determine whether state laws, regulations, and protocols were properly followed before, during, and immediately after the execution. It is important that the independent third party be required to maintain the confidentiality of any sources for information. The independent third party's findings should be communicated in a timely fashion to the Oklahoma Department of Corrections, the Oklahoma Legislature, and the governor's office, while also being made available to the public.