



**Suggested List of Themes Report on the Death Penalty in the United States of America
Submitted by The Advocates for Human Rights,
a non-governmental organization in special consultative status with ECOSOC since 1996
The World Coalition Against the Death Penalty, The Puerto Rican Coalition Against the
Death Penalty, and Witness to Innocence**

for the 107th Session of the UN Committee on the Elimination of Racial Discrimination (8–30
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Founded in 1983, **The Advocates for Human Rights** (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact-finding, direct legal representation, education and training, and publication. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

The World Coalition Against the Death Penalty, an alliance of more than 160 NGOs, bar associations, local authorities and unions, was created in Rome on May 13, 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

The **Puerto Rican Coalition Against the Death Penalty** (PCADP) is a non-party, non-sectarian organisation incorporated in Puerto Rico in March 2005 to promote the elimination of the capital punishment. The PCADP aims to join efforts among the different abolitionist organisations and activists in Puerto Rico. Its Statement of Principles emphasizes that it does not believe in the impunity of a crime and identifies with the pain of the families of both the victims and the accused. It rejects the death penalty inside and outside Puerto Rico. The PCADP aims at excluding Puerto Rico from the scope of the Federal Death Penalty Act, as is the case for other federal laws. It also intends to mark its opposition in every case in which death penalty certification is to be requested by federal prosecutors in Puerto Rico. The PCADP has been a member of the World Coalition since 2006. As of June 2007, the PCADP was composed of more than 40 religious, political, student, community, labor union, professional, and human rights advocacy organisations.

Witness to Innocence is the organization of, by and for death row exonerees, committed to ending

the death penalty.

EXECUTIVE SUMMARY

1. The Committee last reviewed the United States' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination in 2014. Among the 2014 Concluding Observations are two recommendations relevant to this Report.
2. The Committee stated that it “remain[ed] concerned that members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately arrested, incarcerated and subjected to harsher sentences, including life imprisonment without parole and the death penalty.” Among other things, the Committee encouraged “[a]mending laws and policies leading to racially disparate impacts in the criminal justice system ... and implementing effective national strategies or plans of action aimed at eliminating structural discrimination.” The Committee specifically encouraged “[i]mposing a moratorium on the death penalty, at the federal level, with a view to abolishing the death penalty.”¹
3. The Committee also commented on “the ongoing challenges faced by indigent persons belonging to racial and ethnic minorities to access legal counsel in criminal proceedings in practice.” The Committee encouraged the adoption of “all necessary measures to eliminate the disproportionate impact of systemic inadequacies in criminal defence programmes on indigent defendants belonging to racial and ethnic minorities, including by improving the quality of legal representation provided to indigent defendants.”²
4. This report addresses the United States' compliance with its human rights obligations under the Convention with regard to the death penalty, including with respect to those areas identified in the Committee's 2014 Concluding Observations as described above.

The United States fails to uphold its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination

I. The Death Penalty

5. The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.” The Fifth Amendment states that no person shall “be deprived of life . . . without due process of law.” In 2008, the U.S. Supreme Court ruled that, “[a]s it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken.”³

Federal death penalty law

6. At the federal level, the death penalty is available for a wide variety of crimes, including crimes that do not necessarily entail an intentional killing. For example, several crimes “resulting in death” are eligible for the death penalty, including harboring certain aliens,⁴ destruction of aircraft or motor vehicles,⁵ or civil rights offenses.⁶ Treason and espionage are

¹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America, adopted by the Committee at its 2317th session* (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 20.

² *Id.* ¶ 23.

³ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁴ 8 U.S.C. § 1342(B)(iv).

⁵ 18 U.S.C. §§ 32-34.

⁶ 18 U.S.C. §§ 241, 242, 245, 247.

also capital crimes, regardless of whether they result in death.⁷ Trafficking in large quantities of drugs is a capital crime.⁸

7. Racial and ethnic minorities account for 77% of individuals on death row at the federal level.⁹ As of the end of 2020, 21 of the 51 people on federal death row were Black, and 7 were Hispanic.¹⁰ The United States' Tenth to Twelfth Periodic Report states that the Justice Department "continues to take great precautions to ensure that decisions to seek the death penalty at the federal level are not based on factors that include race or national origin."¹¹ Yet federal authorities continue to seek the death penalty disproportionately in prosecutions of members of racial and ethnic minority groups. Prior to 2020, the federal government had not executed anyone since 2003,¹² although the Justice Department continued to seek the death penalty during that time.¹³ Between 1988 and September 29, 2021, the federal government had taken to trial a total of 208 federal death penalty cases involving 305 defendants in 239 trials.¹⁴ During that same period, of the total number of defendants against whom the Justice Department authorized prosecutors to request the death penalty, 28% have been non-Hispanic White, 18% have been Hispanic, 49% have been Black, and 5% have been other races or ethnic groups.¹⁵
8. Federal authorities often disregard local objections to the death penalty, a practice that has particular salience in jurisdictions with large populations of racial and ethnic minorities. One of the individuals that federal authorities recently executed was a member of the Navajo Nation, Lezmond Mitchell.¹⁶ Mitchell was the only indigenous person on federal death row. At the time of Mitchell's trial, Navajo Nation officials had urged the federal government not to pursue the death penalty. The U.S. Attorney General insisted on seeking the death penalty, despite recommendations from the federal prosecutor and the Navajo Nation not to seek it. In the weeks leading up to his execution, Navajo Nation leaders unsuccessfully implored the federal government to commute Mr. Mitchell's sentence.
9. After a 17-year de facto moratorium on executions by the federal government, the federal government resumed executions in 2020 following Attorney General William Barr's 2019 direction to the Federal Bureau of Prisons to adopt an addendum to the Federal Execution

⁷ 18 U.S.C. §§ 794, 2381.

⁸ 18 U.S.C. § 3591(b).

⁹ ACLU, *Race and the Death Penalty*, accessible at [aclu.org/other/race-and-death-penalty](https://www.aclu.org/other/race-and-death-penalty) (last accessed March 16, 2022).

¹⁰ *Capital punishment, 2020 – Statistical tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Dec. 2021, at 10, 13, <https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf>.

¹¹ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (20 Dec. 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 116 [hereinafter U.S. Tenth to Twelfth Periodic Report].

¹² Federal Government Resumes Executions After 17-Year Hiatus, Executes Seven Prisoners in Three Months, AMERICAN BAR ASSOCIATION, available at https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/federal-government-executes-seven-in-three-months/ (last visited March 19, 2022).

¹³ Kelley Czajka, *How Does the Federal Death Penalty Work?* PACIFIC STANDARD, Jul 25, 2019, available at <https://psmag.com/news/how-does-the-federal-death-penalty-work> (last visited March 19, 2022).

¹⁴ Current Statistics re Use of Federal Death Penalty, DEATH PENALTY INFORMATION CENTER, available at <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> (last visited March 19, 2022).

¹⁵ *Ibid.*

¹⁶ Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, NY Times (Aug. 26, 2020) (available at <https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html>) (last accessed March 16, 2022).

