II. HIGHLIGHTS OF THE REPORT

A. Overview of the Virginia Death Penalty Assessment Team's Work and Views

To assess fairness and accuracy in Virginia's death penalty system, the Virginia Death Penalty Assessment Team researched the twelve issues that the ABA identified as central to the analysis of the fairness and accuracy of a state's capital punishment system. The Virginia Death Penalty Assessment Report devotes a chapter to each of the following areas: (1) overview of the Commonwealth's death penalty; (2) law enforcement identification and interrogation procedures; (3) collection, preservation, and testing of DNA and other types of evidence; (4) crime laboratories and medical examiner offices; (5) prosecution; (6) defense services; (7) the direct appeal process and proportionality review; (8) state habeas corpus proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.[2] Chapters begin with an introduction to provide a national perspective of the issues addressed by each chapter, followed by a "Factual Discussion" of the relevant laws and practices in Virginia. The final section of each chapter, entitled "Analysis," examines the extent to which Virginia is in compliance with the ABA Protocols.

It is the Assessment Team's unanimous view that, as long as Virginia imposes the death penalty, it must be reserved for a narrow category of the worst offenders and offenses, ensure heightened due process, and minimize the risk of executing the innocent.

B. Recent Improvements to Fairness and Accuracy in Capital Cases

The Commonwealth has enacted some reforms in recent years that improve fairness and accuracy of capital proceedings. For example, some law enforcement agencies across the Commonwealth have adopted policies that improve the likelihood of accurate eyewitness identifications. Adherence to such policies both reduces the risk of wrongful conviction and improves the ability of law enforcement to identify the real perpetrators. The Virginia Department of Criminal Justice Services' *Model Policy on Eyewitness Identification* incorporates recent advancements in social scientific research, including specific policies consistent with the *ABA Best Practices* on conducting an in-person or photographic lineup. While the *Model Policy* is not mandatory for Virginia law enforcement agencies, many of the policies recommended have been widely adopted. In addition, in 2014, the Virginia Law Enforcement Professional Standards Commission's accreditation standards will require agencies seeking accreditation to develop a written policy for documenting line-up procedures and for conducting showups.[3]

Further, the reliability and timeliness of forensic investigation in death penalty cases in the Commonwealth is enhanced by accreditation of crime laboratories and medical examiner offices in the state, as well as certification of the professionals employed by those entities. 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

[2] This report is not intended to cover all aspects of the Commonwealth's capital punishment system, and, as a result, it does not address a number of important issues, such as the treatment of death row inmates while incarcerated or method of execution.

[3] A showup is an identification procedure in which the eyewitness directly confronts the suspect alone.

Directors/Laboratory Accreditation Board *International* Accreditation Program. DFS has also established guidelines for all law enforcement agencies on the collection, packaging, preservation, and transference of physical evidence to its laboratories. Virginia medical examiner offices have obtained voluntary accreditation through the National Association of Medical Examiners and the Commonwealth's 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. The Commonwealth has also 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.

Finally, Virginia's establishment of Regional Capital Defender offices, staffed by attorneys and support staff specially qualified to represent capital defendants at trial, has significantly improved the quality of representation available to Virginia's indigent defendants in death penalty cases. These offices are also staffed with mitigation and investigative assistance—positions that are critical to defense of those facing the death penalty. Virginia also provides funding to the Virginia Capital Representation Resource Center to represent death row inmates in state habeas, federal habeas, and clemency proceedings. Because state and federal habeas claims in death penalty cases are often complex and require a special understanding of death penalty law, funding an organization specifically dedicated to capital post-conviction representation helps to ensure that death row inmates' claims are fully researched and developed.

Further, the Virginia Indigent Defense Commission also 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.

C. Areas and Recommendations for Reform

Throughout its review, the Assessment Team identified several areas of concern. This section describes those areas viewed by the Team to be most in need of reform, followed by specific recommendations endorsed by the Assessment Team for that purpose. The Team's full list of areas for concern and recommendations for reform may be found throughout the main Assessment Report, organized by chapter.

