III. SUMMARY OF THE REPORT

Chapter One: Overview of Virginia's Death Penalty System

In this chapter, the Assessment Team examined the demographics of Virginia's death row, the statutory evolution of Virginia's death penalty scheme, and the general progression of a death penalty case through Virginia's capital punishment system from arrest to execution.

Chapter Two: Law Enforcement Identification and Interrogation Procedures

Eyewitness misidentifications 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. In this Chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on law enforcement identification and interrogation procedures is illustrated in the following chart.

Law Enforcement Identification and Interrogation Procedures	
ABA Protocol	**Compliance Level**
Protocol #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads 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 Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*.	Partial Compliance
Protocol #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.	Partial Compliance
Protocol #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.	Partial Compliance
Protocol #4: Video-record the entirety of custodial interrogations of suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.	Partial Compliance
Protocol #5: Ensure adequate funding to ensure the proper development, implementation, and updating policies and procedures relating to identifications and interrogations.	Insufficient Information[1]
Protocol #6: Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.	Partial Compliance
Protocol #7: 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. If, in relevant cases, the court finds a sufficient risk of misidentification based on cross-racial factors, judges should have available model jury instructions that inform juries that the cross-racial nature of the identification may affect the reliability of an eyewitness identification.	Partial Compliance
Protocol #8: Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.	Partial Compliance

[1] Insufficient information to determine statewide compliance.

Law Enforcement Identification and Interrogation Procedures (Cont'd)	
ABA Protocol	**Compliance Level**
Protocol #9: Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.	Partial Compliance

Nationwide, approximately 75% of wrongful convictions have involved an eyewitness misidentification, including at least eighteen cases in Virginia between 1989 and 2013.

The Virginia Department of Criminal Justice Services (DCJS) has developed a *Model Policy on Eyewitness Identification* that substantially comports with the *ABA Best Practices*, which incorporates recent advancements in social scientific research. Several of the procedures recommended in the model policy, such as sequential viewing of lineup participants and double blind administration, have been shown to substantially reduce the risk of eyewitness misidentification. However, the DCJS model policy is not mandatory, and as of 2011, only 46% of Virginia's law enforcement agencies had enacted policies "substantially similar" to DCJS's model policy. Law enforcement officers are also not required to receive training on the model policy. Some Virginia law enforcement agencies have also failed to enact policies on showups, a suggestive eyewitness identification procedure in which the witness directly confronts the suspect without any other participants.

Virginia courts have allowed expert testimony on factors affecting the accuracy of eyewitness identifications under "narrow circumstances." The Supreme Court of Virginia permits, but does not require, a trial court to instruct the jury on the factors to be considered in gauging the accuracy of an eyewitness identification.

In addition, false confessions have contributed to approximately 25% of wrongful convictions in the United States, including two high-profile murder cases in Virginia.

A video-recording of a suspect's interrogation may help the court, jury, and prosecutor to evaluate the credibility of a confession. Virginia, however, does not require law enforcement agencies to video-record a suspect's interrogation, nor has DCJS developed a model policy on this area. While some individual law enforcement agencies have implemented their own policies on the recording of interrogations, others have not. Moreover, some of the policies reviewed by the Assessment Team require only audio recording of the interrogation or do not require the entirety of the interrogation to be recorded. This practice can result in law enforcement electronically recording only the defendants' confessions but not the interrogations that preceded their final statements.

Chapter Three: 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 the state's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, the Assessment Team examined Virginia's laws, procedures, and practices concerning not only DNA testing, but also the collection and

preservation of all forms of biological evidence, and we assessed whether the Commonwealth complies with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.[2]

Collection, Preservation, and Testing of DNA and Other Types of Evidence	
ABA Protocol	**Compliance Level**
Protocol #1: Preserve all biological evidence for as long as the defendant remains incarcerated.	Partial Compliance
Protocol #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 the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *ABA Criminal Justice Standards on DNA Evidence*.	Partial Compliance
Protocol #3: Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.	Partial Compliance
Protocol #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.	In Compliance

Since the reinstatement of the death penalty in 1975, sixteen Virginia inmates, including one death row inmate, have been exonerated through post-conviction DNA testing.

In Virginia, the Department of Forensic Science (DFS) is solely responsible for collecting, preserving, and testing forensic evidence in criminal investigations. DFS operates pursuant to its *Evidence Handling and Laboratory Capabilities Guide*, which provides detailed instructions relating to the collection, storage, preservation, and testing of biological evidence. DFS is exclusively responsible for analyzing evidentiary material associated with criminal investigations for all state and local law enforcement agencies, which include 247 police departments and 124 sheriff organizations. DFS is also responsible for analyzing evidentiary material for all medical examiners and 130 prosecutorial agencies within the Commonwealth of Virginia.

In capital cases, Virginia law provides an automatic right to preservation of biological evidence and requires that such evidence be preserved "until the judgment is executed." Virginia's preservation requirements in non-capital cases, however, are subject to two critical limitations, both of which may affect the ability of those under a death sentence to prove wrongful conviction or that the person should not have been subject to the death penalty. First, the right to preservation is not automatic. The failure to provide for blanket preservation in criminal cases is an outlier practice among states that have codified preservation requirements. Second, the Virginia preservation statute includes a fifteen-year time limit on the preservation of DNA evidence in non-capital cases. Failure to provide for long-term preservation of biological evidence may result in the destruction of potentially exculpatory evidence prior to the discovery of advanced technological measures that could allow testing on previously untestable evidence.

[2] Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the "Analysis" section of each chapter.

The law also prohibits an inmate from seeking habeas corpus relief in the event that the Commonwealth fails to properly preserve biological evidence as required under the law.

With respect to testing of preserved biological evidence, the Virginia Code sets out a series of procedures that must be followed in order for a prisoner to obtain post-conviction DNA testing. With access to testing, an inmate may be able to obtain a "writ of actual innocence" from the Supreme Court of Virginia. The post-conviction testing statute, however, limits the ability of death row inmates to prove their innocence or otherwise demonstrate that the inmate should not have been subject to the death penalty in several important respects.

