EXECUTIVE SUMMARY

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project has conducted or is conducting state assessments in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, South Carolina, Texas, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. This assessment of Alabama is the second in this series.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus,

clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with death penalty administration, including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA takes no position on the death penalty *per se,* the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Alabama death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Alabama Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions, including its belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Alabama's capital punishment system.

II. HIGHLIGHTS OF THE REPORT – STRENGTHS AND WEAKNESSES

A. Overview

To assess fairness and accuracy in Alabama's death penalty system, the Alabama Death Penalty Assessment Team researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. The Alabama Death Penalty Assessment Report summarizes the research on each issue and analyzes the level of compliance with the relevant ABA Recommendations.

B. Areas for Reform

The Alabama Death Penalty Assessment Team has identified a number of areas in which Alabama's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems with Alabama's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can undermine sound procedures in others. With that in mind, the Alabama Death Penalty Assessment Team views the following problem areas as most in need of reform:

- Inadequate Indigent Defense Services at Trial and on Direct Appeal – While many individual indigent defense lawyers in the State of Alabama are competent and effective, the State's indigent defense system is failing. At best, it is described as a "very fragmented, mixed, and uneven system that lacks level oversight and standards . . . and does not provide uniform, quality representation to the majority of indigent defendants in the state." The State's failure to adopt a statewide public defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in a hodge-podge of systems that varies by judicial circuit in both type and quality. These problems are seriously exacerbated in the context of indigent defense in capital cases. Capital trial practice is unique and requires special skills that are not part of the standard training and experience of criminal defense attorneys. This patchwork indigent defense system, combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable. The importance of the State's requiring and ensuring that indigent defense lawyers at trial and on direct appeal be held to the performance standards set in the ABA *Guidelines for the Appointment and Performance in Death Penalty Cases* cannot be overemphasized. The Judicial Study Commission of the Alabama Supreme Court, and a committee of the Alabama State Bar have proposed legislation at various times since 2000 to create a statewide indigent defense commission which would oversee indigent defense in Alabama. Thus far, efforts at getting such legislation passed have been unsuccessful. The commission concept is modeled after that used in many other

states across the country. If established as proposed, the Commission would have the final decision on what type of indigent defense system would be used in each circuit, which would assist in eliminating the questionable control over indigent defense services which exist throughout the state. It would also assume the responsibility for approving vouchers of appointed counsel, and would establish a statewide budget for indigent defense. The bill, if passed, would assist in providing some accountability for the funds spent on indigent defense in Alabama, and would, hopefully and more importantly, improve the quality of defense representation.

- Lack of Defense Counsel for State Post-conviction Proceedings – With one exception, Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings. This failure creates a situation where this critical constitutional safeguard is seriously undermined. The importance of the State's requiring and ensuring that indigent defense lawyers in state post-conviction proceedings be held to the performance standards set in the ABA *Guidelines for the Appointment and Performance in Death Penalty Cases* cannot be overemphasized.
- Lack of a Statute Protecting People with Mental Retardation from Execution – Despite the United States Supreme Court decision in *Atkins v. Virginia* banning the execution of mentally retarded offenders, Alabama has not adopted a law setting out standards and procedures for determining which individuals have mental retardation. As a result, and despite repeated judicial requests for legislative guidance, the Alabama courts have been forced to fashion a stopgap process for dealing with claims of mental retardation. The legislature's abdication of its responsibility has resulted in a legitimate and continuing risk that the State of Alabama may execute mentally retarded offenders, despite the constitutional prohibition against it.
- Lack of a Post-conviction DNA Testing Statute – While the State enables defendants to obtain physical evidence for DNA testing during pre-trial discovery, the State has failed to pass legislation providing convicted offenders a clear method for obtaining post-conviction DNA testing. As a result, petitioners seeking post-conviction DNA testing must seek such relief under post-conviction rules that do not adequately protect against the execution of the innocent. Furthermore, individuals that file newly discovered evidence claims to obtain DNA testing may find it difficult, if not impossible, to have their claims heard.
- Inadequate Proportionality Review – In conducting its proportionality review, the Alabama Court of Criminal Appeals looks only to cases where the death penalty was imposed under similar circumstances, rather than also considering cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been sought but was not. Proportionality review that considers only cases where the death sentence was imposed is inherently limited and incapable of uncovering potentially serious disparities—whether those disparities are socio-economic, geographical, racial or ethnic, or attributable to any other inappropriate factor. In addition, many of the decisions that claim to do a proportionality review simply dismiss the issue with conclusory language and no reference to other comparable cases. Finally, even where courts cite comparable cases, they virtually never follow the statutory requirement that proportionality review consider both the crime and the offender.

