

Chapter 1: Demographics of State’s Death Row and Statutory Evolution of State’s Death Penalty Scheme; Progression of a Death Penalty Case¹ from Arrest to Execution

Chapter 2: Collection, Preservation, and Testing of DNA and Other Types of Evidence

- 1) Preserve all biological evidence² for as long as the defendant remains incarcerated.
- 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.
- 3) Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.
- 4) Provide adequate funding to ensure the proper preservation and testing of biological evidence.

¹ A “death penalty case” is any case “in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have commenced or the prosecution has affirmatively indicated that the death penalty will be sought.” ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Commentary HOFSTRA Guideline 1.1 (rev. ed. 2003).

² “Biological evidence” includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. See INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute.html (last visited Dec. 15, 2006).

Chapter 3: Law Enforcement Identifications and Interrogations

- 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 American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (which has been reproduced below, in relevant part and with slight modifications).
 - i. *General Guidelines for Administering Lineups and Photospreads*
 1. The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his/her presence is constitutionally required) should be unaware of which of the participants is the suspect.
 2. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.
 - ii. *Foil Selection, Number, and Presentation Methods*
 1. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.
 2. The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.
 - iii. *Recording Procedures*
 1. The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.
 2. The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.
 3. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.
 - iv. *Immediate Post-Lineup or Photospread Procedures*
 1. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.
- 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.

- 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.
- 4) Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.
- 5) Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.
- 6) Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.
- 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.
- 8) Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.
- 9) Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Chapter 4: Crime Laboratories and Medical Examiner Offices

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

Chapter 5: Prosecutorial Professionalism

- 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.
- 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.
- 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.
- 4) 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.
- 5) Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.
- 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.

Chapter 6: Defense Services

- 1) In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings— pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):
 - a. At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.
 - b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.
 - c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.
 - i. Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.
 - ii. Counsel should have the right to have such services provided by persons independent of the government.
 - iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.
- 2) Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):
 - a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.
 - b. In formulating qualification standards, the jurisdiction should ensure:
 - i. That every attorney representing a capital defendant has:
 - (a) Obtained a license or permission to practice in the jurisdiction;
 - (b) Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - (c) Satisfied the training requirements set forth in Guideline 8.1.
 - ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

- (a) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- (b) Skill in the management and conduct of complex negotiations and litigation;
- (c) Skill in legal research, analysis, and the drafting of litigation documents;
- (d) Skill in oral advocacy;
- (e) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (f) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (g) Skill in the investigation, preparation, and presentation of mitigating evidence; and
- (h) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

3) The selection and evaluation process should include:

- a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:
 - i. A defender organization that is either:
 - (a) A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
 - (b) A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
 - ii. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.
- b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.
- c. The statewide independent appointing authority should perform the following duties:
 - i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;
 - ii. Establish minimum standards for performance of all counsel in death penalty cases;
 - iii. Draft and periodically publish rosters of certified attorneys;
 - iv. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;
 - v. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

- vi. Implement mechanisms to ensure that the workload of defense attorneys in death penalty cases enables counsel to provide each client with high quality legal representation consistent with the ABA Guidelines;
 - vii. Monitor the performance of all attorneys providing representation in capital proceedings;
 - viii. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;
 - ix. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and
 - x. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.
- 4) Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):
- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by ABA Guideline 9.1, by the defense team and outside experts selected by counsel.³
 - b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
 - i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
 - ii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
 - iii. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
 - c. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
 - i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
 - ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

³ In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g., Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

- iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
 - d. Additional compensation should be provided in unusually protracted or extraordinary cases.
 - e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.
- 5) Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)
- a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.
 - b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
 - i. Relevant state, federal, and international law;
 - ii. Pleading and motion practice;
 - iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
 - iv. Jury selection;
 - v. Trial preparation and presentation, including the use of experts;
 - vi. Ethical considerations particular to capital defense representation;
 - vii. Preservation of the record and of issues for post-conviction review;
 - viii. Counsel's relationship with the client and his/her family;
 - ix. Post-conviction litigation in state and federal courts;
 - x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
 - c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.
 - d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

Chapter 7: The Direct Appeal Process

- 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 appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.

Chapter 8 - State Post-Conviction Proceedings

- 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.
- 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.
- 3) Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.
- 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.
- 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.
- 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.
- 7) The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.
- 8) For state post-conviction proceedings, the State should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for 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.
- 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.
- 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.
- 11) In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.
- 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.

Chapter 9: Clemency

- 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.
- 2) The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.
- 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.
- 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.
- 5) Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.
- 6) In clemency proceedings, the death row inmates should be represented by counsel and such counsel should have qualifications consistent with the American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.
- 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.
- 8) Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.
- 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.
- 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.
- 11) To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

Chapter 10: Capital Jury Instructions

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- 7) In states where it is applicable, trial courts should make clear in juror 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.

Chapter 11: Judicial Independence

- 1) States should examine the fairness of their processes for the appointment/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.
- 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.
- 3) Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.
 - a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.
 - b. Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.
 - c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.
- 4) A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.
- 5) A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.
- 6) Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Chapter 12: Racial and Ethnic Minorities

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.
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 (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.
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.
4. Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.
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.
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 death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.
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*.
8. Jurisdictions should require jury instructions that it is improper for prejudice or bias to affect their jurors' decision making and that they should report any evidence of racial discrimination in jury deliberations.
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.
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.

Chapter 13: Mental Retardation⁴, Mental Illness, and the Death Penalty

Mental Retardation:

- 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 (AAIDD).⁵ Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.
- 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 retardation in capital defendants and death-row inmates.
- 3) The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.
- 4) For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*⁶ 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.
- 5) The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.
- 6) During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.
- 7) The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.

Mental Illness:

⁴ While "intellectual disability" is gaining currency as the preferred term to describe the same condition known as mental retardation, the ABA Assessment Reports will continue to use the term mental retardation until "intellectual disability" is more fully integrated in to the legal system. See American Association on Intellectual and Developmental Disabilities ("AAIDD"), *FAQ on Intellectual Disability*, available at http://www.aaid.org/content_104.cfm (last visited on Nov. 10, 2009). For example, mental retardation is more commonly used in death penalty jurisprudence in such definitive decisions as *Atkins v. Virginia*, 536 U.S. 304 (2002), ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty.

⁵ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007, see AAIDD, http://www.aaid.org/content_104.cfm (last visited on Jan. 21, 2010).

⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

- 1) All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.
- 2) 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.
- 3) The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.
- 4) 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.
- 5) Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.
- 6) The jurisdiction should forbid death sentences and executions with regard to 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.
- 7) The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. [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.]
- 8) To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6-#7 as to when it should do so), 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.
- 9) Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.
- 10) The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-

her capacity to make a rational decision.

- 11) The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.
- 12) The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.
- 13) Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.