The law, for example, does not permit testing to prove that the inmate did not engage in aggravating conduct, which the judge or jury must consider before determining the sentence in a death penalty case. The statute requires an inmate to prove by clear and convincing evidence that the results of DNA testing will prove his/her innocence. Virginia is one of the only states to require clear and convincing evidence of innocence, rather than a "reasonable probability" of favorable results, in order to be granted access to testing of biological evidence. It has been observed that this high burden "ensures that it is virtually impossible for a convict to be exonerated through DNA evidence since without access to the evidence he is unable to prove those things necessary to allow him access."

The statute also limits post-conviction testing to two sets of circumstances. First, testing may be permissible where the evidence was not known or available at the time the conviction became final. Second, testing may be allowed if the particular testing procedure was not available at the DFS at the time the conviction became final. The statute does not provide for testing based on suspected unreliability of a prior test absent either of the above criteria.

Chapter Four: 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. In this chapter, the Assessment Team examined these issues as they pertain to Virginia and assessed whether Virginia's laws, procedures, and practices comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices	
ABA Protocol	**Compliance Level**
Protocol #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.	In Compliance
Protocol #2: Crime laboratories and medical examiner offices should be adequately funded.	Partial Compliance

Each of the four crime laboratories that comprise the Virginia Department of Forensic Science (DFS) has voluntarily obtained accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) *International* Accreditation Program. Although DFS is required to conduct forensic testing for capital defendants and death row inmates in certain circumstances, DFS typically services state and local law enforcement agencies, medical examiners, and prosecutors. Indigent capital defense service providers in Virginia routinely send biological evidence to out-of-state private crime laboratories.

DFS has established guidelines for all law enforcement agencies on the collection, packaging, preservation, and transference of physical evidence to its laboratories. DFS has also created an extensive database of guidelines on the collection, testing, and preservation of biological evidence.

Virginia medical examiner offices have obtained voluntary accreditation through the National Association of Medical Examiners (NAME). Moreover, the Chief Medical Examiner is a forensic pathologist licensed to practice medicine and certified by the American Board of Pathology. Each of the medical examiner offices employ forensic pathologists who are similarly licensed and certified as well as medicolegal death investigators who have received certification through the American Board of Medicolegal Death Investigators.

The Commonwealth has created two oversight commissions, the Virginia Scientific Advisory Committee and the Virginia Forensic Science Board, to review actions of the Commonwealth's crime laboratories and medical examiners to ensure the validity, reliability, and timely analysis of forensic evidence.

Due to high demand, testing delays in the toxicology section of DFS have caused backlogs in some medical examiner cases. However, DFS has eliminated its backlog for biological testing and the Office of the Chief Medical Examiner appears to process cases quickly, aside from waiting for toxicology results. This suggests that funding for the two entities is mostly adequate, although additional funding appears necessary in order for DFS to hire additional toxicologists.

Chapter Five: Prosecution

The character, quality, and efficiency of the entire criminal justice 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. Furthermore, prosecutors are held to a higher ethical standard than other attorneys and must balance their duty to protect the public with their duty to ensure that the rights of the accused are honored. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to its prosecution of capital cases and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on the prosecution of criminal cases is illustrated in the following chart.

Prosecution	
ABA Protocol	**Compliance Level**
Protocol #1: 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
Protocol #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.	Not in Compliance
Protocol #3: 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.	Partial Compliance
Protocol #4: 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.	Insufficient Information
Protocol #5: 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.	Insufficient Information
Protocol #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.	Insufficient Information

The Virginia Assessment Team faced limitations in obtaining information related to the analysis contained in this Chapter. The Assessment Team submitted a letter and survey to ten Commonwealth's Attorney Offices, which included the jurisdictions which have imposed six or more death sentences in Virginia since the reinstatement of capital punishment. The survey requested aggregate data on the application of the death penalty in the prosecutor's jurisdiction, as well as information on qualification and training requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices. As only one Commonwealth's Attorney Office responded to the Assessment Team's inquiry, the Assessment Team has relied on publicly available information on the training, discovery and charging practices, and discipline of Virginia's prosecutors, including statutory and case law, media reports, and studies conducted by other entities.

Virginia's Commonwealth's Attorneys have broad discretion in determining whether to seek the death penalty. Virginia's two aggravating factors—one of which must be found in order for a jury to sentence a defendant to death—appear to offer little guidance or clarity to prosecutors in determining when to seek the death penalty. As a result, the standards and policies governing the decision to seek the death penalty vary greatly among Virginia's prosecutors. One prosecutor, for example, has stated that he will seek the death penalty "even if it's questionable as [to] whether or not it fits" into one of the statutory capital-eligible offenses.

Problems exist in other areas as well. There have been a number of capital convictions in the Commonwealth that were later overturned due to uncorroborated eyewitness misidentifications, false confessions, and untruthful jailhouse informant testimony, underscoring the need for prosecutors to closely scrutinize cases when relying on these leading causes of wrongful conviction. For example, at least eighteen people have been exonerated of serious violent felonies in Virginia between 1989 and 2013 due to eyewitness misidentifications. False confessions have

led to a number of wrongful convictions in Virginia, including one case in which the defendant was sentenced to death.

Virginia's discovery rules are more restrictive than in other states and the federal system in providing capital defendants the basic information necessary to prepare and present a defense. Notably, the discovery rules governing civil cases are far more widely-encompassing than those required in a criminal—or even capital—case in Virginia. When discovery conforms to Virginia's uniquely-limited rules, a capital defendant may go to trial without knowing who will testify against him/her. S/he may face the prospect of cross-examining witnesses without access to written or recorded statements made by the witness at the time of the events. A capital defendant also may face the daunting task of preparing for trial without access to much of the record of the police investigation that gave rise to capital charges.