- Lack of Effective Limitations on the "Heinous, Atrocious, or Cruel" Aggravating Circumstance – The language of this aggravating circumstance ("the capital offense was especially heinous, atrocious or cruel compared to other capital offenses") has not been interpreted in a manner that provides a basis for distinguishing between those cases in which the death penalty is properly imposed from those cases in which the death penalty is not. Because Alabama courts have not systematically reviewed cases involving this aggravating circumstance, and have thus failed to fully enforce the statutory requirement that prosecutors establish the comparative atrocity of a given capital murder as compared to other capital murders, this aggravating factor is not subject to any meaningful or rational limitation. It thus has the potential to be improperly used as a mere catch-all provision.
- Capital Juror Confusion – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Alabama capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. Over 54% of interviewed Alabama capital jurors did not understand that they could consider any evidence in mitigation, over 53% erroneously believed that the defense had to prove mitigating factors beyond a reasonable doubt, and over 55% did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. In addition, a full 40% of capital jurors interviewed did not understand that they must find that one or more statutory aggravating circumstances exist beyond a reasonable doubt, over 56% incorrectly believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 52% erroneously believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death. This research data suggests that jurors are recommending death sentences based on serious legal errors.

C. Alabama Death Penalty Assessment Team Recommendations

In addition to endorsing the recommendations found in each section of the report, the Alabama Death Penalty Assessment Team makes the following recommendations:

(1) The State of Alabama should eliminate judicial override of a jury's recommendation of life without parole in capital cases. Alabama is one of only four states that allow such overrides. Further complicating the issue, Alabama is the only state with such override that selects its judges in partisan elections. This combination can cause bias or the appearance of bias. For example, 90% of overrides in Alabama are used to impose sentences of death, but in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life. There are at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation for a life without parole sentence. Arthur Green dissents from this recommendation.

(2) The State of Alabama should sponsor a study of the administration of its death penalty to determine the existence or non-existence of unacceptable disparities, socio-economic, racial, geographic, or otherwise.

(3) The State of Alabama should establish a clearinghouse to collect data on its death penalty system. At a minimum, this clearinghouse should collect data on each judicial circuit's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Alabama Court of Criminal Appeals for use in conducting its proportionality review.

(4) The State of Alabama should require that the jury be unanimous before it may recommend a sentence of death.

(5) The State of Alabama should create a statewide indigent defense commission that would be responsible for overseeing all indigent defense activities in the State.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice system in the State of Alabama, our research establishes that at this point in time, the State cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Because of that, the members of the Alabama Death Penalty Assessment Team, except Arthur Green who dissents, join with over 450 other organizations, religious institutions, newspapers, and city/town/county councils[1] and call on the State of Alabama to impose a temporary moratorium on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular the Executive Summary.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of Alabama's Death Penalty System

In this Chapter, we examined the demographics of Alabama's death row, the statutory evolution of Alabama's death penalty scheme, and the progression of an ordinary death penalty case through Alabama's system from arrest to execution.