Pretrial Areas for Reform

Eyewitness Identification Procedures (Chapter 2). Between 1989 and 2013, at least 18 people in Virginia whose convictions were based largely on eyewitness misidentifications have been exonerated of serious violent felonies following DNA testing or the discovery of new evidence. In one case, an innocent person remained in prison for 15 years for an offense he did not commit while the actual perpetrator remained free and committed an assault on another victim. While the Virginia Department of Criminal Justice Services (DCJS) has developed a *Model Policy on Eyewitness Identification*, a 2011 DCJS report found that a majority of law enforcement agencies in Virginia do not use double blind administration—in which both the officer and the witness are

unaware of the identity of the suspect during a lineup—despite the fact that the *Model Policy* has recommended this method since 2005. The DCJS report also found that 69% of the law enforcement agency policies it reviewed do not require documented lineup results. Moreover, only 10% of responding agencies' policies indicated a preference for video- or audio-recording the procedure, rather than a written recordation of the procedure.

Recommendations
Virginia should require law enforcement agencies to adopt the Virginia Department of Criminal Justice Service's (DCJS) *Model Policy on Eyewitness Identification*. Any new rule or law on eyewitness identification procedures should also include remedies for agencies' noncompliance with the identification procedures. Such remedies need not mean an automatic exclusion of the eyewitness's identification. Virginia DCJS should also incorporate its *Model Policy on Eyewitness Identification* into its minimum training requirements for law enforcement officers.

Interrogation Procedures in Capital Cases (Chapter 2). Virginia does not require law enforcement agencies to electronically record a suspect's interrogation and confession, nor has any Virginia agency developed a model policy on interrogation recording. The Northwestern University School of Law Center on Wrongful Convictions found that only nine Virginia law enforcement agencies record a majority of their interrogations.

Recommendations
Virginia should require law enforcement agencies to record interrogations and interviews with suspects and witnesses that take place in a law enforcement-controlled setting in any potential capital case. DCJS could assist with developing the statute, or Virginia could look to the several other states that have already implemented interrogation recording statutes, including the neighboring jurisdictions of Maryland, North Carolina, and the District of Columbia. With respect to interrogations, recording should include the reading of *Miranda* rights, the *Miranda* waiver, all questioning by law enforcement, and the suspect's final statement. Exceptions to the recording requirement should be permitted in the case of certain exigent circumstances, such as a sudden utterance by the suspect, a suspect's unequivocally expressed desire not to be recorded, and cases in which the recording equipment fails and officers made a good faith attempt to record the interrogation. The statute must also provide defendants with a remedy if law enforcement failed to record the interrogation in violation of the statute; importantly, however, the remedy need not mean a total exclusion of all unrecorded statements.

Discovery in Capital Cases (Chapter 5). 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. By comparison, discovery rules governing civil cases are far more widely-encompassing than those required in a death penalty case in the Commonwealth.

While some prosecutors in capital cases provide more discovery than the rules require, when discovery conforms to Virginia's rules, a capital defendant may go to trial without knowing who

will testify against him or her. She or 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. And a capital defendant 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 on issues of mitigation, Virginia's limited rules of discovery can also put the prosecutor in the difficult position of deciding for him or herself which evidence in a police file may support a sentence less than death. Despite prosecutors' efforts to act in good faith, such a system makes *Brady* violations more likely and can result in extensive post-trial litigation, reversals, and retrials. Recently, two Virginia capital cases were reversed on appeal due to failures to disclose exculpatory evidence.

Recommendations
The Virginia Supreme Court should modify Rule 3A:11, for capital cases, to require prosecutors to disclose the identity and any prior statements of testifying witnesses at a time sufficient to allow adequate preparation for cross-examination and to allow discovery of police reports. In recognition of the sensitive issues regarding the cooperation and safety of witnesses, the rules should include a provision for protective orders to protect witness safety in appropriate cases. Importantly, such discovery contributes to earlier and better informed disposition of capital cases through guilty pleas. Because of the added costs and protracted nature of capital litigation, such dispositions likely would more than offset the minimal cost of providing broader discovery of information already in the hands of the Commonwealth. All Commonwealth's Attorneys should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose exculpatory evidence. Prosecutors should have in their possession a complete copy of the investigating agencies' case file and must conduct a full inspection of the complete contents of the file. All law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, including anything that might constitute *Brady* material, such as mitigating evidence in death penalty cases.