Because capital cases bring particular focus to issues of mitigation, Virginia's limited rules of discovery may place the prosecutor in the difficult position of deciding for him/herself which evidence in a police file may support a sentence less than death. Recent high profile wrongful conviction cases in Virginia also demonstrate instances of serious failures to comply with *Brady*. Despite prosecutors' efforts to act in good faith, such a system makes *Brady* violations more likely and can result in extensive post-conviction litigation, reversals and retrials.

Finally, it appears that Virginia prosecutors have rarely been investigated for their conduct leading to wrongful conviction or for otherwise contributing to an unfair proceeding against a capital defendant. The Center for Public Integrity's study of criminal appeals, which included both capital and non-capital cases from 1970 to June 2003, revealed 127 Virginia cases in which a defendant alleged prosecutorial error or misconduct. In twenty-two cases, the appellate court reversed or remanded the defendant's conviction, sentence, or indictment due to prosecutorial error that prejudiced the defendant.

While the Virginia State Bar's disciplinary process is meant to serve as a means to investigate and discipline the misconduct of all attorneys, it does not appear designed to effectively address allegations of prosecutorial error, negligence, or misconduct. Of the more than 500 public disciplinary orders issued by Virginia State Bar District Committees and the Disciplinary Board from 2008 to 2012, only three related to prosecutors.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to lawyers who undertake capital cases, and sufficient 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 as an integral part of a fair justice system. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services	
ABA Protocol	**Compliance Level**
Protocol #1: Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines*)—The Defense Team and Supporting Services	Partial Compliance
Protocol #2: Guideline 5.1 of the *ABA Guidelines*—Qualifications of Defense Counsel	Partial Compliance
Protocol #3: Guideline 3.1 of the *ABA Guidelines*—Designation of a Responsible Agency	Partial Compliance
Protocol #4: Guideline 9.1 of the *ABA Guidelines*—Funding and Compensation	Partial Compliance
Protocol #5: Guideline 8.1 of the *ABA Guidelines*—Training	Partial Compliance

Provision of Counsel

Virginia is now one of eleven states that provides representation to capital defendants through a statewide public defender system. The Commonwealth complies with several components of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*). For example, Virginia guarantees the appointment of at least two attorneys at trial and on direct appeal for indigent defendants, and ensures the appointment of at least one attorney during state habeas corpus proceedings. The Commonwealth has also established four Regional Capital Defender offices (RCDs), which employ attorneys and support staff specially qualified to represent capital defendants at trial, and continues to fund a non-profit organization that provides capital defense representation during state habeas corpus proceedings. Furthermore, the Virginia Indigent Defense Commission (Commission) oversees numerous aspects of the provision of defense services in the Commonwealth, including the certification of attorneys providing representation to Virginia's indigent capital defendants and death row inmates, as well as the hiring and monitoring of the Capital Defenders. Virginia also has established minimum qualification standards applicable to capital trial, appellate, and state habeas counsel. Such steps have significantly improved the quality of representation available to Virginia's indigent defendants in death penalty cases.

Virginia's current delivery of defense services in death penalty cases, however, is not without problems. For example, the Commonwealth's qualification standards focus primarily on experiential requirements and do not include an assessment of counsel's skills in relation to death penalty cases, which the Assessment Team believes is essential to the provision of consistent, effective capital defense representation. Virginia does not require attorneys representing indigent defendants at a capital trial to successfully complete training on each of the areas required by the *ABA Guidelines*, and direct appeal and state habeas corpus counsel need no training prior to obtaining initial certification from the Commission.

Virginia also has not promulgated any standards for performance in death penalty cases, which is in stark contrast to the performance standards and oversight provided by the Commission in *non*-capital cases. No entity monitors the performance of all defense counsel to ensure that the capital client receives high quality legal representation, nor is Virginia able to ensure that corrective action is taken when complaints about counsel's performance arise. In addition, capital trial counsel is, at times, not appointed at the earliest stage of capital proceedings.

Additional quality control measures are needed to ensure that every attorney representing a capital defendant or death row inmate possesses the necessary skills and demonstrates a commitment to zealous advocacy.

Provision of Ancillary Services and Experts

The RCDs appear to be staffed with investigators and mitigation specialists to support the defense. Virginia has also adopted a new law recognizing the necessity of ex parte requests for expert assistance.

Virginia law, however, does not guarantee assignment of a mitigation specialist and investigator in each capital case, which can result in the wasteful practice of counsel having to perform these important functions. The appointment of experts and ancillary professional services is also left to the discretion of individual circuit court judges who may select experts based on the cost of services or prior work for the prosecution. In addition, Virginia has not adopted training requirements for non-attorney members of the capital defense team, nor does it appear that Virginia provides adequate funding for effective education and training of its non-attorney capital defense team members. Finally, courts do not grant funding for expert services, including experts trained to screen for mental and psychological disorders, to assist death row inmates in developing or presenting constitutional claims during capital state habeas proceedings.

Funding

The Commonwealth has funded four Regional Capital Defender offices, each of which employ attorneys, investigators, and mitigation specialists to provide capital representation at trial and direct appeal. Trial courts appear to authorize funding for expert, investigative, mitigation, and other ancillary services in cases where other court-appointed counsel represents a capital defendant. Virginia also provides periodic billing in death penalty cases for other court-appointed counsel and does not compensate trial counsel via flat fee or lump-sum contracts.

However, Virginia does not ensure funding for the full cost of high quality legal representation, including for the defense team and outside experts selected by counsel. It appears, for example, that the compensation rates for assistant RCDs are insufficient to recruit and retain experienced attorneys with the necessary skills to effectively represent clients facing the death penalty. The reimbursement rate for court-appointed counsel also differentiates between in and out-of-court time, which can provide a disincentive for counsel to advocate in the best interests of the client, which may include accepting a plea offer. The Virginia Supreme Court's Office of the Executive Secretary has also dramatically reduced the reimbursement amount provided to counsel in some capital cases without explanation, effectively denying payment to counsel for many hours worked on behalf of a capital client. In some cases, it has authorized only a flat fee to reimburse counsel for work performed on behalf of a death row inmate on direct appeal.