Chapter Two: 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, we examined Alabama's laws, procedures, and practices concerning not only DNA testing, but also the

[1] Of these organizations, businesses, religious institutions, newspapers, and city/town/county councils that have called for a moratorium on executions in Alabama, the following city/town/county councils are included: Town of Akron; City of Bessemer; City of Birmingham; Town of Boligee; City of Brighton; County of Bullock; Town of Camp Hill; County of Clayton; City of Colony; City of Epes; Town of Emelle; City of Eutaw; City of Fairfield; Town of Five Points; Town of Forkland; Town of Gainesville; Town of Geiger; Town of Gordonville; County of Greene; Town of Hayneville; City of Hobson; City of Hurtsboro; City of La Fayette; Town of Lisman; City of Leighton; County of Lowndes; County of Macon; Town of Midway; Town of Mosses; City of North Courtland; City of Prichard; City of Ridgeville; City of Selma; County of Sumter; City of Tuskegee; City of Union Springs; City of Uniontown; Town of White Hall; County of Wilcox; and Town of Yellow Bluff. *See* Equal Justice USA, National Tally, *available at* http://www.quixote.org/ej/ (last visited May 25, 2006).

collection and preservation of all forms of biological evidence, and we assessed whether Alabama complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Alabama'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 chart below.[2]

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

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*[3]	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*[4]	*Not Applicable*
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.			X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.				X	
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure preparedness and accountability.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

The State of Alabama does not require governmental entities in possession of physical evidence from a criminal case to preserve all biological material until a defendant is executed. Furthermore, while the State enables defendants to obtain physical evidence for DNA testing during pre-trial discovery, it does not provide inmates a clear method to

[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.

[3] Given that a majority of the ABA's recommendations are composed of several parts, we used the term "partially in compliance" to refer to instances in which the State of Alabama meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

[4] In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Alabama death penalty. The Project would welcome notification of any omissions in this report so that they may be corrected in any future reprints.

seek post-conviction DNA testing. In addition, Alabama fails to require law enforcement agencies to establish and enforce written procedures and policies governing the preservation of biological evidence. Some of the procedural ambiguities and restrictions that are particularly problematic include:

- The State of Alabama does not have any uniform procedures for the preservation of evidence during the capital trial or any uniform requirements for how long evidence must be preserved after the conclusion of the defendant's capital trial;
- The State of Alabama does not have a separate mechanism for seeking post-conviction DNA testing and consequently, post-conviction petitioners must seek such relief under post-conviction rules that do not adequately protect against the execution of the innocent;
- A death-row petitioner who files a post-conviction petition within the permitted time limits may seek DNA testing of evidence in his/her case as an appropriate ground for relief of the constitutional violation of wrongful conviction. However, for many death-row petitioners, the time for making such a claim had run before DNA testing was widely used or within the knowledge of inmates, law enforcement, and the judiciary;
- Petitioners who fail to request post-conviction DNA testing within the legal time frame technically still may be able to bring a claim of newly discovered evidence, so long as they file the request within six months of discovering the new evidence. It appears, however, that even this outlet may not be available to all death-row petitioners. Alabama courts appear inclined to dismiss claims of newly discovered evidence as untimely by starting the six month time limit in 1991, the year that Alabama courts began recognizing DNA testing as admissible. The courts then dismiss the petitioner's allegation that s/he only recently became aware of DNA testing as not credible and failing to provide a rationale for overcoming the time bar. This interpretation fails to take into account the evolution of DNA testing since its inception and particularly the progressive development of new testing methods allowing accurate testing of increasingly smaller and more degraded samples of varied types of biological evidence; and
- Claims of newly discovered evidence and the normal post-conviction discovery procedures require the new evidence to "exist" before such a claim can be reviewed on the merits. Because the results of the testing, rather than the method of testing itself, can be construed as the newly discovered evidence, a claim of newly discovered evidence cannot be made until testing is performed and the results are discovered. This means that a petitioner likely would not have a meritorious claim for DNA testing through post-conviction discovery without first knowing the results of such testing, resulting in petitioners being unable to discover the evidence they need to prove their innocence.

To eliminate at least some of these ambiguities and restrictions, the State of Alabama should enact a separate post-conviction DNA testing law that clarifies and expands the mechanism for requesting post-conviction DNA testing and its corresponding time limitations.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, we reviewed Alabama's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies on law enforcement identifications and interrogations.

A summary of Alabama's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the chart below.