Protocol and schedule executions.¹⁷ The federal government executed 13 individuals between July 14, 2020 and January 16, 2021.¹⁸ Of those, seven were racial or ethnic minorities.¹⁹

10. The Tenth to Twelfth Periodic Report also notes that the current administration supports legislatively ending the federal death penalty.²⁰ Indeed, after the change in administration in January 2021, Attorney General Merrick Garland issued a moratorium on federal executions on July 1, 2021, stating that the Justice Department will need to review the policies and procedures previously implemented to ensure that the Department maintains their “commitment to fairness and humane treatment in the administration of existing federal laws governing capital sentences.”²¹

Puerto Rico and the federal death penalty

11. According to the U.S. Census, 98.7% of the population of Puerto Rico is Hispanic, and only 1% of the population is non-Hispanic and White.²²
12. Puerto Rico has been a non-incorporated territory of the United States under the Territorial Clause of the U.S. Constitution since 1898. Federal laws and regulations widely apply to Puerto Rico if they are not locally inapplicable or if Congress does not expressly exclude Puerto Rico from their application.
13. Puerto Rico abolished the death penalty by statute on April 26, 1929.²³ In 1952, when Puerto Rico drafted and ratified its Constitution, it explicitly prohibited capital punishment.²⁴ The U.S. Congress amended the draft constitution but did not amend the provision prohibiting the death penalty. Puerto Rico thus became one of the first jurisdictions in the world to ban the death penalty in its constitution.²⁵
14. The Tenth to Twelfth Periodic Report notes that, “U.S. territories are governed by federal laws, such as equal employment laws and voting rights laws, which are enforced by the federal government. Territories are also governed by their own territorial laws, which must not contravene federal law.”²⁶

¹⁷ DEPARTMENT OF JUSTICE, Office of Public Affairs, *Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse*. UNITED STATES (July 25, 2019), available at <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> (last visited March 19, 2022).

¹⁸ Executions Under the Federal Death Penalty, DEATH PENALTY INFORMATION CENTER, available at <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty> (last visited March 19, 2022).

¹⁹ Execution Database, Death Penalty Information Center, available at <https://deathpenaltyinfo.org/executions/execution-database> (last visited April 26, 2022).

²⁰ U.S. Tenth to Twelfth Periodic Report ¶ 116.

²¹ DEPARTMENT OF JUSTICE, Attorney General Merrick Garland, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, July 1, 2021, available at <https://www.justice.gov/opa/page/file/1408636/download> (last visited March 23, 2022).

²² United States Census Bureau, *Puerto Rico Quick Facts*, <https://www.census.gov/quickfacts/fact/table/selahcitywashington/PST045219> (accessed April 19, 2022).

²³ See Act of Apr. 26, 1929, No. 42, § 1, 1929 P.R. Laws 232 (“The death penalty is hereby definitively abolished in Porto Rico.”). See also Elizabeth Vicens, *Application of the Federal Death Penalty Act in Puerto Rico: A New test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005). The last execution in Puerto Rico took place on Sept. 15, 1927.

²⁴ P.R. CONST. art. II, § 7.

²⁵ AMNESTY INTERNATIONAL, *Constitutional prohibitions of the death penalty* (Apr. 2005), AI Index: ACT 50/009/2005, available at <https://www.amnesty.org/en/documents/act50/009/2005/en/> (last accessed March 16, 2022).

²⁶ U.S. Tenth to Twelfth Periodic Report ¶ 136.

15. Despite Puerto Rico’s longstanding opposition to the death penalty, people in Puerto Rico can be sentenced to death for federal crimes. The Federal Death Penalty Act of 1994²⁷ did not exclude Puerto Rico from its application, although Congress had previously approved Puerto Rico’s Constitution prohibiting the death penalty, and courts have concluded that the FDPA applies to the territory.²⁸ The people of Puerto Rico therefore exist in a “democratic void,” unable to seek adequate political or legal recourse due to their lack of representation in the federal government. In April 2019, a federal judge acknowledged that the “total disenfranchisement of United States Citizens in Puerto Rico within our National government is a historical fact that is not in dispute.”²⁹ The court concluded that electoral disenfranchisement of Puerto Ricans was “without question undemocratic and unacceptable,” but held that it was not an unconstitutional violation of due process.³⁰
16. Puerto Ricans have consistently rejected the death penalty. Although the local political spectrum is largely divided, there is near-universal opposition to capital punishment among political and religious groups, as well as civil society in Puerto Rico, as reflected by R.S. 079/2019, a unanimously adopted Resolution by the Puerto Rican Senate on the 90th Anniversary of the Abolition of Capital Punishment in Puerto Rico.
17. Federal prosecutors seek the death penalty in Puerto Rico at higher rates than in other jurisdictions. Between 1998 and April 2021, the Department of Justice authorized the certification of 539 death penalty cases throughout the United States³¹ Of these cases, roughly five percent were in Puerto Rico,³² although Puerto Rico accounts for less than one percent of the U.S. population.³³
18. Moreover, a defendant being prosecuted for a capital offense in Puerto Rico is not guaranteed a jury of the defendant’s peers. Only individuals who can speak, “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” can serve as jurors in federal court.³⁴ This requirement excludes 80%–

²⁷ See Pub. L. 103-322, Title VI, Sections 60001-26 (Sept. 13, 1994), 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–3598). The federal crimes carrying the threat of capital punishment include murder during a carjacking, during a bank robbery, and while using an illegal weapon, along with various drug-related crimes and espionage or treason.

²⁸ See *U.S. v. Pedro Vidal*, 371 F. Supp. 3d 57 (D.P.R. 2019); *U.S. v. Acosta-Martínez*, 252 F.3d 13 (1st Cir. 2001).

²⁹ *Pedro-Vidal*, 371 F. Supp. 3d at 58 (emphasis in original).

³⁰ *Id.* at 59.

³¹ FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Declaration of Kevin McNally regarding the geographic location of federal cases, the frequency of authorizations, death sentences and executions and the race and gender of defendants and victims* (April 26, 2021) available at https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/race__gender/declaration_location_and_frequency_of_capital_prosecutions_and_racegender_of_defendants_and_victims_mcnally_april_2021.pdf (last accessed March 22, 2022).

³² *Ibid.*

³³ The estimated population of the United States is approximately 331 million, while the population of Puerto Rico is 3.2 million. UNITED STATES CENSUS BUREAU, *Annual Estimates of the Resident Population Estimates*, available at <https://data.census.gov/cedsci/table?q=United%20States&g=0400000US72&tid=DECENNIALPL2020.P1> (last accessed March 16, 2022).

³⁴ 28 U.S.C. § 1865(b) (2006); Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualifications of jurors in the United States District Court for the District of Puerto Rico); *United States v. Candelario-Santana*, 356 F. Supp. 3d 204, 208 (D.P.R. 2019) (rejecting challenge to English language requirement for jurors in death penalty cases).

90% of Puerto Ricans.³⁵ Defendants in these capital cases come from an array of racial and socio-economic backgrounds, but all are Puerto Rican.³⁶

State death penalty laws and practices

19. Despite the Supreme Court decision referenced in paragraph 5, states may impose the death penalty in cases in which the defendant did not kill “but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.”³⁷ Under the “felony murder” rule or “law of parties,” a person may be convicted of murder (and in some states sentenced to death) if the person participated in a felony during which a victim died at the hands of another participant.³⁸ In 2018, Texas executed Joseph Garcia, a Hispanic man, under such a provision.³⁹
20. In nearly every state that retains the death penalty, there is a documented pattern of discrimination based on the race of the victim, the race of the defendant, or both.⁴⁰ Approximately 34% of all persons executed since 1976 have been Black, while Black persons make up approximately 13% of the population. In capital cases, approximately 75% of the victims were White, even though approximately 50% of murder victims are White.⁴¹ According to the Equal Justice Initiative, 41% of people currently under a sentence of death in the United States are Black.⁴²
21. In October 2018, the Supreme Court of the State of Washington struck down that state’s death penalty law based on convincing data of racial bias, finding that courts had imposed the death penalty arbitrarily.⁴³
22. As of January 2022, 50% of the death row population in Alabama is comprised of racial or ethnic minorities; 73% of the death row population in Texas is comprised of racial or ethnic minorities; 45% of the death row population in Florida is comprised of racial or ethnic

³⁵ See generally Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497; see also U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Puerto Rico: 2009-2013* (Oct. 2015), available at <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>

³⁶ Correspondence with the Puerto Rican Coalition Against the Death Penalty, May 12, 2022, on file with The Advocates for Human Rights.

³⁷ *Ibid.*

³⁸ Death Penalty Information Center, *Executed But Did Not Directly Kill Victim*, <https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim> (last visited Sept. 29, 2019).