With respect to expert, investigative, mitigation, and other ancillary services, trial courts may limit the hours of work that these professionals may perform on behalf of an indigent capital defendant. Significant court and counsel time can also be diverted to resolution of funding questions and courts may be reticent to fully fund needed defense services in cases requiring

additional language services and extensive travel. Furthermore, since 1995, it appears that no Virginia court has provided funding for experts, investigators, and mitigation specialists during state habeas corpus proceedings or clemency proceedings.

Appellate Representation

Trial counsel are often appointed to represent a capital defendant on direct appeal. While this practice ensures continuity of counsel in death penalty cases, it does not ensure that a defendant receives high quality legal representation on direct appeal, which is particularly important given it is the last stage that the defendant has a right to effective counsel. Trial counsel frequently are not possessed of the time or special skills necessary for appellate representation, which requires thorough review of the trial record anew, as well as extensive brief-writing. This is in contrast to the appellate representation provided by the Office of the Attorney General on behalf of the prosecution in any appeals in death penalty cases in Virginia. Furthermore, compensation of counsel employed by the Attorney General to handle capital appeals is often far greater than that afforded to attorneys employed by the RCDs who undertake appellate representation.

Chapter Seven: The Direct Appeal and Proportionality Review

One important function of appellate review is to ensure that death sentences are not imposed arbitrarily or based on improper biases. 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 primary method to prevent arbitrariness and bias at sentencing. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices and assessed whether they comply with the ABA's policies on the direct appeal process and proportionality review.

A summary of Virginia's overall compliance with the ABA's policies on the direct appeal process and proportionality review is illustrated in the following chart.

The Direct Appeal and Proportionality Review	
ABA Protocol	**Compliance level**
Protocol #1: 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 appeal 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 but was not sought.	Partial Compliance

The Supreme Court of Virginia undertakes proportionality review in death penalty cases by comparing the death sentence in the case at bar to (1) previous cases in which a death sentence was imposed, and (2) previous cases in which a life sentence was imposed if the defendant, following the denial of his/her appeal by the Court of Appeals of Virginia, sought and received discretionary review of his/her case by the Supreme Court of Virginia. This review, however, excludes many relevant cases needed to better ensure proportionality and provide a check on arbitrary sentencing in death penalty cases. For example

- Proportionality review excludes many cases where the death penalty was sought but not imposed, and excludes all cases in which the death penalty could have been but was not sought;
- The Supreme Court of Virginia has held that the sentences of co-defendants are irrelevant in determining the validity of a death sentence. Therefore death sentences have been imposed and carried out on defendants for crimes in which a co-defendant received only a term of years; and
- The existing proportionality review typically offers minimal analysis of the similarities between the facts of the case at bar and previous cases in which a death sentence was imposed. While the Supreme Court of Virginia has reviewed the death sentences imposed in over one hundred cases since 1974 per this statutorily-mandated proportionality review, it never has vacated a death sentence on this ground.

A review that relies chiefly on cases in which the death penalty was imposed will inevitably increase the likelihood that a death sentence will be upheld, while potentially ignoring several factually similar cases that did not warrant a death sentence and providing little safeguard against arbitrariness in capital sentencing.

Finally, application of Virginia's death penalty laws must be sufficiently limited and definite that the Supreme Court of Virginia can reasonably conduct a meaningful proportionality review. Since reinstating the death penalty in 1975, the Virginia General Assembly has repeatedly expanded the number of predicate offenses eligible for the death penalty: from three in 1975 to fifteen in 2011.[3] The ever-widening reach of the Virginia death penalty statute increases the importance that the Supreme Court of Virginia undertake a comprehensive and meaningful proportionality review in every death penalty case.

Chapter Eight: State Habeas Corpus Proceedings

The importance of state post-conviction proceedings—called habeas corpus in Virginia—to the fair administration of justice in capital cases cannot be overstated. Because capital defendants may receive inadequate representation at trial and on direct appeal, and because some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For these reasons, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to state habeas corpus proceedings, and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the following chart.

[3] The actual number of capital-eligible offenses is greater than fifteen as most of the predicate offenses described in the Virginia Code contain several death-eligible offenses. *See generally* VA. CODE ANN. § 18.2-31 (2013).

State Habeas Corpus Proceedings	
ABA Protocol	**Compliance Level**
Protocol #1: 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.	Not in Compliance
Protocol #2: 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.	Not in Compliance
Protocol #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.	Not in Compliance
Protocol #4: 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.	Partial Compliance
Protocol #5: 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 applicable
Protocol #6: 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.	Not in Compliance
Protocol #7: The state should establish post-conviction defense organizations, similar in nature to the capital resource centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.	Partial Compliance
Protocol #8: For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.	Partial Compliance
Protocol #9: 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.	Partial Compliance
Protocol #10: 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.	Not in Compliance
Protocol #11: In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	Not in Compliance
Protocol #12: 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

Virginia has adopted some laws and procedures that facilitate the development and consideration of state habeas corpus claims. For instance, the Commonwealth supports the Virginia Capital Representation Resource Center, an organization devoted to the representation of Virginia's death row inmates in state and federal habeas proceedings.

In general, however, Virginia's capital habeas procedure is structured in a manner that makes it difficult or, in some cases, impossible for a death row inmate to develop and present evidence essential to meaningful habeas review. As a result, the substance of habeas claims often go

unaddressed, death sentences are rarely overturned, and inmates are left with a limited record for federal courts to review in subsequent proceedings.

