



## **THE STATE OF THE DEATH PENALTY: EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS**

Key Findings, Compliance Levels, and Executive Summaries

**“A system that takes life must first give justice.”**  
John J. Curtin, Jr., Former ABA President

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## **ACKNOWLEDGEMENTS**

The American Bar Association Death Penalty Moratorium Implementation Project (the Project) is pleased to present this publication, *The State of the Death Penalty: Evaluating Fairness and Accuracy in State Death Penalty Systems*.

The Project expresses its great appreciation to all those who helped to develop, draft, and produce each of the eight state death penalty assessment reports. The efforts of the Project and the death penalty assessment teams were aided by many lawyers, academics, judges, and others who presented ideas, shared information, and assisted in the examination of each state capital punishment system. We would like to offer particular thanks to each of the state team leaders: Daniel M. Filler, Sigmund "Zig" Popko, Christopher Slobogin, Anne S. Emanuel, Joel Schumm, Phyllis Crocker, Anne Bowen Poulin, and Dwight L. Aarons. Additional thanks goes to the team members on each of the state death penalty assessment teams, as well as to the law student researchers in each of the eight states.

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## **STATE DEATH PENALTY ASSESSMENTS KEY FINDINGS**

As a society, we must do all we can to ensure a fair and accurate system for every person who faces the death penalty. When a life is at stake, there is no room for error or injustice. The American Bar Association, working with in-state teams, assessed the fairness and accuracy of eight state death penalty systems. To do this, the state-based teams researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. While the requisite data often was not collected, maintained, or made available in a way that made analysis possible, general themes emerged in each of the topic areas. Ultimately, serious problems were found in every state death penalty system.

### Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on states' laws and on state law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. We examined each state's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence. After examining eight states, the themes that emerged include:

- States generally are failing to require the preservation of physical and/or biological evidence through the entire legal process and after release from prison or execution, thereby increasing the possibility that crucial evidence that could prove innocence will be destroyed; and
- DNA testing statutes often are drafted too narrowly, with strict filing deadlines and onerous procedural hurdles, making it difficult for a wrongfully convicted person to successfully file for and obtain DNA testing.

### Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. After examining eight states, the themes that emerged include:

- States are not requiring law enforcement agencies to adopt procedures that comport with identified national best practices on identifications and interrogations; and
- Most states are not requiring law enforcement agencies to videotape or audiotape the entirety of custodial interrogations in murder cases. While some law enforcement agencies are in fact taping interrogations, this practice is limited and sporadic in the eight states studied.

### Crime Laboratories and Medical Examiner Offices

With courts' increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. After examining eight states, the themes that emerged include:

- States are not requiring that crime laboratories and medical examiner offices be accredited;
- Most states have had at least one serious incident of crime lab mistake or fraud;
- Many states are failing to require that state crime laboratories make their standards and procedures public;
- Most state crime laboratories are not utilizing the newest and/or most sophisticated methods of DNA testing; and
- Many crime labs are seriously underfunded.

### Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion deciding whether or not to seek the death penalty. After examining eight states, the themes that emerged include:

- States are not establishing policies, nor are they requiring prosecutors' offices to establish policies, on the exercise of prosecutorial discretion, or on evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit;
- Many states are failing to require that prosecutors who handle capital cases receive any specialized training; and
- Most states have cases in which courts have found serious misconduct by prosecutors in capital cases, yet the prosecutors are not disciplined by the state disciplinary organization or by the prosecutor's office.

### Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. After examining eight states, the themes that emerged include:

- Many states are failing to provide a statewide indigent capital defense system, providing services instead on a county-by-county basis;
- The judiciary remains primarily responsible for appointing defense counsel;

- Some states are failing to provide for the appointment of counsel in post-conviction proceedings and all states are failing to provide for the appointment of counsel in clemency proceedings;
- Capital indigent defense systems, whether statewide or county-by-county, generally are significantly underfunded;
- Many states are failing to provide for the appointment of two lawyers at all stages of a capital case, nor are they guaranteeing access to investigators and mitigation specialists;
- Many states are requiring only minimal training and experience for attorneys handling death penalty cases; and
- The compensation paid to appointed capital defense attorneys is often woefully inadequate, dipping to well under \$50 per hour in some cases.

#### Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or result in improper racial or geographic disparities. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing. After examining eight states, the themes that emerged include:

- Some states are not required to conduct a proportionality review and, in those that are, the review tends to be cursory and include only cases where death was imposed, leaving out potentially important cases where death was sought but not imposed and where death could have been, but was not sought; and
- Few, if any, states maintain the sort of capital case database that would include case information on actual and potential capital cases to make meaningful proportionality review easier to achieve.

#### State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. After examining eight states, the themes that emerged include:

- Many states provide unreasonably short time periods in which to file post-conviction petitions;
- Most states allow the post-conviction judge to adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own, potentially undermining the judge's duty to exercise independent judgment;

- Some states assign post-conviction cases to the original trial judge, creating the potential for and/or the appearance of bias;
- Many states make it difficult, if not impossible, to obtain discovery materials in post-conviction;
- Many states make it difficult to obtain an evidentiary hearing and afford the post-conviction judge many opportunities to summarily deny a post-conviction petition; and
- Some states make it difficult to raise claims of error, including wrongful conviction errors, in post-conviction proceedings.

#### Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision making. After examining eight states, the themes that emerged include:

- Most states fail to require any specific type or breadth of review in considering clemency petitions;
- Most states do not require the clemency decision-maker to explain the reasons why clemency was or was not granted; and
- Very few states require that the clemency decision-maker meet with the petitioning inmate and/or the inmate's counsel.

#### Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must, through jury instructions, present clearly and accurately the applicable law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. After examining eight states, the themes that emerged include:

- Jurors in many states appear to have difficulty understanding their roles and responsibilities as described by the judge in his/her jury instructions;
- Many states fail to provide, as a matter of course, written jury instructions;
- Many states fail to define important terms of art, such as "life imprisonment without the possibility of parole" when instructing the jury; and
- Most states fail to require that the jury be instructed that it may impose a life sentence if a juror does not believe that the defendant should receive the death penalty, even in the absence of any mitigating factors, and even where an aggravating factor is established beyond a reasonable doubt.

#### Judicial Independence

With increasing frequency, judicial elections, appointments, and confirmations are being influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. In addition, judges' decisions in

individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, undermining society's confidence that individuals in court are guaranteed a fair hearing. After examining eight states, the themes that emerged include:

- Judicial elections are used in most states for at least some judicial positions, and some of these judicial elections are partisan;
- The cost of judicial elections have risen quickly and significantly in many states; and
- Judicial candidates in many states have discussed and advertised their views of the death penalty.

#### Racial and Ethnic Minorities

To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. After examining eight states, the themes that emerged include:

- Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim;
- Even in states with acknowledged racial disparities, little, if anything, has been done to rectify the problem; and
- Generally, states are not keeping the data necessary to conduct the sort of analysis necessary to quantify any problem with bias and identify its causes, making the process of conducting analysis difficult, if not impossible.

#### Mental Retardation and Mental Illness

In *Atkins v. Virginia*, the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant was mentally retarded at the time of the offense.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant. After examining eight states, the themes that emerged include:

- States do not have policies in place to ensure that people with mental retardation or mental illness are represented by attorneys who fully appreciate the significance of their client's mental disability;
- States do not formally commute a death sentence upon a finding that the inmate is incompetent to proceed on factual matters requiring the inmate's input; and

- Most states fail to require that jurors be instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing.

## COMPLIANCE WITH ABA POLICIES

### Collection, Preservation, and Testing of DNA and Other Types of Evidence

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> Preserve all biological evidence for as long as the defendant remains incarcerated.	Not in Compliance	Partially in Compliance	In Compliance	In Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #2:</b> Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.	Partially in Compliance							
<b>Recommendation #3:</b> Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #4:</b> Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.	Partially in Compliance							
<b>Recommendation #5:</b> Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.	Insufficient Information							
<b>Recommendation #6:</b> Provide adequate funding to ensure the proper preservation and testing of biological evidence.	Insufficient Information	Not in Compliance						