³⁹ Keri Blakinger, *‘Texas 7’ escapee fights death sentence as Dec. 4 execution nears*, Houston Chronicle, Nov. 23, 2018, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-Seven-escapee-fights-death-sentence-13413007.php> (last visited Sept. 29, 2019). See also Texas Department of Criminal Justice, *Death Row Information: Executed Inmates*, https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last visited May 11, 2022).

⁴⁰ Equal Justice Initiative, *Race and Poverty* (Washington D.C., 2022), www.eji.org/death-penalty/race-and-poverty (last visited March 16, 2022).

⁴¹ *Death Penalty Information Center, Facts about the death penalty*, February 22, 2022, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited March 16, 2022).

⁴² Equal Justice Initiative, *Race and Poverty*, supra note 40.

⁴³ *State v. Gregory*, 192 Wash. 2d, 427 P.3d 621 (2018); Garrett Epps, *How Statistics Doomed Washington State’s Penalty*, Atlantic (Oct. 14, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/how-statistics-doomed-washington-states-death-penalty/572968/>, archived at <https://perma.cc/H3Z5-GNQQ>.

minorities; and 67% of the death row population in California is comprised of racial or ethnic minorities.⁴⁴

II. Prohibition against torture and cruel, inhuman, or degrading treatment

Methods of execution

23. All but one of the 27 states that retain the death penalty have adopted lethal injection as the exclusive or primary means of execution.⁴⁵ Many people who are executed are subject to torture or cruel, inhuman, or degrading treatment. Such treatment may be caused by unqualified members of the execution team failing to properly insert an intravenous catheter for administering drugs, or by the drugs themselves.⁴⁶
24. For example, in October 2021, John Marion Grant, a Black man, was executed using a three-drug protocol. After Grant was given the first drug, midazolam, witnesses reported that he “convulsed and vomited for several minutes, leading members of the execution team to wipe the vomit from his face and neck.” According to one observer, “He began convulsing about two dozen times” and then “he began to vomit, which covered his face.” Midazolam had previously been linked to botched executions in Oklahoma. Dale Baich, an attorney representing several persons on death row, stated: “It’s the third time in three tries by Oklahoma using midazolam that things did not go the way the state said they would go.” Political scientist Austin Sarat commented: “[w]hen midazolam is used, as it is in Oklahoma’s current protocol, [the rate of botched executions] skyrockets to 22.4 percent.”
25. Texas recently carried out an execution without the presence of the media, following a series of botched executions in other states.⁴⁷

Detention conditions

26. People under sentence of death are typically held in solitary confinement, contrary to Nelson Mandela Rules 43-45 governing the treatment of prisoners. As of late 2020, twelve states housed people sentenced to death in indefinite solitary confinement.⁴⁸ Since 2017, an additional five states ended mandatory solitary confinement after they were sued for

⁴⁴ DEATH PENALTY INFO. CENTER, “Overview: Racial Demographics” accessed Apr. 25, 2022, <https://deathpenaltyinfo.org/death-row/overview/demographics>.

⁴⁵ *States and Capital Punishment*, National Conference of State Legislatures, <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> (last visited March 28, 2022).

⁴⁶ Death Penalty Information Center, *Behind the Curtain: Secrecy and the Death Penalty in the United States* (Washington D.C., 2018), by Robin Konrad, Robert Dunham and Ngozi Nduluw, <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> (last visited March 28, 2022), 12.

⁴⁷ Jolie McCullough, *For the first time in more than 40 years, media were not allowed to witness a Texas execution*, Texas Tribune, May 20, 2021, <https://www.texastribune.org/2021/05/20/texas-quintin-jones-execution-media/> (last visited March 20, 2022).

⁴⁸ Merel Pontier, *Cruel but not Unusual the Automatic Use of Indefinite Solitary Confinement on Death Row: A Comparison of the Housing Policies of Death-Sentenced Prisoners and Other Prisoners Throughout the United States*, 26 TEX. J. ON C.L. & C.R. 117 (2020) (Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Mississippi, Nevada, Oklahoma, South Dakota, Texas, and Wyoming accounted for 953 death-row prisoners, or 38.6% of those on death row nationwide at the end of 2020. The other five states that ended mandatory solitary confinement are Arizona, Louisiana, Pennsylvania, South Carolina, and Virginia.).

unconstitutional death row conditions.⁴⁹ More than half of the people currently on death row are incarcerated pursuant to death sentences imposed more than 20 years ago.⁵⁰

27. People on death row are alone in their cells for the vast majority of the time, including for all meals.⁵¹ Approximately 60% of people who are on death row in the United States are isolated for 20 or more hours per day.⁵²
28. In 2019, one appellate court recognized “expert evidence establishing the risks and serious adverse psychological and emotional effects of prolonged solitary confinement” on Virginia’s death row.⁵³ On Texas’ death row, people spend up to 23 hours a day alone in a small cell and have little or no human contact (no contact visitation rights) or even exposure to natural light.⁵⁴ On Oklahoma’s death row, people live in conditions “that effectively constitute a dim underground bunker; there are no windows to the outside world from the cells and thus no natural light or air. [Death row] is an electronically controlled facility designed to minimize contact between the men incarcerated in the unit and prison staff.”⁵⁵ In September 2019, the interim director of the Oklahoma Department of Corrections agreed to move “qualifying” prisoners out of the unit, after civil society organizations threatened a lawsuit.⁵⁶
29. In May 2009, Oklahoma prison authorities terminated a program allowing people on death row to attend congregate religious services, in violation of the federal Religious Land Use and Institutionalized Persons Act.⁵⁷ In March 2022, however, the Supreme Court held in *Ramirez v. Collier* that a person on death row in Texas “likely has the right to have his Baptist pastor touch and audibly pray over him as he is put to death,” a practice prohibited under rules that violated the Act.⁵⁸ In many jurisdictions, people under sentence of death do not have access to educational, vocational, or rehabilitation programs.⁵⁹

⁴⁹ *Ibid.*

⁵⁰ Tracy L. Snell, *Capital Punishment, 2020 – Statistical Tables*, U.S. Department of Justice – Office of Justice Programs – Bureau of Justice Statistics, December 2021, available at <https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf> (last visited March 24, 2022).

⁵¹ Gabriella Robles, *Condemned to Death—And Solitary Confinement*, The Marshall Project, July 23, 2017, <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (last visited March 13, 2022).

⁵² *Ibid.*

⁵³ *Porter v. Clarke*, No. 18-6257, slip op. at 10 (4th Cir. May 6, 2019), available at https://files.deathpenaltyinfo.org/legacy/files/pdf/PorterVClark_4Cir_DeathRowConditionsOpinion_2019-05-03.pdf.

⁵⁴ Robles, *supra* note 51.

⁵⁵ ACLU Oklahoma, letter to Scott Crow, Interim Director, Oklahoma Department of Corrections, July 29, 2019, at 2, available at https://www.acluok.org/sites/default/files/field_documents/demand_letter_re_conditions_for_death-sentenced_people_incarcerated_at_h-unit.pdf (last visited March 13, 2022).

⁵⁶ Elizabeth Weill-Greenberg, *Oklahoma Department of Corrections Agrees to Move “Qualifying” Death Row Prisoners out of Tomblike Unit*, The Appeal, Sept. 28, 2019, <https://theappeal.org/oklahoma-department-of-corrections-agrees-to-move-qualifying-death-row-prisoners-out-of-tomb-like-unit/?fbclid=IwAR2LeCBEHGVG8gIiefqkuB8IWnPVy7I-NybmH0Uzvz9fs9s5F7JIpugoFZA> (last visited March 13, 2022).

⁵⁷ ACLU Oklahoma, *supra* note 55.

⁵⁸ Supreme Court of the United States, Syllabus for *Ramirez v. Collier*, *Executive Director, Texas Department of Criminal Justice, et al.*, (March 2022), available at https://www.supremecourt.gov/opinions/21pdf/21-5592_feah.pdf (last visited March 24, 2022).