Law Enforcement Identifications and Interrogations

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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 Associations Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photspreads, and training on non-suggestive techniques for interviewing witnesses.				X	
Recommendation #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.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.			X		
Recommendation #5: The State of Alabama should provide adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	

Law Enforcement Identifications and Interrogations (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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.	X				
Recommendation #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.		X			

We commend the State of Alabama for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Alabama are required to complete a basic training course that includes instruction on interviewing and questioning techniques;
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications; and
- Alabama courts allow a jury instruction that provides jurors with information about the shortcomings and trouble spots of the eyewitness identification process.

Despite these measures, the State of Alabama does not require law enforcement agencies to adopt procedures on identifications and interrogations nor does it appear than any Alabama law enforcement agencies videotape or audiotape the entirety of custodial interrogations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Alabama should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA's recommendations. In addition, the State should mandate that law enforcement agencies record the entirety of custodial interrogations.

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, we examined these issues as they pertain to Alabama and assessed whether Alabama's laws, procedures, and

practices comply with the ABA's policies on crime laboratories and medical examiner offices.

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

Crime Laboratories and Medical Examiner Offices					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the preservation, validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Alabama does not require crime laboratories or medical examiner offices to be accredited, but nine of the ten crime laboratories in the Department of Forensic Sciences (Department) are accredited and are required by the accrediting body to adopt written standards and procedures on handling, preserving, and testing forensic evidence. Neither the accrediting body nor Alabama statutory law, however, require Department crime laboratories to publish these standards and procedures, nor must they be made public before becoming effective. Therefore, the contents of the Department standards and procedures, along with the other crime laboratories around the state, are unknown.

In addition, while the State of Alabama requires the Department's Chief Medical Examiner to be a pathologist certified in forensic pathology and other Department medical examiners to be forensic pathologists who graduated from accredited medical schools and completed up to five years of additional training in pathology and one year in forensic pathology, the Office of the Chief Medical Examiner does not currently employ any standard operating procedures to maintain reliability and consistency in its work among its four offices. Additionally, the Office of the Chief Medical Examiner does not provide standardized training for new and existing state medical examiners to ensure the validity and reliability of medical examiners' death investigations.

Chapter Five: Prosecutorial Professionalism

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

In this Chapter, we examined Alabama's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Alabama's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the chart below.

Prosecutorial Professionalism					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Each prosecutor's office should have written polices governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.			X		
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.			X		
Recommendation #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.		X			
Recommendation #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.		X			
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.			X		

The State of Alabama does not require district attorneys' offices to establish policies on the exercise of prosecutorial discretion or on evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other

witnesses who receive a benefit. Furthermore, Alabama does not require that the prosecutors handling capital cases receive any specialized training. The State of Alabama, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Alabama has entrusted the Alabama State Bar Association with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Alabama State Bar Association has established the Alabama Rules of Professional Conduct, which address prosecutorial discretion in the context of the role and responsibilities of prosecutors;
- The State of Alabama has established the Office of Prosecution Services to assist prosecuting attorneys throughout the state in a number of different ways, including offering training courses, preparing and distributing a basic prosecutor's manual and other educational materials, and promoting and assisting with the training of prosecuting attorneys; and
- The Alabama Court of Criminal Appeals has held prosecutors responsible for disclosing not only evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf."

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, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this Chapter, we examined Alabama's laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA's policies on defense services.

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

Defense Services					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #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		X			
Recommendation #2: Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel			X		
Recommendation #3: Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency			X		

Defense Services (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation			X		
Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training			X		

The State of Alabama's indigent defense system is a "very fragmented, mixed, and uneven system that lacks level oversight and standards … and does not provide uniform, quality representation to the majority of indigent defendants in the state." The State's failure to adopt a statewide public defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in the State being incapable of delivering quality counsel in all capital cases.