Capital Charging (Chapter 5). After a capital indictment, a Commonwealth's Attorney may determine—in his or her discretion—that seeking the death penalty is not appropriate in a particular case. However, existing Virginia law does not explicitly provide for such circumstances and may even permit a court to impose a death sentence where the prosecutor does not seek it.

Recommendation
Virginia should enact a statutory change that authorizes the prosecutor to unilaterally withdraw the death penalty when the defendant has been charged with capital murder. Notably, this amendment would provide a cost savings to the Commonwealth as prosecutors would be able to seek a sentence less than death in a capital case, with the concomitant savings in capital litigation by the court, prosecution, and defense. It would also provide additional options to Commonwealth's Attorneys in determining how to prosecute a capital case as new information relevant to the sentencing decision arises after indictment.

Post-Trial Areas for Reform

Biological Evidence Preservation (Chapter 3). Virginia requires automatic preservation of biological evidence in capital cases; however, the preservation of evidence which likely affects death-eligibility—such as evidence in non-capital cases—is not required to be preserved for as long as the defendant remains incarcerated. Further, the Virginia Code prohibits petitioners from seeking a writ of habeas corpus if the Commonwealth fails to preserve biological evidence—even in capital cases. Long-term preservation of biological evidence would not only improve the Commonwealth's ability to identify wrongful convictions, but would also be an effective tool to assist in identifying and convicting actual perpetrators.

Recommendations
When biological evidence is collected in a felony case, Virginia should require long-term preservation of such evidence. The experience of the many other states that have enacted provisions, which call for blanket preservation of biological evidence in criminal cases, may prove instructive. In addition, the Commonwealth should provide notice to all parties whenever testing may consume the only available sample of evidence. In order to encourage preservation and promote adherence to existing evidence preservation requirements, state law also should be amended to permit the Commonwealth's failure to preserve evidence to serve as a basis for relief in state habeas corpus proceedings. Courts should not be prohibited, as they are under existing law, from exercising their discretion to determine if the circumstances surrounding lost or destroyed evidence warrant relief.

Access to Post-Conviction Testing of Biological Evidence (Chapter 3). Virginia's post-conviction testing statute limits the ability of death row inmates to prove their innocence or otherwise demonstrate that they 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 also requires an inmate to prove by clear and convincing evidence that the results of DNA testing will prove his or 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." Further, the statute does not provide for testing based on suspected unreliability of a prior DNA test.

Recommendations
Virginia should amend its DNA testing statute to permit post-conviction testing on biological evidence if the testing requested was not available at the time of trial or there is credible evidence that prior test results or interpretation were unreliable. The Commonwealth should also ensure that Virginia law grants access to testing to an individual who is able to show that a *reasonable probability* exists that she or he is innocent of the offense *or* did not engage in aggravating conduct in a death penalty case.

Appellate Representation (Chapter 6*).* While Virginia should be commended for ensuring continuity of counsel in death penalty cases by assigning trial counsel to represent the defendant on direct appeal, this system does not ensure that a defendant receives high quality legal representation on appeal, which 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 required of appellate representation, which require 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 oftentimes far greater than that afforded to attorneys employed by the Regional Capital Defenders who undertake appellate representation.

Recommendation
Virginia should create a position for an appellate defender within the Regional Capital Defender Office in Richmond. If and when direct appellate representation in a capital case is required, the attorneys serving in this position will be specially trained to investigate and present the unique issues raised in capital appeals. In cases where an appellate defender cannot represent the defendant, Virginia must fully compensate counsel for actual time and services performed.

State Habeas Corpus Proceedings (Chapter 8). One of the biggest areas for concern in Virginia's present death penalty system is the nature and timing of the Commonwealth's state post-conviction process, known as state habeas corpus. In most respects, the state habeas process in Virginia emphasizes finality of convictions and death sentences over fairness. Importantly, many of the limitations placed on Virginia death row inmates petitioning for habeas relief are not imposed in other capital jurisdictions.

For example, Virginia imposes strict and limited time constraints on inmates filing state habeas petitions. Other capital jurisdictions provide death row inmates with a significantly longer period in which to file a petition for state post-conviction relief, or do not impose a specific deadline at all. Additionally, Virginia permits an execution date to be scheduled once a state habeas petition has been denied. This practice denies Virginia death row inmates the full-year for research, preparation, and filing of their federal petition that would otherwise be available. Because Virginia cannot impose this restriction on inmates *not* sentenced to death, this effectively provides less due process to those under a death sentence than that which is afforded to non-capital inmates in Virginia.

