

APPENDIX

**AMERICAN BAR ASSOCIATION
APPROVED INNOCENCE RESOLUTIONS, 2004-2005**

MIDYEAR MEETING 2004

I. INTERROGATIONS:

RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial investigations.

FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, to provide necessary funding, and to provide appropriate remedies for non-compliance.

Annual Meeting 2004

**II. CRIME LABORATORIES AND FORENSIC EVIDENCE—111B
(CJS):**

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

2. Crime laboratories and medical examiner offices should be adequately funded.

3. The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense.

4. Training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.

5. Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case.

III. EYEWITNESS IDENTIFICATION—111C (CJS):

RESOLVED, That the American Bar Association adopts the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Police and prosecutors craft detailed guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy;

2. Police and prosecutors receive periodic training on how to implement the above-referenced guidelines,

3. Police and prosecutors receive periodic training on non-suggestive techniques for interviewing witnesses;

4. Internal mechanisms be created within police departments and prosecutors' offices to periodically update such guidelines to incorporate advances in social scientific research and in the continuing lessons of practical experience; and

5. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar

Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association, to improve the ability of juries and judges to make fully informed trial decisions concerning the accuracy of eyewitness identifications, urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Courts should have the discretion, where appropriate in an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy; and

2. Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.

IV. INVESTIGATIVE POLICIES AND PERSONNEL: (111E (CJS))

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Establish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations;

2. Establish training programs and disciplinary procedures to assure that investigative personnel are prepared and accountable for their performance;

3. Establish adequate opportunity for citizens and investigative personnel to report misconduct in investigations; and

4. Establish adequate funding for all of the above.

V. PROSECUTION PRACTICES (111F (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Provide adequate funding to prosecutors' offices;
2. Establish standards to ensure that workloads of prosecutors are maintained at levels that allow them to provide competent legal representation;
3. Ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence;
4. Establish procedures for evaluating cases that rely upon eyewitness identification, confessions or testimony from witnesses that receive a benefit; and
5. Draft legislation to provide that material evidence be preserved for a reasonable period of time after criminal appeals are exhausted to permit post-conviction review.

MIDYEAR MEETING 2005**VI. COMPENSATION FOR THE WRONGFULLY CONVICTED (108A (CJS)):**

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.

FURTHER RESOLVED, The American Bar Association urges jurisdictions to consider the following factors in drafting a compensation statute:

A. Conditions Precedent:

1. Statutes should require claimants to have been incarcerated as the result of a conviction.
2. Claimants must be able to show that their convictions were vacated or pardoned on a ground demonstrating actual innocence, which for this purpose re-

quires that the claimant did not commit the crime, or the crime did not occur.

3. The claimant's own misconduct should not have substantially contributed to the conviction. A false confession or guilty plea does not automatically bar recovery.

B. The size of the award:

1. The award should be in proportion to the time served;

2. The award should be based upon economic loss;

3. The award should include non-economic losses, such as pain and suffering, humiliation, loss of consortium, and loss of reputation; and

4. Claimants are eligible for compensation only if, but for this conviction, the claimant would not have been incarcerated. The government should have the burden of demonstrating that the claimant would have otherwise been incarcerated.

C. A successful claimant shall be entitled to receive reasonable attorneys fees in connection with establishing the claim of actual innocence.

D. Judgment should include relief from all governmental obligations incurred as a result of the trial, conviction and incarceration of the claimant, and restoration of all rights lost as a result thereof.

E. The court or executive authority that releases an individual based on actual innocence should give that person notice of the statutory compensation scheme.

1. Any suit must be brought within one year of notice.

2. If the claimant was not given notice, suit must be commenced within two years after exoneration is final or after the adoption of a compensation statute.

F. Jurisdictions should assist the innocent to reenter the community.

1. Assistance should be provided that is at least equivalent to that available to individuals on probation or parole.

2. The erroneous judgment of conviction should be expunged from the innocent's criminal record.

VII. JAILHOUSE INFORMANTS (108B (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.

VIII. DEFENSE COUNSEL PRACTICES (108C CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases that:

1. Formalize the means for providing appropriately experienced and qualified appointed or assigned defense counsel in serious criminal cases, modeled after the means prescribed in Standards 5-1.2 and 5-1.3 of the ABA Standards for Criminal Justice Providing Defense Services and in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, by:

a) Adopting and implementing a Criminal Defense Plan to be administered by a Responsible Agency, which is either a defender organization or an independent authority; and

b) Authorizing the Responsible Agency to establish and publish recommended standards for defense representation, including knowledge, training, and experience in the defense of serious criminal cases, and using as a guide the requirements enumerated in Standard 5-2.2 of the ABA Standards for Criminal Justice Providing Defense Services:

2. Ensure that the workloads of defense counsel be maintained at levels that enable them to provide the level of representation recommended by the Criminal Defense Plan, using as a guide the requirements enumerated in Standard 5-5.3 of the ABA Standards for Criminal Justice Providing Defense Services;

3. Ensure that defense counsel are compensated at rates no less than comparable prosecutors and that other defense team members are compensated at rates no less than comparable professionals in the private sector; using as a guide the requirements enumerated in Standard 5-2.4 of the ABA Standards for Criminal Justice Providing Defense Services;

4. Ensure that defense counsel have adequate resources and training to fulfill their obligation to conduct thorough and independent investigation into their clients' guilt or innocence in every case, including heightened scrutiny into cases that rely on eye-witness identification, witnesses who receive any benefit in return for their testimony, and confessions by youthful or mentally limited defendants;

5. Require defense counsel to investigate circumstances indicating innocence regardless of the client's admissions or statements of facts constituting guilt or the client's stated desire to plead guilty or dispose of the case without trial;

6. Require that defense counsel cooperate fully with successor counsel, including the preservation and transfer of all pertinent records and information;

7. Require defense counsel in all cases, whether or not serious criminal cases, to meet the requirements enumerated in the ABA Standards for Criminal Justice Providing Defense Services.

ANNUAL MEETING 2005

IX. SYSTEMIC REMEDIES (115A (CJS)):

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to identify and attempt to eliminate the causes of erroneous convictions.

FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to assist in the effort to identify and attempt to eliminate the causes of erroneous convictions.

**AMERICAN BAR ASSOCIATION
BIOLOGICAL EVIDENCE PRINCIPLES
(ADOPTED AT THE 2000 ANNUAL MEETING)**

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to adhere to the following Principles concerning Biological Evidence collected in conjunction with the investigation of a criminal case:

1. All biological evidence should be preserved.
2. All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.
3. All necessary funding to accomplish these principles should be provided.
4. Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.

**AMERICAN BAR ASSOCIATION
DEATH PENALTY MORATORIUM POLICY
(ADOPTED AT THE 1997 MIDYEAR MEETING)**

#107

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA “Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases” (adopted Feb. 1989) and Association policies intended to encourage competence of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts’ authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offense, the Association takes no position on the death penalty.

**AMERICAN BAR ASSOCIATION
DEATH PENALTY HABEAS CORPUS LITIGATION
POLICIES (ADOPTED AT THE 1990 MIDYEAR MEETING,
AND RETAINED AT THE 2000 ANNUAL MEETING)**

115E (CJS)

BE IT RESOLVED, That the American Bar Association urges that the following measures be taken in the litigation of death penalty cases:

1) Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants / appellants / petitioners, as well as to provide sufficient resources for investigation, ex-

pert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.

2) The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource center to seek the best qualified attorneys available.

3) Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

4) New counsel should be appointed to represent the death-sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record.

5) To avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel recognized in paragraph "1" above, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner:

- (a) exhaustion of state judicial remedies,
- (b) procedural default rules; and

(c) the presumption of correctness of state court findings of fact.

7) Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

8) State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law.

9) On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

10) The federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

11) A rational process of review will be facilitated by a stay of execution that remains in force until the completion of the initial round of state and federal post-conviction review. Therefore, unless the state courts grant a stay of execution, the federal courts, in preservation of their habeas corpus jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings, and should be empowered to do so.

12) The petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

13) A one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably

prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner's claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

14) A federal court should entertain a second or successive petition for habeas corpus relief if:

(a) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

(b) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or

(c) consideration of the requested relief is necessary to prevent a miscarriage of justice.

15) The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

16) To afford the states a reasonable time to adopt and implement rules and procedures pursuant to these recommendations, the proposed federal statutory and rule changes should take effect upon adoption by the states of provisions in accordance with these recommendations, but not later

than two years from the date of enactment of federal legislation; and

BE IT FURTHER RESOLVED, That the American Bar Association commends to Congress the sample legislation attached in Appendix "B" as a way to implement these Recommendations.

**ABA CRIMINAL JUSTICE STANDARDS
ON POST-CONVICTION REMEDIES
(APPROVED AUGUST 1978)**

Standard 22-2.1. Grounds for relief encompassed

A postconviction proceeding should be sufficiently broad to provide relief:

(a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

**ABA CRIMINAL JUSTICE STANDARDS
ON THE PROSECUTION FUNCTION
(APPROVED FEBRUARY 1992)**

Standard 3-1.2 The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.