In contrast with most states, where post-conviction petitions are first reviewed by the trial court, Virginia statutory law grants the Supreme Court of Virginia original jurisdiction over state habeas petitions in death penalty cases. Thus, habeas petitions are never reviewed by the court where the inmate was originally tried, which is typically the court that is best able to evaluate errors in the case. While the Supreme Court of Virginia has the authority to order the trial court to hold an evidentiary hearing in capital habeas cases to resolve factual disputes, it has done so in only a small fraction of cases. Instead, the Court typically relies on affidavits and other documents, which are a poor substitute for an evidentiary hearing in which witnesses must appear, testify, and be cross-examined. Virginia law also imposes strict filing deadlines and procedural default rules on inmates in state habeas corpus proceedings, and does not permit successive habeas petitions under any circumstances.

Furthermore, Virginia law provides that *no* court has jurisdiction over a death row inmate's case until after his/her habeas petition is filed. Thus, an inmate cannot obtain the materials and resources needed to adequately research and present the claims in his/her petition. For instance, death row inmates have no right to discovery in capital habeas proceedings, because there is no court with the jurisdiction to grant it. Petitioners do not have access to documents that could contain evidence of prosecutorial misconduct or ineffective assistance of counsel. When questions of constitutional violations arise, Virginia habeas petitioners often must rely on the federal courts to obtain relief. Death row inmates are also unable to seek the appointment of mitigation specialists, investigators, and experts, who are often needed to fully develop state habeas claims.

Finally, Virginia law permits execution dates to be scheduled before an inmate's federal habeas proceedings have concluded. To avoid being executed, the inmate must often file his/her federal habeas petition earlier than is required under federal law. Collectively, these procedures appear designed to accelerate the rate at which capital habeas petitions are resolved, sometimes at the expense of a detailed and substantive review. Virginia stands apart from other U.S. death penalty jurisdictions in this regard. Virginia's non-capital habeas petitioners, for example, are not subjected to most of these limitations.

Chapter Nine: 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 a death sentence without regard to constraints that may limit a court's or jury's decision-making. In this chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices concerning the clemency process and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on clemency is illustrated in the following chart.

Clemency	
ABA Protocol	**Compliance Level**
Protocol #1: 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
Protocol #2: The clemency decision-making process should take into account all factors that might lead the decision maker to conclude that death is not an appropriate punishment.	Insufficient Information
Protocol #3: Clemency decision-makers should consider as factors in their deliberations any patterns 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
Protocol #4: Clemency decision-makers should consider as factors in their deliberations 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 relating to a lingering doubt about the inmate's guilt.	Partial Compliance
Protocol #5: Clemency decision-makers should consider should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.	Insufficient Information
Protocol #6: In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.	Partial Compliance
Protocol #7: Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.	Not in Compliance
Protocol #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.	Not in Compliance
Protocol #9: 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 clemency petitioners.	Not Applicable
Protocol #10: Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.	Partial Compliance
Protocol #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.	In Compliance

The Governor of Virginia has the sole power to commute a death sentence in the Commonwealth. A governor may, but is not required to, request that the Virginia Parole Board investigate and report to the Governor on any case in which clemency has been requested. Since Virginia reinstated the death penalty in 1975, five Governors have granted clemency to eight death row inmates.

Generally, it is difficult to determine the reasons for which Governors grant or deny pleas for clemency, or the process by which they make their decisions. Although the Governor is required to transmit his/her reasons for granting clemency to the General Assembly, frequently these reports convey little information beyond the mere fact that clemency has been granted. The Governor is not required to make known his/her reasons for denying clemency.

In some cases, Virginia Governors appear to have granted clemency due to lingering doubts of guilt, as well as concerns over an inmate's possible mental retardation or mental illness. However, it also appears that in some instances Virginia Governors were not fully informed or

did not fully understand the wide-ranging considerations for clemency, particularly when the courts did not reach the merits of a particular issue that was later presented in an application for clemency. In addition, death row inmates petitioning for clemency are not guaranteed counsel. Attorneys who do undertake clemency representation may have neither sufficient time nor resources to adequately develop clemency petitions on behalf of death row inmates. This may be due, in part, to Virginia's practice of issuing an execution warrant before the exhaustion of legal remedies in the case.

Finally, Virginia has limited improper political influence on clemency decision-making. For example, Virginia Governors may serve only one consecutive term in office which may, to some extent, insulate the Governor from considerations of the political impact of his/her decision in a death penalty case.

Chapter Ten: Capital Jury Instructions

In capital cases, jurors possess the "awesome responsibility" of deciding whether another person will live or die. Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed. Sometimes, however, jury instructions are poorly written and poorly conveyed, leading to confusion among jurors as to the applicable law and the extent of their responsibilities. In this chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions	
ABA Protocol	**Compliance Level**
Protocol #1: Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.	Partial Compliance
Protocol #2: Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.	Partial Compliance
Protocol #3: 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.	Not in Compliance
Protocol #4: Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.	Not Applicable
Protocol #5: Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.	Not in Compliance

Capital Jury Instructions (Cont'd)	
Protocol #6: 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
Protocol #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.	Not Applicable

As with many states, the sentencing process in Virginia is a complex, multi-step process. Jurors must make findings on aggravating factors, compare mitigating and aggravating evidence, and then decide whether to impose a sentence of life imprisonment or the death penalty. Perhaps due to this complexity, it appears that jurors in Virginia death penalty cases experience confusion regarding their roles and responsibilities in determining the sentence in the penalty phase of a capital case. The Capital Jury Project, in particular, has revealed that a substantial number of capital jurors in Virginia death penalty cases had several misconceptions about capital sentencing procedures. The Capital Jury Project found, for instance, that

- 77% of surveyed Virginia jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating;
- 53% did not realize they could consider any evidence as mitigating evidence; and
- 51% believed that they were required to find mitigating evidence beyond a reasonable doubt.