⁵⁹ Arthur Liman Public Interest Program, Yale Law School, *Rethinking Death Row: Variations in the Housing of Individuals Sentenced to Death* (July 2016) at 7, available at ssrn.com/abstract=2806015 (last visited March 23, 2022) (“Under RLUIPA, the government is prohibited from imposing a ‘substantial burden on the religious exercise’ of any person ‘residing in or confined to an institution,’ including state prisons, unless the government demonstrates that the

30. States that have moved away from mandatory solitary confinement for people on death row have reported improved security, reduced violence, and cost savings.⁶⁰

III. Legal aid and the right to consular notification

31. In its Tenth to Twelfth Periodic Report, the United States writes: “States and localities use a variety of methods for delivering indigent criminal defense services, including public defender programs, assigned counsel programs, and contract attorneys.”⁶¹
32. Inadequate representation for indigent persons charged with capital offenses remains widespread. According to a 2018 report by a committee appointed by Chief Justice John Roberts, these defendants often do not receive experienced and qualified counsel or the extensive resources needed to properly prepare a capital murder defense. The report recognizes that “disastrous” consequences result when these individuals are provided inadequate representation.⁶²
33. The United States is a party to the Vienna Convention on Consular Relations, which requires authorities arresting or detaining foreign nationals to inform such persons without delay of their right to have their consulate notified and, upon the foreign national’s request, to so notify the consulate of the arrest or detention without delay.⁶³
34. Foreign nationals often face significant disadvantages when interacting with the U.S. criminal legal system. Consular officials can help these individuals,⁶⁴ and their assistance can be invaluable when a foreign national faces the death penalty.
35. The United States has failed to comply with its consular notification obligations in capital cases.⁶⁵ The Supreme Court held that the International Court of Justice’s *Avena* decision is not binding on states without federal legislation.⁶⁶ California, Florida, Illinois, North Carolina, and Oregon have adopted statutes addressing consular notification, but these state measures do not always guarantee foreign nationals effective access to their consulate.⁶⁷

burden imposed ‘is in furtherance of a compelling governmental interest and is the least restrictive means of further that compelling governmental interest.’”); *see also* 42 U.S.C. § 2000cc-1(a).

⁶⁰ Robles, *supra* note 51.

⁶¹ U.S. Tenth to Twelfth Periodic Report ¶ 126.

⁶² Ad Hoc Committee, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program*, (June 2018), <http://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf>, at 222 (last visited March 22, 2022) (The report recognizes that many of these defenders work on 4 to 6 cases at any one time and have other serious cases they are juggling with as well).

⁶³ Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262.

⁶⁴ Consular officials help by visiting them, communicating with family members, arranging for legal representation, and assisting with investigations and evidence collection within the individual’s native country.

⁶⁵ *See, e.g.*, INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS, CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS, JUDGMENT OF 31 MARCH 2004. <https://files.deathpenaltyinfo.org/legacy/files/AvenaICJDecision.pdf>; *Honored in the Breach: The United States’ Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at https://reprieve.org.uk/wp-content/uploads/2015/01/2013_02_26_PUB-VCCR-Report-WEB-VERSION-KEY-DOC.pdf, *passim*; Bruce Swartz, Deputy Assistant Att’y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011) (“Despite the fact that these [consular notification] obligations already exist, instances in which notification is not provided continue to occur.”).

⁶⁶ *Medellín v. Texas*, 552 U.S. 491 (2008).

⁶⁷ Texas has insisted that procedurally defaulted VCCR claims (where defendants are assumed to have waived their right to object to VCCR violations because of a failure to raise that issue at the appropriate time, stage of proceedings, or using

36. As of September 2021, 122 foreign nationals from 34 countries sit on the death rows of 14 states and the federal government,⁶⁸ with California, Florida, and Texas collectively holding 78% of the reported total.⁶⁹ Of those 122 foreign nationals, 83 are from Mexico, Central America, and South America.⁷⁰ The Death Penalty Information Center reports only two cases of complete compliance with Article 36, out of approximately 122 reported death sentences.⁷¹ Since *Avena*, state authorities have executed thirteen foreign nationals, only three of whom did not raise consular notification violations on appeal or in clemency proceedings.⁷² A number of states with significant death row populations, such as Georgia, Kentucky, Mississippi, Missouri, Pennsylvania, and Tennessee, have yet to produce complete reports on foreign nationals incarcerated in their respective prison systems—making up roughly 5% of the total U.S. death row population.⁷³
37. The State Department released the 5th edition of its Consular Notification and Access Manual in September 2018.⁷⁴ The State Department asserts that its “experts travel extensively throughout the United States to provide training on consular notification and access to federal, state, and local law enforcement, corrections and criminal justice officials free of charge.”⁷⁵ Over the past 7 years, the State Department has conducted an average of approximately 18 training sessions per year.⁷⁶

IV. Wrongful convictions and remedies for people wrongfully sentenced to death

38. The Tenth to Twelfth Periodic Report states that “Officials at all levels work to ensure that the U.S. legal system efficiently delivers outcomes that are fair and accessible to all,

the appropriate procedure) cannot be reviewed, thus foreclosing relief for most death-sentenced foreigners in that state. Florida courts have generally not recognized Article 36 violations as cognizable claims. Florida amended its law in 2001 so the government’s failure to provide consular notification “shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.” (FLA.STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.)

⁶⁸ DEATH PENALTY INFO. CENTER, “See Foreign Nationals Under Sentence of Death in the U.S.,” accessed Sept. 20, 2019, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>. (last visited March 25, 2022).

⁶⁹ *Ibid.*

⁷⁰ Death Penalty Info. Center, “See Foreign Nationals Under Sentence of Death in the U.S.,” accessed Apr. 26, 2022, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>.

⁷¹ *Ibid.*

⁷² *Ibid.* Of the thirteen foreign nationals executed since the *Avena* decision, seven were from Mexico, three were from Cuba, one was from Honduras, one was from Jamaica, and one was from El Salvador. In nine of the thirteen cases, Texas was the executing state. Two of the other cases were in Florida, and two were in Virginia. Only Angel Maturino Resendiz, a Mexican foreign national executed by the State of Texas, reportedly received information regarding consular rights without delay after arrest as required under the VCCR.

⁷³ DEATH PENALTY INFO. CENTER, “See Foreign Nationals Under Sentence of Death in the U.S.,” accessed Sept. 20, 2019, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>. (last visited March 25, 2022).

⁷⁴ U.S. DEP’T OF STATE, *CONSULAR NOTIFICATION AND ACCESS* (2018), available at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA%20Manual%205th%20Edition_September%2018.pdf. (last visited March 24, 2022).

⁷⁵ U.S. Dep’t of State, “State Department Activities to Advance Consular Notification and Access Awareness and Compliance,” ACCESSED Sept. 20, 2019 <https://travel.state.gov/content/travel/en/consularnotification/training---outreach-by-the-state-department.html>. (last visited March 24, 2022).

⁷⁶ U.S. DEP’T OF STATE, *CONSULAR NOTIFICATION AND ACCESS*, *supra* note 74.

irrespective of race, ethnicity, wealth, or status.”⁷⁷ Nonetheless, there is evidence that the U.S. legal system does not deliver fair and accessible outcomes.

39. Since 1973, 187 people have been exonerated and released from death row.⁷⁸ Of those 187, 54% are Black.⁷⁹ Since 2017, 19 people sentenced to death have been exonerated, three of whom are White. The others are Black (13) and Latino (3).⁸⁰ For those 19 people, the average time between sentencing and exoneration was 22 years; two men exonerated in 2019 were both convicted in 1976.⁸¹ There have been at least twenty individuals who were likely innocent but executed, and additional innocent individuals are at risk of execution.⁸²
40. Even though the percentage of Black and White individuals on death row is approximately equal, Black defendants are more likely to be exonerated than White defendants. Of the 2,436 individuals currently on death row, 41% are Black, 42% are White, and 14% are Latino.⁸³ Black defendants constitute 54% of exonerations, while White defendants only comprise 36%.⁸⁴
41. Even though Black defendants are more likely to be wrongfully convicted and sentenced to death, Black exonerees spend, on average, more than four years longer than White defendants on death row: Black exonerees spend approximately 14 years on death row, while their White counterparts spend an average of 9.6 years.⁸⁵
42. Black defendants are more likely to be wrongfully convicted and sentenced to death due to racial discrimination.⁸⁶ Police may target Black individuals because of their race. For example, Anthony Ray Hinton—a Black man who spent 30 years on death row before being exonerated and released from prison in 2015—was convicted despite evidence that he was at work when one of the crimes was committed. The arresting officer told Mr. Hinton that he would be convicted because: “First of all you’re Black, second of all you’ve been in prison

⁷⁷ U.S. Tenth to Twelfth Periodic Report ¶ 116.