Furthermore, factual disputes in state habeas proceedings appear to be resolved based on review of affidavits submitted by the parties rather than through evidentiary hearings. This is particularly troublesome because many claims that are commonly presented in state habeas proceedings involve complex factual considerations that typically require the court to consider evidence that is not in the trial record and that cannot be fully developed in the absence of an evidentiary hearing. Only five capital habeas cases between 1995 and 2012 have been granted evidentiary hearings, and the courts ultimately dismissed the habeas petition following the hearing in four of these cases. During this same time period, no court has approved funding for mitigation, investigative, or expert assistance in a death row inmate's case for state habeas relief. Instead, the Virginia Capital Representation Resource Center—the entity responsible for

representation of most death row inmates—must often request pro bono assistance from such service providers.

Recommendations
Virginia should • Return original jurisdiction over capital state habeas claims to trial courts to ensure that the court in which the inmate was originally convicted has the first opportunity to correct any errors. This approach also affords more process to all parties involved, as the decision to grant or deny a hearing and the court's final order may then be appealed to the Supreme Court of Virginia; • Increase the amount of time afforded to death row inmates for filing of their state habeas petitions, with an allowance for an extension of time upon a showing of good cause; • Eliminate the practice of scheduling an execution date while an inmate's federal habeas proceedings are pending, and permit the setting of an execution date only after all state and federal remedies are exhausted; and • Provide funding so that state habeas attorneys can hire mitigation specialists, investigators, and experts needed to fully develop and present their clients' claims.

Special Issue Areas

Capital Jury Instructions (Chapter 10). The Virginia Assessment Team recognizes the complexities inherent in designing capital jury instructions that are both comprehensible to laypersons and accurate statements of the law. As shown by the findings of the Capital Jury Project, however, a significant number of Virginia's capital jurors have failed to understand several aspects of Virginia's capital sentencing procedure. On some issues, a majority of surveyed jurors expressed understandings of the law that contradicted U.S. Supreme Court decisions. The Capital Jury Project found, for instance, that

- 77% of surveyed Virginia capital jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating;
- 53% did not realize that 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 capital 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.

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." With the abolition of parole, this aggravating factor

requires the prosecution to prove that the defendant would pose a threat to others *during his or her life prison term*, not while in society at large.

Juror confusion is likely to persist unless Virginia's capital jury instructions are revised to enhance clarity, instructions are presented to jurors in a more organized and logical manner, and judges are more willing to respond to juror inquiries regarding questions of law.

Recommendations
Virginia capital jurors should be instructed that • Jurors are never required to return a verdict of death. Jurors may return a life sentence, even in the absence of any mitigating factor and even when both aggravating factors have been established beyond a reasonable doubt, if they do not conclude that the defendant should receive the death penalty; • Mitigating evidence does not need to be found beyond a reasonable doubt; • A finding of mitigating evidence need not be unanimous; • Any evidence presented during the guilt and sentencing phases of the trial may be considered as mitigating evidence; and • Jurors must consider mitigating evidence if they find an aggravating factor. In addition, • Jurors should be instructed on individual mitigating factors when such an instruction is supported by the evidence and requested by the defendant; and • In applicable cases in which jurors are considering whether the defendant poses a continuing threat to society, the instruction should make clear that jurors must consider the defendant's threat to others in light of his or her incarceration while serving a sentence of life in prison without the possibility of parole.

Persons with Mental Retardation/Intellectual Disability (Chapter 13). The Virginia statute detailing how intellectual functioning testing must be conducted for the purposes of determining whether a defendant has mental retardation seeks to ensure that only scientifically valid IQ tests are admissible. However, under Virginia law, a defendant must present an IQ score of 70 or below to prove that she or he has mental retardation. This is a requirement that has been expressly rejected by the American Association on Intellectual and Developmental Disabilities (AAIDD) and is contrary to the modern, scientific understanding of mental retardation.