Juror confusion on these issues was higher than average in Virginia among the thirteen states in which the Capital Jury Project conducted its study. Many Virginia jurors also misunderstood whether the death penalty was required in a particular case. An alarming 53% of surveyed Virginia jurors believed that the death penalty was required by law if they found that the murder was heinous, vile, or depraved, and 41% believed death was required if they found that the defendant would be dangerous in the future. In fact, however, a finding of aggravation is only a factor for the jury to *consider* in determining whether to sentence a defendant to death.

A study of mock jurors in Virginia also demonstrated a high rate of confusion. In that study, 44% of mock jurors who received only the standard instruction believed that the vileness aggravating factor required the death penalty, and 46% believed the same about the "continuing serious threat to society" factor.

These juror misconceptions may be due, in part, to jury instructions that do not fully apprise jurors of their ability to consider any evidence that might serve as a basis for a sentence less than death. While the Virginia model instructions comport with decisions by the Supreme Court of Virginia, the instructions exclude significant explanatory legal rules and principles that might help jurors understand how mitigating evidence should be considered. For example, jurors are not instructed that mitigating evidence does not need to be found beyond a reasonable doubt. Nor are jurors instructed that a finding of mitigating evidence need not be unanimous or that any evidence may be considered as mitigating evidence. Moreover, while jurors receive specific

instructions on how to consider aggravating factors, they receive only a general description of mitigating evidence.

Since the abolition of parole in Virginia in 1995, capital jurors may also experience confusion in predicting whether the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society," one of Virginia's two aggravating circumstances. With the abolition of parole, this aggravating factor, commonly called "future dangerousness," requires the prosecution to prove that the defendant would pose a threat to others *during his/her life prison term*, not while in society at large.

Virginia trial courts also do not appear to instruct jurors that they 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 they do not believe that the defendant should receive the death penalty.

Notwithstanding the confusion experienced by Virginia capital jurors, a review of capital cases in Virginia indicates that trial courts typically respond to juror questions, including questions of law, by instructing jurors to review the instructions already given.

Chapter Eleven: Judicial Independence and Vigilance

In some states, judicial elections, appointments, and confirmations are 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 increases the possibility that judges will be selected, elevated, and retained by a process that ignores the larger interests of justice and fairness, focuses narrowly on the issue of capital punishment, and undermines society's confidence that individuals in court are guaranteed a fair hearing. In this chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices on the election of judges and on judicial decision-making processes and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on judicial independence is illustrated in the following chart.

Judicial Independence and Vigilance	
ABA Protocol	**Compliance Level**
Protocol #1: States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.	Partial Compliance
Protocol #2: A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.	In Compliance

Judicial Independence and Vigilance (Cont'd)	
Protocol #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases, educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, and publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.	In Compliance
Protocol #4: 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
Protocol #5: 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
Protocol #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.	Not in Compliance

Members of Virginia's judiciary at all levels are elected by a majority vote of each House of the General Assembly. In order to be eligible for election before the legislature, would-be candidates must be nominated to the Courts of Justice Committees by the local legislative delegation in which particular vacancies occur. State and local bar associations will also conduct interviews and submit questionnaires to judicial nominees.

Virginia's nearly distinctive approach to the selection of judges may protect the independence of the judiciary in several ways. Judicial candidates in Virginia, unlike judges elected through popular elections, need not stage donor-funded campaigns, which can encourage candidates to make promises about their prospective decisions. The nomination process, during which candidates are interviewed publicly by the Courts of Justice Committees of both legislative chambers, allows for meaningful public participation and coverage by the media of legislators' questions of candidates. Bar associations in Virginia have also made efforts to educate the public on the importance of an independent judiciary.

The Virginia State Bar, as well as state and local bar association questionnaires, do not elicit responses from judicial candidates regarding their views on issues to come before the court such as the death penalty. Judicial candidates may, however, be asked about their purported views on the death penalty before the Courts of Justice Committees in the General Assembly. However, the only records of judicial candidates' statements are media reports of judicial nominees' interviews with the Courts of Justice Committees as the hearings themselves are neither recorded nor transcribed.

Legislative election in Virginia does have the potential to interfere with the independence of the judiciary. Legislators have recently asked judges to defend, or otherwise comment on, their decisions in criminal cases even when such decisions are wholly consistent with Virginia Supreme Court jurisprudence. In addition, the effective functioning of the judiciary in Virginia is also threatened by judicial vacancies and budget reductions to the court system.

The structure of Virginia law obligates trial courts to take effective action to ensure a capital defendant receives a fair trial and to remedy unfair practices. Judges who may preside over capital cases may, for example, participate in a special course offered by the Supreme Court of Virginia. The occurrence of ineffective lawyering, prosecutorial misconduct, and trial court errors, however, has nonetheless affected the fairness of the proceedings in death penalty cases in the Commonwealth. Since 2000, eight of thirty-six Virginia death sentences imposed have been reversed due to ineffective assistance of counsel, prosecutorial misconduct, and/or trial court errors, excluding instances in which unfair practices occurred at trial and were deemed by an appellate court as improper, but were found to be harmless error not prejudicial to the outcome of the proceeding, or were procedurally barred from the appellate court's consideration.

As evidenced by the exoneration of many individuals in Virginia due to the revelation of exculpatory evidence that was never disclosed to the defense at trial, courts must be vigilant in ensuring compliance with any disclosure obligations to prevent future miscarriages of justice. No rule or law, however, requires Virginia trial courts to conduct a pretrial hearing to ensure that all parties are aware of their respective disclosure obligations, notwithstanding the limited disclosure permitted under the rules in the first instance.