⁷⁸ DEATH PENALTY INFORMATION CENTER, “Innocence,” accessed Mar. 24, 2022, <https://deathpenaltyinfo.org/policy-issues/innocence>.

⁷⁹ DEATH PENALTY INFORMATION CENTER, “Exonerations by Race,” accessed Mar. 24, 2022, <https://deathpenaltyinfo.org/policy-issues/innocence>.

⁸⁰ DEATH PENALTY INFORMATION CENTER, “Innocence Database,” accessed Mar. 24, 2022, <https://deathpenaltyinfo.org/policy-issues/innocence-database>.

⁸¹ *Ibid.*; *Florida Man Exonerated 42 Years After Wrongful Conviction and Death Sentence*, Death Penalty Information Center, Mar. 29, 2019, <https://deathpenaltyinfo.org/news/florida-man-exonerated-42-years-after-wrongful-conviction-and-death-sentence> (last visited Mar. 24, 2022); *Charles Ray Finch Exonerated 43 Years After He Was Sentenced to Death in North Carolina*, Equal Justice Initiative, June 28, 2019, <https://eji.org/news/charles-ray-finch-exonerated-43-years-after-being-sentenced-to-death> (last visited Mar. 24, 2022).

⁸² According to the Death Penalty Information Center, there is strong evidence that at least twenty people who have been executed were innocent. *See* DEATH PENALTY INFORMATION CENTER, “Executed But Possibly Innocent”, accessed Mar. 24, 2022, <http://deathpenaltyinfo.org/executed-possibly-innocent>.

⁸³ Death Penalty Information Center, “Current U.S. Death Row Population by Race,” accessed Apr. 26, 2022, Racial Demographics | Death Penalty Information Center.

⁸⁴ Death Penalty Information Center, “Innocence Database” accessed Apr. 26, 2022, Innocence Database | Death Penalty Information Center.

⁸⁵ *Ibid.*

⁸⁶ Ngozi Ndulue, “Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty,” Death Penalty Information Center (Sept. 2020) *Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf* (deathpenaltyinfo.org).

before, third, you're going to have a white judge, fourth, you're more than likely to have a white jury..."⁸⁷

43. Several trials that have resulted in death sentences for Black individuals also involved racial discrimination during the trial, including instances of prosecutors actively striking potential Black jurors to ensure a majority White jury. For example, in 2001, Marcellus Williams, a Black man, was sentenced to death for stabbing a White woman after the prosecutor (who had a history of excluding Black jurors) struck six of seven potential Black jurors. The jury that convicted Mr. Williams and sentenced him to death was ultimately comprised of 11 White jurors and only one Black juror.⁸⁸ Williams is still on death row; in 2017 the Governor of Missouri stayed his execution for consideration of newly discovered DNA evidence that may prove his innocence, but after a 2018 panel hearing, there has been no apparent progress on his case.⁸⁹
44. Similarly, in 2019, a Tennessee county prosecutor admitted that the prosecutor who tried the case that resulted in Abu-Ali Abdur'Rahman being sentenced to death had struck two potential Black jurors based on racial stereotypes.⁹⁰ In 2021, Abdur'Rahman reached a plea agreement to be resentenced to three life terms after the district attorney conceded to the court "that prosecution notes from Abdur'Rahman's jury selection and comments [the former district attorney] made during a state-wide prosecutors' training program in which he advocated [for] race-based use of jury strikes amounted to a 'smoking gun of racial bias' in the case."⁹¹
45. On April 18, 2022, the U.S. Supreme Court declined to review an appeal of a Black man on death row in Texas who claimed that one of the jurors in his trial was racially biased.⁹² During jury selection, the juror had stated that "non-white" races were the "more violent races."⁹³ Justice Sonia Sotomayor, joined by Justices Elena Kagan and Stephen Breyer, would have heard the case and noted that "[w]hen racial bias infects a jury in a capital case, it deprives a defendant of his right to an impartial tribunal in a life-or-death context."⁹⁴
46. Perjury or false accusation and official misconduct are the two most prevalent causes of wrongful convictions in capital cases.⁹⁵ In 2020, at least 87 of the 129 exonerations— or approximately two thirds of exonerations—involved official misconduct.⁹⁶

⁸⁷ *Id.* at 49.

⁸⁸ *Id.*

⁸⁹ *Missouri, Please Commute Death Sentence of Marcellus Williams*, Innocence Project, <https://innocenceproject.org/commute-death-sentence-marcellus-williams/> (last visited 9 May 2022).

⁹⁰ DPIC Releases Report Placing Death Penalty in Historical Context as a 'Descendant of Slavery, Lynching, and Segregation' (Sept. 15, 2020) *Enduring Injustice: the Persistence of Racial Discrimination in the U.S. Death Penalty* | Death Penalty Information Center.

⁹¹ *After prolonged fight with local prosecutors, Tennessee Attorney General will not appeal plea deal taking Abu-Ali Abdur'Rahman off death row*, Death Penalty Information Center, Dec. 13, 2021, <https://deathpenaltyinfo.org/news/after-prolonged-fight-with-local-prosecutors-tennessee-attorney-general-will-not-appeal-plea-deal-taking-abu-ali-abdurrahman-off-death-row>.

⁹² *Love v. Texas*, No. 21-5050, 2022 U.S. LEXIS 1908, at *1 (Apr. 18, 2022).

⁹³ *Id.* at *3.

⁹⁴ *Id.* at *1.

⁹⁵ THE NATIONAL REGISTRY OF EXONERATIONS, "% of Exonerations by Contributing Factor," accessed Mar. 24, 2022, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

⁹⁶ THE NATIONAL REGISTRY OF EXONERATIONS, 2021 Annual Report, accessed Mar. 24, 2022, <https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf>.

47. Of the 375 people in the United States who have been exonerated through DNA testing, 69% of convictions involved eyewitness misidentification, and 42% of those cases involved a cross-racial misidentification.⁹⁷ Even though cross-racial eyewitness identification can be particularly unreliable, courts often do not allow jury instructions on this unreliability. Only a few states that retain the death penalty allow such instructions, and only then at the judge’s discretion.⁹⁸ Some states have adopted evidence-based policies regulating police practices for eyewitness identification so as to reduce the risk of misidentification.⁹⁹
48. The appeals process is focused on legal or procedural errors at the trial level, not the facts adduced at trial,¹⁰⁰ and therefore appellate courts do not usually afford people the chance to dispute the facts of their conviction.
49. Exonerees face numerous challenges in rebuilding their lives. Many exonerees experience significant financial hardships and need assistance securing basic necessities, such as food.¹⁰¹ Exonerees have difficulty obtaining employment and appropriate housing because expungement of their conviction is not automatic.¹⁰² Wrongful imprisonment results in additional health care needs resulting from prolonged incarceration, including post-traumatic stress disorder.¹⁰³ Exonerees are not automatically eligible for Medicaid, and many lack adequate access to health care.¹⁰⁴ Because exonerees often work in short-term or low-paying jobs, they rarely receive employer-based health benefits.¹⁰⁵
50. The federal wrongful conviction compensation statute offers compensation for people who have spent time on federal death row and subsequently been exonerated. It awards up to \$100,000 per year of wrongful imprisonment on death row.¹⁰⁶ People wrongfully sentenced to death under state law face a patchwork of wrongful conviction compensation statutes.¹⁰⁷ In May 2018, Kansas adopted a wrongful conviction compensation statute that the Innocence Project referred to as the “gold standard,” providing \$65,000 per year of wrongful imprisonment, but also providing social services to assist exonerees with short-term and long-term needs, such as housing, tuition assistance, counseling, health care, and financial literacy

⁹⁷ THE INNOCENCE PROJECT, “DNA Exonerations in the United States,” accessed Mar. 24, 2022, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

⁹⁸ *More than meets the eye in cross-racial IDs*, New Jersey State Bar Foundation, May 7, 2021, <https://njsbf.org/2021/05/07/more-than-meets-the-eye-in-cross-racial-ids/>.