Virginia law also requires the determination of whether a defendant has mental retardation to be made as part of the sentencing phase of a death penalty case. This is problematic because jurors hearing a mental retardation claim after the determination of guilt may be strongly influenced by evidence of future dangerousness or vileness. Additionally, determining mental retardation at the sentencing phase means that the Commonwealth may conduct a long, expensive, and ultimately unnecessary capital proceeding.

Recommendations
Virginia should amend its mental retardation statute such that it fully conforms to the AAIDD definition. The statute should not require a particular IQ score to prove mental retardation and should allow courts to take into account errors of measurement like the *Flynn effect* and *practice effect*. In addition, the statute should clearly provide that formal mental retardation testing administered before the age of 18 is not required to prove mental retardation. Virginia should amend its statute to require the trial court make a pretrial determination of whether a capital defendant has mental retardation, and is thus ineligible for the death penalty, so long as the defendant can present some credible evidence that she or he has mental retardation. This should not, however, preclude the defendant from presenting a mental retardation claim in the sentencing phase of the trial in the event that a pretrial hearing is not granted or if the defendant does not prevail in the hearing. There are distinct advantages to determining mental retardation in a pretrial hearing. If a defendant is determined to have mental retardation prior to commencement of trial, the Commonwealth is spared a long, expensive, and unnecessary capital proceeding. This frees the court, prosecution, and defense counsel to devote their limited resources to other matters. Several jurisdictions have already adopted these procedures.

Persons with Severe Mental Illness (Chapter 13). Virginia's rules and laws do not afford adequate protection of 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 18 or older would be eligible for the death penalty, even if, as a result of the injury, she or 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 a ban on the execution of persons with mental retardation, 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.

Recommendations
The diminished culpability of defendants with mental retardation arises from their intellectual and adaptive limitations, not the cause of these limitations. Accordingly, persons who suffer from these limitations should be afforded the same protection under the law, irrespective of the cause of the disability. Thus, Virginia should adopt a law prohibiting the application of the death penalty to anyone who, at the time of the offense, suffered from significant limitations in both their general intellectual functioning and adaptive behavior, whether resulting from mental retardation, *dementia, traumatic brain injury, or other disease or disability*. Under this standard, the defendant would have to prove that she or he suffers from the same intellectual functioning and adaptive behavior limitations as a person with mental retardation.

Recommendation
The law should also forbid death sentences and executions with regard to persons who, at the time of the offense, had a *severe* mental disorder or disability that significantly impaired the person's 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. The law should make explicit that a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, 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 exclusion from capital punishment. This procedure would affect only a defendant's eligibility for the death penalty. Those defendants qualifying as having a severe mental disorder under this standard would still be eligible to stand trial.

Data Collection (Chapters 5, 7, & 12). Virginia has continued to expand the number and type of death penalty-eligible offenses since reinstatement of the death penalty. While, in 1975, an offender convicted of first-degree murder was only eligible for the death penalty if she or he was found guilty of one of three predicate offenses, this number rose to one out of fifteen separate predicate offenses by 2011. Of the many cases in which a death sentence could have been sought but was not because of a plea agreement, there often is no appeal and thus no official record of salient facts relative to the offense and the offender. A 2002 report by the Joint Legislative Audit and Review Commission (JLARC) of the Virginia General Assembly examined capital-eligible homicide cases in Virginia from 1995 to 1999. The JLARC report commented on the problems with respect to data collection on Virginia's death penalty and recommended that the Commonwealth create a searchable, publicly available tool on the charging and sentencing of all capital-eligible offenses.

Creation of a data collection tool would not only assist the Supreme Court of Virginia in reviewing the proportionality of death sentences imposed in the Commonwealth, but would also assist litigants in presenting claims on proportionality issues and aid prosecutors in making charging decisions. Obtaining accurate, reliable data on whether race, geography, or any other improper factor influences outcomes in capital cases is also essential to ensuring that the Commonwealth provides due process and equal protection of the law.

Recommendation
Virginia should designate an appropriate entity, such as the Virginia Sentencing Commission, to collect, analyze, and make publicly available salient facts on all death-eligible cases in Virginia, regardless of whether the case was resolved at trial or through a plea negotiation. It is imperative that the collection of this data be sanctioned by the Supreme Court of Virginia to ensure its reliability, trustworthiness, and admissibility. Other affected stakeholders, including prosecutors, capital defense counsel, and trial courts, should also be consulted in creation of such a database.