Chapter Twelve: Treatment of Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race affects the system must be identified, and strategies must be devised to root out discriminatory practices. In this chapter, the Assessment Team examined Virginia's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Treatment of Racial and Ethnic Minorities	
ABA Protocol	**Compliance Level**
Protocol #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.	Partial Compliance
Protocol #2: 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. The 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.	Partial Compliance
Protocol #3: 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.	Partial Compliance
Protocol #4: Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.	Not Applicable

Treatment of Racial and Ethnic Minorities (Cont'd)	
Protocol #5: 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 such a law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.	Not in Compliance
Protocol #6: 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 the death penalty's 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.	Partial Compliance
Protocol #7: 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 voir dire.	Partial Compliance
Protocol #8: Jurisdictions should require jury instructions stating that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.	Not in Compliance
Protocol #9: 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.	In Compliance
Protocol #10: 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

There has been one detailed examination of the effect of racial and ethnic discrimination on Virginia's capital punishment system since the reinstatement of the death penalty in the Commonwealth. The Joint Legislative Audit and Review Commission (JLARC) conducted a study, published in 2002, on several aspects of the Commonwealth's death penalty system. JLARC noted that "one of the most serious complaints is that the system is racially biased, systemically exposing black persons who are arrested for capital murders to the death penalty in larger percentages than their white counterparts." Consequently, a portion of the study examined whether decisions to seek the death penalty in capital-eligible cases are based on the race of the defendant or the race of the victim. JLARC analyzed prosecutorial discretion at two stages of the capital decision-making process: (1) whether prosecutors returned indictments for capital murder in capital-eligible cases; and (2) whether prosecutors "chose to actually seek the death penalty throughout the adjudication process."

JLARC found that "prosecutors were over three times more likely to seek the death penalty [in a capitally-indicted case] if the victim is white." However, the authors noted that "when the character of the victim was accounted for in the regression model, the association between the race of the victim and[] whether the prosecutor sought the death penalty in the case lost its statistical significance."

Importantly, JLARC's review was confined to an analysis of sample cases occurring within the five-year period from 1995 through 1999. In addition, JLARC's examination of race and ethnicity focused on its impact on prosecutorial decision-making. The study was not designed to

address the effect race may have on a jury's decision to impose the death penalty, which is a crucial decision-making point in the progression of a capital case.

Current data reveal general patterns that race or ethnicity may be affecting the administration of the death penalty in Virginia. While these data are not conclusive evidence that racial discrimination affects death penalty case outcomes, they do suggest that the issue needs to be examined further. For example, since reinstating the death penalty through May 31, 2013, Virginia has carried out 110 executions. Of those, eighty-nine inmates were executed for the murder of a white victim. Four white offenders were executed for killing a black victim; by contrast, thirty-seven black offenders have been executed for killing a white victim. There is also evidence of potential racial bias in jury selection for capital murder cases. At least four black defendants have been sentenced to death by all-white juries since the death penalty was reinstated in Virginia.

Importantly, the unavailability of accurate and complete data affects the ability of the Commonwealth to undertake a comprehensive review of its death penalty system. JLARC researchers recounted the difficulty they encountered, reporting that "[s]electing a universe or sampling frame for the study was complicated by the unique data problems associated with this subject." JLARC noted that "Virginia does not maintain a centralized database containing information on murder cases that can be prosecuted as capital cases."

Some actors in the Virginia criminal justice system, including law enforcement and judges, receive mandatory education stressing that race should not be a factor in the administration of justice. However, prosecutors and defense counsel are not necessarily educated about these topics. For example, defense counsel training on developing and identifying racial discrimination claims and juror bias is offered to and completed by some capital counsel, but it is not required.

Chapter Thirteen: Mental Retardation and Mental Illness

Mental Conditions Generally

First, the Assessment Team reviewed Virginia's procedures and practices related to issues common to capital defendants and death row inmates with mental retardation and mental illness. Generally, these policies relate to the manner in which actors in the criminal justice system are trained and receive the resources necessary to recognize and understand mental retardation and mental illness in defendants and death row inmates.

A summary of Virginia's overall compliance with the ABA policies that relate to both mental retardation and mental illness is illustrated in the following chart.

Mental Retardation & Mental Illness	
ABA Protocol	**Compliance Level**
Protocol #1: All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.	Partial Compliance
Protocol #2: All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.	Partial Compliance
Protocol #3: 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.	Partial Compliance
Protocol #4: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Partial Compliance
Protocol #5: 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 clients' 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 skills deficiencies of a defendant who counsel believes may have mental retardation.	Partial Compliance
Protocol #6: 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 clients' 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.	Partial Compliance
Protocol #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.	Partial Compliance
Protocol #8: 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/her capacity to make a rational decision.	Partial Compliance

Virginia law enforcement and corrections officers are required to receive some training relevant to recognizing and interacting with persons who have mental retardation or mental illness. However, law enforcement officers are not required to receive training or follow any special procedures with respect to the interrogation of a suspect with mental retardation or mental illness. Such training is important as studies have demonstrated that persons with mental retardation or mental illness face a special risk of falsely confessing to crimes. Moreover, innocent defendants in Virginia, including former death row inmate Earl Washington, were wrongly convicted after falsely confessing to a crime as a result of a mental disability or illness. Comprehensive training and improved procedures in this area could help reduce the risk of false confessions.

In addition, trial judges do not appear to receive any training on these issues, and prosecutor training is limited to litigation strategies for overcoming a defendant's claim of mental retardation. Comprehensive mental health training for trial judges and prosecutors is especially important because these persons must rule on and make charging decisions with respect to capital defendants.

Many Virginia capital defense attorneys, in particular those employed by the Regional Capital Defender offices, receive training relevant to recognizing and assessing mental retardation and mental illness. However, no such training is required by law. In particular, there is no requirement that defense counsel be trained to recognize in and litigate incompetency claims for their clients. Such training would be especially helpful in Virginia, as four death-sentenced defendants since 2000 have waived significant rights at some stage of their case, such as the right to counsel, to present mitigating evidence, or to appeal their conviction. Additionally, while trial-level defense counsel have access to investigators, mitigation specialists, and experts qualified to assess mental retardation, such assistance has not been funded by the Commonwealth in state habeas corpus proceedings. Thus, habeas counsel lack the resources necessary to effectively litigate a claim related to mental health.