⁹⁹ Thomas D. Albright & Brandon L. Garrett, *The law and science of eyewitness evidence*, Boston Univ. L. Rev. (2022), <https://www.bu.edu/bulawreview/files/2022/03/ALBRIGHT-GARRETT.pdf>.

¹⁰⁰ DEATH PENALTY INFORMATION CENTER, “Innocence,” accessed Mar. 24, 2022, <https://deathpenaltyinfo.org/policy-issues/innocence>.

¹⁰¹ THE INNOCENCE PROJECT, “Compensating the Wrongly Convicted,” accessed Mar. 24, 2022, <https://www.innocenceproject.org/compensating-wrongly-convicted/>.

¹⁰² THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 10.

¹⁰³ *Id.* at 7. “Institutionalization” refers to how prisoners adjust to surviving the hostile living environment conditions of prison.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ 28 U.S.C. §§ 1495, 2513.

¹⁰⁷ See University of Michigan Innocence Project, *Compensation Statutes: A National Overview*, May 21, 2018, https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf (last visited Sept. 29, 2019).

training. The law also provides exonerees with a certificate of innocence and expungement of the wrongful conviction from state and federal records.¹⁰⁸

51. Most wrongful conviction compensation statutes fail to provide services critical to a successful return to society, including housing, food, psychological counseling, medical and dental care, job skills training, education, and other vital assistance.¹⁰⁹
52. Many state compensation schemes do not provide for social services. Ironically, exonerees may be deemed ineligible for services from agencies that assist ex-offenders, because such services may be provided only to individuals who actually committed a crime.¹¹⁰
53. Compensation is not guaranteed. The federal compensation law does not apply to exonerees wrongfully imprisoned by states, and the majority of state compensation laws do not meet the U.S. federal standard.¹¹¹
54. Some states compensate individuals only if “private legislation” is enacted, requiring the state legislature to introduce and pass a bill to compensate a specific person. For example, Anthony Ray Hinton, discussed above, spent 30 years on Alabama’s death row for a crime that he did not commit before he was exonerated in 2015. The Alabama legislature, however, refused to pass a bill to compensate Mr. Hinton.¹¹²
55. Other states may require that exonerees affirmatively prove their innocence to be eligible for compensation.¹¹³ In several states, any exoneree who entered a guilty plea or confessed is ineligible.¹¹⁴ In some states, the exoneree must not have “contributed” to his or her arrest or conviction to be eligible for an award.¹¹⁵ These restrictions do not account for factors that may have resulted in the wrongful conviction in the first place, such as coerced false confessions.¹¹⁶ One study of 2019 exoneration cases found that false confessions were 3.26% more likely to occur if prosecutors or the police threatened suspects or witnesses with the death penalty.¹¹⁷

¹⁰⁸ *Governor Signs Gold-Standard Wrongful Conviction Compensation Law in Kansas*, Innocence Project, May 15, 2018, <https://www.innocenceproject.org/governor-signs-wrongful-conviction-compensation-law-kansas/> (last visited Sept. 29, 2019).

¹⁰⁹ THE INNOCENCE PROJECT, “Compensating the Wrongly Convicted,” *supra* note 101.

¹¹⁰ THE INNOCENCE PROJECT, *Making up for Lost Time*, *supra* note 102, at 4, 15-16.

¹¹¹ *Id.* at 15.

¹¹² *Alabama Refuses Compensation to Innocent Man Who Spent 30 Years on Death Row*, Equal Justice Initiative, July 31, 2017, <https://eji.org/news/alabama-refuses-compensation-to-anthony-ray-hinton-innocent-man-who-spent-30-years-death-row> (last visited Mar. 24, 2022).

¹¹³ Matt Schudel, *Glenn Ford, wrongfully convicted in Louisiana murder case, dies at 65*, Washington Post, July 4, 2015, https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8aa61_story.html (last visited Mar. 24, 2022).

¹¹⁴ THE INNOCENCE PROJECT, *supra* note 102, at 4.

¹¹⁵ *Id.* at 27.

¹¹⁶ For example, disqualification for pleading guilty fails to take into account cases in which false confessions led to wrongful convictions. False confessions appear to have been a contributing cause behind wrongful convictions in 30 of the 186—or more than 16% of—death sentence exonerations. DEATH PENALTY INFORMATION CENTER, “Innocence Database,” accessed Mar. 24, 2022, <https://deathpenaltyinfo.org/policy-issues/innocence-database> (last visited Mar. 25, 2022).

¹¹⁷ DEATH PENALTY INFORMATION CENTER, “DPIC Analysis: Use or Threat of Death Penalty Implicated in 19 Exoneration Cases in 2019,” accessed Mar. 25, 2022, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/dpic-analysis-2019-exoneration-report-implicates-use-or-threat-of-death-penalty-in-19-wrongful-convictions>.

56. Even when an exoneree successfully obtains compensation, the money may be redirected toward basic needs and legal fees.¹¹⁸ Moreover, exonerees may have to wait years to receive the money.¹¹⁹ The average amount of time to obtain state compensation is nearly three years.¹²⁰
57. Thirteen states that retain the death penalty have no compensation laws for wrongful convictions.¹²¹ Due to immunity provisions, it can be difficult to prevail in civil lawsuits when police, prosecutors, or judges are at fault.¹²² Even if an exoneree prevails, the process can take years and may involve costly litigation.¹²³

V. Persons with disabilities

58. Intelligence (IQ) testing has become the predominant tool for determining if someone has an intellectual disability that would bar a court from imposing the death penalty. The Supreme Court in 2002 held that people with “mental retardation” are exempt from the death penalty, which the Court stated generally includes individuals with an IQ score below 70.¹²⁴ In 2014, the U.S. Supreme Court held that a strict IQ score cutoff was an insufficient method for determining intellectual disability, and added protections for individuals whose IQ score ranged from 71 to 75, but gave states discretion to fashion other criteria.¹²⁵ “Still, IQ testing continues to play a major role, with a threshold of around 70 serving as the cutoff score, below which a person cannot legally be executed.”¹²⁶
59. IQ testing in the United States has a history rooted in eugenics and racial bias.¹²⁷ In the context of the death penalty, some states have sought to artificially adjust minority defendants’ IQ scores upward, under the theory that because IQ testing has inherent racial biases, results for

¹¹⁸ For example, Kirk Bloodsworth, who was wrongfully imprisoned by the state of Maryland for nine years (two of which were on death row), applied for and received \$300,000 from the Maryland Board of Public Works. Most of the compensation, however, went toward paying legal fees Mr. Bloodsworth incurred due to his wrongful conviction. K. Bloodsworth, Personal Communication, Aug. 15, 2013.

¹¹⁹ Albert Burrell’s case illustrates how lengthy and difficult it can be to seek compensation. Mr. Burrell was released from Louisiana’s death row after serving 14 years for a crime he did not commit. Mr. Burrell filed for compensation under Louisiana’s compensation law, but a state appeals court upheld a decision to deny him compensation in 2016—15 years after his release. THE NATIONAL REGISTRY OF EXONERATIONS, Albert Burrell: Other Louisiana Cases with Official Misconduct, accessed Mar. 25, 2022, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3073>.