## Law Enforcement Identifications and Interrogations

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> Law enforcement agencies should adopt guidelines for conducting lineups and photopreads in a manner that maximizes their likely accuracy. 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 ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.	Insufficient Information							
<b>Recommendation #2:</b> Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photopreads, and training on non-suggestive techniques for interviewing witnesses.	Insufficient Information	Partially in Compliance	Partially in Compliance	Insufficient Information				
<b>Recommendation #3:</b> Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photopreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.	Insufficient Information							
<b>Recommendation #4:</b> Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations and identify the recording.	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Insufficient Information	Not in Compliance
<b>Recommendation #5:</b> Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.	Insufficient Information							
<b>Recommendation #6:</b> Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	In Compliance	Partially in Compliance	Not in Compliance	Not in Compliance				
<b>Recommendation #7:</b> 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 use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.	Partially in Compliance							

## Crime Laboratories and Medical Examiner Offices

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation	<p><b>Recommendation #1:</b> 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.</p> <p><b>Recommendation #2:</b> Crime laboratories and medical examiner offices should be adequately funded.</p>							
	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information

## Prosecutorial Professionalism

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.	Not in Compliance	Insufficient Information	Insufficient Information	Not in Compliance	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #2:</b> Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.	Not in Compliance	Not in Compliance	Insufficient Information	Not in Compliance	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #3:</b> Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #4:</b> Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Insufficient Information

## Prosecutorial Professionalism (cont'd)

**Recommendation #5:** Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.

**Recommendation #6:** The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

	Not in Compliance	In Compliance	In Compliance	Partially in Compliance	In Compliance	Partially in Compliance	In Compliance
Insufficient Information	Partially in Compliance	Insufficient Information					
Insufficient Information	Partially in Compliance	Insufficient Information					
Insufficient Information	Partially in Compliance	Insufficient Information					

		Defense Services							
		Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation	State								
<b>Recommendation #1:</b> Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> (ABA Guidelines)—The Defense Team and Supporting Services	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #2:</b> Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #3:</b> Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #4:</b> Guideline 9.1 of the ABA Guidelines—Funding and Compensation	Not in Compliance	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #5:</b> Guideline 8.1 of the ABA Guidelines—Training	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance

## Direct Appeal Process

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation							a	
<b>Recommendation #1:</b> In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.								
	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance	In Compliance	Not in Compliance	Partially in Compliance

## State Post-Conviction Proceedings

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.	Insufficient Information	Not in Compliance	Insufficient Information	Partially in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #2:</b> The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.	Insufficient Information	Partially in Compliance	Insufficient Information	In Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Insufficient Information
<b>Recommendation #3:</b> Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information	Not in Compliance	Not in Compliance	Insufficient Information
<b>Recommendation #4:</b> When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	Partially in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Insufficient Information	In Compliance	In Compliance
<b>Recommendation #5:</b> On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance

## State Post-Conviction Proceedings (cont'd)

<b>Recommendation #6:</b> When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal, and should liberally apply a plain error rule with respect to errors of state law in capital cases.	Insufficient Information	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #7:</b> The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.	Not in Compliance	Partially in Compliance	Insufficient Information	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #8:</b> The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.	Insufficient Information	Partially in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Insufficient Information	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #9:</b> State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #10:</b> State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.	Insufficient Information	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	In Compliance	In Compliance	In Compliance	In Compliance
<b>Recommendation #11:</b> In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	In Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #12:</b> During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable	Not Applicable

Clemency								
State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Not in Compliance	Insufficient Information
<b>Recommendation #2:</b> The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Not in Compliance	Insufficient Information
<b>Recommendation #3:</b> Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #4:</b> Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #5:</b> Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #6:</b> Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .	Insufficient Information	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance
<b>Recommendation #7:</b> Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance

	Clemency (cont'd)						
	Insufficient Information	Partially in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #8:</b> Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.	Insufficient Information	Partially in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #9:</b> If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.	Not Applicable	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #10:</b> Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.	Insufficient Information	Partially in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Insufficient Information	Not in Compliance
<b>Recommendation #11:</b> To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.	Not in Compliance	Insufficient Information	Insufficient Information	In Compliance	Insufficient Information	Insufficient Information	Insufficient Information

## Capital Jury Instructions

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.	Not in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #2:</b> Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	Not in Compliance	In Compliance	In Compliance	Not in Compliance	In Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance
<b>Recommendation #3:</b> Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.	Insufficient Information	Insufficient Information	Not in Compliance	Insufficient Information	Insufficient Information	Not in Compliance	Insufficient Information	Insufficient Information
<b>Recommendation #4:</b> Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #5:</b> Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.	Not in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance

### **Capital Jury Instructions (cont'd)**

Recommendation #6:	Capital Jury Instructions (cont'd)					
	In Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Not in Compliance
Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	In Compliance	Not in Compliance	Not in Compliance	Not Applicable	Not in Compliance	In Compliance

## Judicial Independence

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on independence.	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #2:</b> A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to pre-judgment should not preside over any capital case or review any death penalty decision in the jurisdiction.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #3:</b> Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Partially in Compliance
<b>Recommendation #4:</b> A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.	Insufficient Information							
<b>Recommendation #5:</b> A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.	Insufficient Information							
<b>Recommendation #6:</b> Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.	Insufficient Information	Insufficient Information	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information

## Racial and Ethnic Minorities

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation								
<b>Recommendation #1:</b> Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #2:</b> Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.	Partially in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Insufficient Information	Partially in Compliance	Partially in Compliance	Partially in Compliance
<b>Recommendation #3:</b> Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.	Not in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance	Insufficient Information	Not in Compliance	Partially in Compliance	Not in Compliance
<b>Recommendation #4:</b> Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.	Not in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance	Partially in Compliance	Not in Compliance

## Racial and Ethnic Minorities (cont'd)

	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #5:</b> Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the state should have the burden of rebutting it by substantial evidence.	Not in Compliance	Not in Compliance	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance	Not in Compliance
<b>Recommendation #6:</b> Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.	Partially in Compliance										
<b>Recommendation #7:</b> Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during <i>voir dire</i> .	Not in Compliance	Insufficient Information	Insufficient Information								
<b>Recommendation #8:</b> Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.	Partially in Compliance										
<b>Recommendation #9:</b> Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.	Insufficient Information										
<b>Recommendation #10:</b> States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.	Not in Compliance										

## Mental Retardation

State	Alabama	Arizona	Florida	Georgia	Indiana	Ohio	Pennsylvania	Tennessee
Recommendation	<p><b>Recommendation #1:</b> Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.</p> <p><b>Recommendation #2:</b> All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.</p> <p><b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.</p>							
	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	In Compliance	Partially in Compliance	In Compliance	Not in Compliance
	Not in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance
	Not in Compliance	Insufficient Information						

## Mental Retardation (cont'd)

**Recommendation #4:** For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

**Recommendation #5:** The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the

evidence.

**Recommendation #6:** During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

**Recommendation #7:** The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.

## Mental Illness

	<i>State</i>	<i>Florida</i>	<i>Indiana</i>	<i>Ohio</i>	<i>Pennsylvania</i>	<i>Tennessee</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Partially in Compliance	Not in Compliance
<b>Recommendation #2:</b> During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Not in Compliance	Not in Compliance	Partially in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.	Insufficient Information	Insufficient Information	Not in Compliance	Insufficient Information	Insufficient Information	Insufficient Information
<b>Recommendation #4:</b> Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.	Insufficient Information	Insufficient Information	Partially in Compliance	Insufficient Information	Partially in Compliance	Partially in Compliance

## Mental Illness (cont'd)

**Recommendation #5:** Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

**Recommendation #6:** Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

**Recommendation #7:** The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.

**Recommendation #8:** To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.

**Recommendation #9:** Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.

Insufficient Information      In Compliance      Insufficient Information      Insufficient Information      Insufficient Information

Not in Compliance      Not in Compliance      Not in Compliance      Not in Compliance

Not in Compliance      Not in Compliance      Not in Compliance      Not in Compliance

Not in Compliance      Not in Compliance      Not in Compliance      Not in Compliance

Not in Compliance      Not in Compliance      Not in Compliance      Not in Compliance

Partially in Compliance      Insufficient Information      Not in Compliance      Not in Compliance

## Mental Illness (cont'd)

**Recommendation #10:** The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

**Recommendation #11:** The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.

**Recommendation #12:** The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.

**Recommendation #13:** Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.

	In Compliance	Partially in Compliance	Not in Compliance	In Compliance	Partially in Compliance
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	In Compliance	Partially in Compliance	Not in Compliance	In Compliance	Partially in Compliance
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	In Compliance	Partially in Compliance	Not in Compliance	In Compliance	Partially in Compliance
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	In Compliance	Partially in Compliance	Not in Compliance	In Compliance	Partially in Compliance
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