Virginia has instituted some measures to protect defendants with mental retardation or mental illness from waivers of rights that are the product of their mental disability. However, the court is not required to conduct an evidentiary hearing before determining the defendant's competency, increasing the risk that relevant evidence on this issue will go unexplored. Furthermore, Virginia, unlike the federal courts, does not permit a "next friend" to file a habeas petition on a mentally ill death row inmate's behalf.

Mental Retardation

In *Atkins v. Virginia*, the U.S. 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 has mental retardation. In this section of Chapter Thirteen, the Assessment Team reviewed Virginia's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation	
ABA Protocol	**Compliance Level**
Protocol #1: Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities. 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 seventy-five should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.	Partial Compliance

Mental Retardation (Cont'd)	
Protocol #2: 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.	Not in Compliance
Protocol #3: Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	In Compliance

Virginia enacted a statute banning the execution of mentally retarded offenders following the U.S. Supreme Court's decision in *Atkins v. Virginia*. The statute comports with some elements of the modern, scientific understanding of mental retardation. Most notably, the law requires appropriate clinical testing to be used in determining whether a capital defendant has mental retardation. In addition, while the statute places the burden of proving mental retardation on the defendant, s/he is required to prove mental retardation by only a preponderance of the evidence.

Virginia's law on excluding persons with mental retardation from the death penalty, however, is lacking in other respects. The statute requires a defendant to present an IQ score of seventy or below to prove that s/he has mental retardation. The American Association of Intellectual and Developmental Disabilities (AAIDD) and other clinically-accepted definitions of mental retardation expressly reject a bright-line IQ score requirement. Virginia courts also will not consider some clinically-accepted phenomena that can influence or artificially inflate a person's IQ score, such as the *Flynn Effect*. Furthermore, in at least one case, the Supreme Court of Virginia interpreted the age of onset component of mental retardation to require *documentation* of the disability, not simply manifestation, before age eighteen. This requirement is inconsistent with the AAIDD definition and could prejudice defendants who were not properly tested as children or for whom records of such testing could not be found.

Finally, Virginia does not permit a capital defendant's claim of mental retardation to be determined as early as possible in capital proceedings. Instead, the determination must be made by the jury as part of the sentencing phase proceedings, after a defendant has been convicted of capital murder. However, there are clear advantages to allowing the determination to be made in a hearing prior to commencement of the guilt phase of a capital trial. Specifically, if the defendant is found to have mental retardation, the Commonwealth is spared the expense of a lengthy capital trial. Moreover, jurors often misunderstand mental retardation evidence, and the evidence may be especially confusing when presented in the same proceeding with mitigating and aggravating evidence.

Mental Illness

Finally, the Assessment Team reviewed Virginia's laws, procedures, and practices pertaining to mental illness in connection with the death penalty. 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 is often central to the defendant's mitigation case. Conversely, the risk of reversible error increases 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.

A summary of Virginia's overall compliance with the ABA's policies on mental illness is illustrated in the following chart.

Mental Illness	
ABA Protocol	**Compliance Level**
Protocol #1: 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.	Not in Compliance
Protocol #2: 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.	Partial Compliance
Protocol #3: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.	Partial Compliance
Protocol #4: 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. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.	Not in Compliance
Protocol #5: To the extent that a mental disorder or disability does not preclude imposition of a 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.	Not in Compliance
Protocol #6: 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.	Not in Compliance
Protocol #7: The jurisdiction should stay post-conviction proceedings where a prisoner under a 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.	Not in Compliance
Protocol #8: 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.	Not in Compliance
Protocol #9: 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.	Partial Compliance

Virginia has taken some steps to protect the rights of individuals with mental disorders and disabilities in capital cases. For instance, Virginia has enacted statutory qualification standards for mental health experts in trial-level capital cases, and Virginia courts appear to have appointed qualified mental health experts to assist defense counsel in these cases. Virginia also has established a structure for the appointment and reasonable compensation of these experts at trial.

In other respects, however, Virginia's rules and laws do not afford adequate protection to individuals with several mental disorders or illnesses in death penalty cases. For example, the Commonwealth does not prohibit death sentences or executions of persons who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior caused by a disability other than mental retardation, such as dementia or traumatic brain injury. Under this standard, a defendant who suffered a serious brain injury at age eighteen or older would be eligible for the death penalty, even if, as a result of the injury, s/he exhibits every other characteristic of mental retardation. Furthermore, Virginia does not forbid execution of the severely mentally ill under any standard. Much as the AAIDD supports excluding persons with mental retardation from the death penalty, several leading mental health groups and the American Bar Association support a prohibition of the death penalty for a narrow group of severely mentally ill individuals whose ability to control their conduct at the time of the offense was significantly impaired.

Furthermore, Virginia's jury instructions fail to adequately explain how evidence of mental illness should be considered in a death penalty case. Jurors are not instructed on individual statutory mitigating factors, including factors relevant to mental illness. Nor are jurors instructed that a mental disorder or disability is a mitigating factor, not an aggravating factor; that they should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; or that they should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor. Jurors are also not instructed that any medication the defendant is receiving for a mental disorder or disability may affect his/her perceived demeanor and that this should not be considered in aggravation.

Finally, Virginia law does not adequately protect death row inmates whose mental disorders have rendered them incompetent. The Commonwealth does not permit an inmate's state habeas proceedings to be stayed, even if s/he suffers from a mental disorder or disability that significantly impairs his/her capacity to assist or communicate with counsel in those proceedings. Virginia also has not enacted any procedures for determining whether an inmate possesses a rational understanding of the nature and purpose of his/her death sentence and is, thus, competent to be executed. This is contrary to U.S. Supreme Court precedent, which expressly prohibits the execution of incompetent inmates.