¹²⁰ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 17.

¹²¹ THE INNOCENCE PROJECT, “Compensating the Wrongly Convicted,” accessed Mar. 25, 2022, <https://www.innocenceproject.org/compensating-wrongly-convicted/>. The 13 states that retain the death penalty but have no compensation laws for wrongful convictions are Alaska, Arizona, Arkansas, Delaware, Georgia, Kentucky, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Wyoming.

¹²² THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (2009), 12; *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

¹²³ *Id.* at 13.

¹²⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹²⁵ *Hall v. Florida*, 134 S.Ct 1986 (2014).

¹²⁶ David M. Perry, *How IQ Tests Are Perverted to Justify the Death Penalty*, Pacific Standard Magazine, January 25, 2018, available at <https://psmag.com/social-justice/how-iq-tests-are-perverted-to-justify-the-death-penalty> (last visited April 26, 2022); *Pizzuto v. Blades*, No. 1:05-cv-00516-BLW, 2016 U.S. Dist. LEXIS 163792, at *14 (D. Idaho Nov. 28, 2016).

¹²⁷ Ajitha Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 DePaul L. Rev. 667 (2008), available at <https://via.library.depaul.edu/law-review/vol57/iss3/5> (last visited Apr. 26, 2022).

ethnic and racial minorities may need to be adjusted to compensate for those biases.¹²⁸ According to one researcher, “prosecutors in Florida, Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio have all used ethnic adjustments to successfully impose the death penalty on people who otherwise might have been deemed exempt.”¹²⁹ Such “‘ethnic adjustments’ are not appropriate, clinically or logically, when calculating a defendant's IQ score” and “‘ethnic adjustments’ make it more likely that such individuals - authentically ‘intellectually disabled’ - will be sentenced and put to death.”¹³⁰ At least one psychologist has “misused” ethnic adjustments in cases that led to death sentences, with over two dozen defendants affected by this psychologist’s testimony.¹³¹

60. Persons with documented psycho-social disabilities and intellectual disabilities have been executed. Since 2017, states and the federal government have executed four Black men with evidence of such disabilities. In 2017, Arkansas executed Lendell Lee, who was born with fetal alcohol syndrome disorder, a medical condition that left him with brain dysfunction and intellectual disability.¹³² In January 2021, federal authorities executed Corey Johnson, despite strong arguments indicating that he likely had an intellectual disability,¹³³ and in December 2020 they executed Alfred Bourgeois, had similar evidence of disability.¹³⁴ The State of

¹²⁸ Robert M. Sanger, IQ, Intelligence Tests, “Ethnic Adjustments,” and *Atkins*, American Uni. L. Rev. 65:87 (2015), available at http://aualawreview.org/au_law_review/wp-content/uploads/2015/12/Sanger.pdf (last visited Apr. 26, 2022); Death Penalty Information Center, *Is Racially Biased Testimony Wrongly Subjecting Intellectually Disabled Defendants to the Death Penalty?* (Feb. 16, 2018) <https://deathpenaltyinfo.org/news/is-racially-biased-testimony-wrongly-subjecting-intellectually-disabled-defendants-to-the-death-penalty> (last visited Apr. 26, 2022).

¹²⁹ David M. Perry, *How IQ Tests Are Perverted to Justify the Death Penalty*, Pacific Standard Magazine, January 25, 2018, available at <https://psmag.com/social-justice/how-iq-tests-are-perverted-to-justify-the-death-penalty> (last visited April 26, 2022) (Noting that “ethnic adjustments” take two forms. “One adjustment purports to compensate for perceived racial bias in IQ testing by boosting the defendant’s IQ scores. A second form of adjustment is determining, based upon the expert witness’s subjective views about a defendant’s social conditions and culture, that impairments in day-to-day functioning that would be considered adaptive deficits for White defendants are not as rare for a person with the defendant’s racial, ethnic, and socio-economic background, and so are not evidence of intellectual disability.”).

¹³⁰ Michael L. Perlin, “Your Corrupt Ways Had Finally Made You Blind”: Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities, (quoting Robert M. Sanger, IQ, Intelligence Tests, “Ethnic Adjustments,” and *Atkins*, American Uni. L. Rev. 65:87 (2015)).

¹³¹ Brandi Grissom, *Psychologist Remanded in Death Penalty Cases*, Texas Tribune, April 15, 2011, available at <https://www.texastribune.org/2011/04/15/texas-psychologist-punished-in-death-penalty-cases/> (last visited April 26, 2022); Death Penalty Information Center, *Is Racially Biased Testimony Wrongly Subjecting Intellectually Disabled Defendants to the Death Penalty?* (February 16, 2018) <https://deathpenaltyinfo.org/news/is-racially-biased-testimony-wrongly-subjecting-intellectually-disabled-defendants-to-the-death-penalty> (last visited April 26, 2022).

¹³² Cassandra Stubbs, *In Its Rush to Kill, Arkansas May Have Executed an Innocent Man*, ACLU, Apr. 24, 2017, <https://www.aclu.org/blog/capital-punishment/innocence-and-death-penalty/its-rush-kill-arkansas-may-have-executed> (last visited March 19, 2022).

¹³³ *Federal Government Executes Corey Johnson, Who was Likely Intellectually Disabled, Without Any Judicial Review of His Eligibility for the Death Penalty*, Death Penalty Information Center, Jan. 14, 2021, <https://deathpenaltyinfo.org/news/federal-government-prepares-to-execute-corey-johnson-who-is-likely-intellectually-disabled-without-any-judicial-review-of-his-eligibility-for-the-death-penalty> (last visited March 19, 2022); Elizabeth Bruenig, *When an I.Q. Score Is a Death Sentence*, New York Times, Jan. 11, 2021, <https://www.nytimes.com/2021/01/11/opinion/death-penalty-mental-disability.html> (last visited March 19, 2022).

¹³⁴ *Federal Government Carries Out Two More Executions, Capping Deadliest Federal Death Penalty Year Since the 1890s*, Death Penalty Information Center, Dec. 11, 2020, <https://deathpenaltyinfo.org/news/federal-government-carries-out-two-more-executions-capping-deadliest-federal-death-penalty-year-since-the-1890s> (last visited March 19, 2022).

Alabama executed Willie B. Smith even though the U.S. Court of Appeals for the Eleventh Circuit agreed that he had an intellectual disability.¹³⁵

61. As of July 2020, the U.S. Supreme Court has denied petitions to review three separate cases in Alabama, Tennessee and Oklahoma, allowing death sentences “to stand despite the application of unconstitutionally restrictive standards in assessing a prisoner’s intellectual disability” stemming from *Atkins v. Virginia*, *Hall v. Florida*, and *Moore v. Texas*.¹³⁶
62. Since *Atkins* and as of April 2021, at least 135 former death-row prisoners were granted relief from their sentences as a result of court decisions, plea agreements, or stipulations by prosecutors that they had an intellectual disability. Of those 135 individuals, seven with intellectual disabilities have been resentenced to life in prison and at least five have been exonerated from death row. 67% of these individuals are Black and 17% are Hispanic.¹³⁷

VI. Questions

63. This report suggests the following questions for the List of Themes for the United States:
 - What measures has the State Party adopted to study and identify the root causes of racial and ethnic disparities pertaining to the death penalty and to make and implement recommendations for eliminating bias and discrimination in the federal and state criminal legal systems?
 - What is the status of the federal moratorium on the death penalty? Is it limited to executions, or are federal prosecutors no longer seeking the death penalty? What is the timeline for expanding this moratorium and making it permanent?
 - What deference do federal authorities give to states and jurisdictions such as Puerto Rico and the Navajo Nation that have expressly rejected the death penalty when deciding whether to see the death penalty for federal offenses committed in those jurisdictions?
 - What efforts have federal and state authorities undertaken to adopt police policies and practices to reduce the risk of mistaken eyewitness identification, particularly in cases involving potential capital crimes?
 - What steps are federal authorities undertaking to ensure that no person is subjected to torture or cruel, inhuman, or degrading treatment as a result of flawed execution protocols or policies?

¹³⁵ Lee Hedgepeth, *Alabama executes Willie B. Smith, intellectually disabled Black man, for 1991 murder*, CBS42.com, October 21, 2021, <https://www.cbs42.com/alabama-news/alabama-executes-willie-b-smith-intellectually-disabled-black-man-for-1991-murder/> (last visited March 19, 2022); *Alabama Executes Intellectually Disabled Death-Row Prisoner*, Death Penalty Information Center, Oct. 21, 2021, <https://deathpenaltyinfo.org/news/alabama-executes-intellectually-disabled-death-row-prisoner> (last visited March 19, 2022).

¹³⁶ Death Penalty Information Center, *U.S. Supreme Court Declines to Review Three Cases on Scope of Protections Against Executing the Intellectually Disabled*, <https://deathpenaltyinfo.org/news/u-s-supreme-court-declines-to-review-three-cases-on-scope-of-protections-against-executing-the-intellectually-disabled> (last visited April 27, 2022) (Citing *Sharp v. Smith*, in which a federal appeals court found Roderick L. Smith, a black male, ineligible for the death penalty because of his intellectual disability. The petitioner sought review as the U.S. Court of Appeals for the Tenth Circuit allegedly improperly used the principles set out in *Moore* prior to *Moore*’s decision. This article also cites *Keen v. Tennessee*, involving a white male, and *Smith v. Dunn*, involving a black male—Willie B. Smith—whose claim for intellectual disability was denied as he had not sufficiently proven his intellectual or adaptive functioning.)

¹³⁷ Death Penalty Information Center, *Reversals Under Atkins*, <https://deathpenaltyinfo.org/policy-issues/intellectual-disability/reversals-under-atkins> (last visited April 27, 2022).

- What progress has the State Party made, in federal and state detention facilities, toward eliminating the use of solitary confinement as the default method of confinement for people under sentence of death?
- How is the federal government taking action to improve the quality of legal aid for persons at risk of being sentenced to death?
- Describe the measures taken by federal authorities during the reporting period to step up compliance with the Vienna Convention on Consular Relations, particularly for individuals arrested on suspicion of committing capital offenses.
- What measures have been taken at the federal, state, and local levels to identify wrongful convictions and to take prompt measures to release individuals who have been wrongfully convicted?
- How do authorities reduce the risk of racial bias in jury selection and provide remedies when such bias is suspected or identified?
- For all people who have been exonerated from death row during the reporting period, please provide: demographic information (e.g., race, ethnicity, gender, age at time of conviction), reason(s) for wrongful conviction, length of time imprisoned and length of time on death row, measures to address the cause(s) of wrongful conviction and hold relevant systems actors accountable, compensation, assistance, and other remedies provided to the person after exoneration, time elapsed between exoneration and the provision of those remedies.
- How has the State Party improved assistance and other remedies to persons wrongfully convicted and sentenced to death and streamlined provision of assistance?
- What measures has the State Party taken to ensure that racial bias does not influence capital proceedings against people with intellectual and/or psycho-social disabilities?

VII. Recommendations

64. This report suggests the following recommendations for the United States:

- Appoint an independent commission of experts to study and identify the root causes of racial and ethnic disparities pertaining to the death penalty and to make recommendations for eliminating bias and discrimination in the federal and state criminal legal systems.
- Prohibit federal prosecutors from seeking the death penalty in Puerto Rico.
- Adopt all necessary measures, including interpretation services or a waiver of the English language requirement, to allow Spanish-speaking people to serve on juries in Puerto Rico and other territories with majority Spanish-speaking populations, to ensure defendants are judged by a jury of their peers.
- Impose a formal moratorium on the death penalty and executions, irrespective of the presidential administration, with a view to its eventual abolition.
- Conduct a comprehensive review of federal law to eliminate the death penalty for any crime that does not entail an intentional killing by the defendant.
- Prohibit states from using the felony murder rule or the law of parties to sentence people to death who neither killed nor intended to kill.
- Promulgate and endorse science-based model jury instructions regarding the reliability of eyewitness identifications, including cross-racial eyewitness identifications.
- Provide training and incentives for law enforcement to adopt model practices for eyewitness identification to reduce the risk of erroneous eyewitness identifications.

- Adopt legislation and financial incentives for states to implement recommendations promulgated by the Innocence Project regarding compensation and assistance for individuals wrongly sentenced to death: untaxed compensation of at least \$100,000 per year on death row; legal assistance for seeking compensation; and adequate and appropriate services, including housing, transportation, education, physical and mental health care, employment assistance, and other reintegration assistance.
- Make all persons exonerated from death row automatically eligible for Medicaid.
- Ensure that there are adequate mechanisms to hold prosecutors, law enforcement, and judges accountable when their conduct leads to wrongful convictions and wrongful death sentences.
- Bar admission of evidence obtained from foreign nationals who had not been informed of their consular notification rights at the time the evidence was obtained.
- Mandate that all states that retain the death penalty adopt statutory schemes to require law enforcement to inform all suspects of their consular notification rights at the time the *Miranda* notification is given and to impose penalties for failure to notify foreign nationals of their rights.
- Expand State Department efforts to train local law enforcement about consular notification requirements, prioritizing jurisdictions where prosecutors have actively sought the death penalty in the last ten years.
- Adopt legislation to mandate state compliance with the *Avena* decision.
- Ensure that all foreign nationals on federal death row receive the review and reconsideration mandated under *Avena*.¹³⁸
- Fully implement the recommendations of the Ad Hoc Committee to Review the Criminal Justice Act as they pertain to providing adequate and adequately funded legal counsel in all capital cases, appeals, and habeas corpus proceedings, including the creation of an independent Defender Commission within the judicial branch that would have the sole authority to set policy and practices related to the provisions of federal defense in capital cases.
- Expand federal funding and significantly increase caps for capital counsel compensation and fees and expenses in capital cases, ensuring that caps are automatically adjusted for inflation.
- Provide state and federal trial court judges with guidance about the level of experience required for adequate counsel in capital cases, the amount of time required to provide an adequate defense in such cases, the funds counsel needs to provide experts and present a mitigation defense, and the importance of timely appointment of qualified post-conviction counsel.
- Reduce funding disparities across districts and circuits for federal capital cases.
- Develop and offer ongoing, comprehensive training for counsel in capital cases, including post-conviction litigation.

¹³⁸ The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.aut_hcheckdam.pdf.

- Require all states that retain the death penalty to fully fund a program to provide competent public defenders in all capital cases and to provide qualified legal assistance to people on death row.
- Restore the Food and Drug Administration’s authority to prohibit importation of any drug found to violate 21 U.S.C. § 381(a).¹³⁹
- Prohibit the use of drugs produced by compounding pharmacies in executions.
- Ensure that authorities provide persons scheduled for execution with complete information about the execution protocol, the drugs to be used, and drug origins.
- Prohibit states from using secrecy laws to circumvent contractual obligations established between drug manufacturers and distributors.
- Prohibit mandatory solitary confinement for persons sentenced to death and ensure that conditions for people sentenced to death comply with Nelson Mandela Rules 43-45.
- Ensure that all persons on death row may participate in congregate religious services, consistent with the federal Religious Land Use and Institutionalized Persons Act.
- Ensure that all persons on death row have access to educational, vocational, and rehabilitative programming available to people in the general prison population.
- Ensure that no person with an intellectual disability or a severe psycho-social disability is sentenced to death or executed.

¹³⁹ 21 U.S.C. § 381(a)(1)-(4) states, in relevant part:

If it appears . . . that [any drugs manufactured, prepared, or compounded in an establishment not registered with the Department of Health and Human Services] are imported or offered for import into the United States and that (1) such article has been manufactured, processed, or packed under insanitary conditions . . . , or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated [or] misbranded . . . , or (4) the recordkeeping requirements under section 2223 of this title . . . have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section.