In addition, the indigent capital defense system falls far short of complying with the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) for a number of reasons:

- The State of Alabama does not guarantee counsel at every stage of the proceedings. Indigent defendants charged with a capital felony for which the death penalty is being sought have a right to appointed counsel at trial and on direct appeal. However, death-sentenced inmates are not entitled to appointed counsel in state post-conviction or clemency proceedings;
- Alabama statutory law contains only minimal qualification requirements for attorneys handling death penalty cases. Further, these qualifications are not always enforced and there is no mandated consequence or recourse in cases in which an attorney is appointed who fails to comply with these minimal qualifications;
- The State of Alabama does not guarantee two lawyers at every stage of the proceedings, nor does it guarantee the assistance of an investigator and mitigation specialist;
- The compensation caps of $2,000 for defense services in direct appeal proceedings and $1,000 in state post-conviction proceedings are far too low to ensure that lawyers have the funds necessary to present a vigorous defense or to attract the most experienced and qualified lawyers to these cases;
- The State of Alabama has failed to remove the judiciary from the attorney appointment process; and
- Alabama does not require any training for capital defense attorneys beyond the State Bar of Alabama requirement that all lawyers complete twelve hours of continuing legal education per year.

Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or 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 prime method to prevent arbitrariness and bias at sentencing. In this Chapter, we examined Alabama's laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA's policies on the direct appeal process.

A summary of Alabama's overall compliance with the ABA's policies on the direct appeal process is illustrated in the chart below.

Direct Appeal Process

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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 but was not.			X		

The Alabama Code requires that the Alabama Court of Criminal Appeals determine whether the defendant's sentence of death is excessive or disproportionate by comparing the "penalty imposed in similar cases considering both the crime and the defendant." In practice, however, the Alabama Court of Criminal Appeals has not followed this statutory requirement in several respects. First, it has not considered cases where death was not imposed. Second, it has often issued decisions with cursory and conclusive claims of proportionality, without reference to any other cases. And finally, it has repeatedly failed to account for the defendants, focusing exclusively on general attributes of the crimes alone.

Given the scope of the cases considered by the Court of Criminal Appeals and the cursory manner in which the proportionality review is explained, the proportionality review conducted by the Alabama Court of Criminal Appeals appears to be of limited value. In order to increase the meaningfulness of its proportionality review, the Alabama

Court of Criminal Appeals should thoroughly review cases in which the death penalty was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. In this Chapter, we examined Alabama's laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA's policies on state post-conviction. A summary of Alabama's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the chart below.

State Post-Conviction Proceedings

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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.				X	
Recommendation #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.				X	
Recommendation #3: Judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X	
Recommendation #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.		X			
Recommendation #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.			X		

State Post-Conviction Proceedings (Con't.)					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #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.			X		
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded be Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X		
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the ABA Guidelines on the Appointment and Performance of Death Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.				X	
Recommendation #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.		X			
Recommendation #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.				X	
Recommendation #11: State courts should apply the harmless error standard of *Chapman v. California*, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	X				
Recommendation #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.					X

The State of Alabama has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—for example, courts permit second and successive petitions under certain circumstances. But some laws and procedures have the opposite effect, such as:

- Post-conviction cases in Alabama usually are assigned to the original trial-level sentencing judge. Although the sentencing judge has knowledge of relevant facts and issues in the case, a potential for or the appearance of bias exists under this scenario, as post-conviction proceedings stem from a decision in which the same judge presided. A judge's ability to exercise independent judgment, therefore, may or may appear to be compromised, resulting in a petitioner not being afforded adequate judicial consideration of his/her claims;
- The State of Alabama provides only a short period of time to file a post-conviction petition after one's conviction and sentence become final and an even shorter amount of time for filing following the discovery of new evidence, potentially inhibiting the full development of the record upon which the *habeas* court bases its decision; and
- Alabama law only applies the "knowing, understanding, and voluntary" standard for waivers of constitutional and state law claims to claims of "sufficient constitutional magnitude," meaning that the review of potentially viable claims can be barred even without the petitioner's "knowing, understanding, and voluntary" waiver of those claims.

The effect of these issues on the adequate development and judicial consideration of claims is even more acute in a post-conviction proceeding where the petitioner may not be represented by counsel. In Alabama, death-sentenced inmates do not have a right to appointed counsel after direct appeal, leaving them in many cases to represent themselves or to obtain *pro bono* representation in order to pursue state post-conviction relief.

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 the death sentence without regard to constraints that may limit a court's or jury's decision making. In this Chapter, we reviewed Alabama's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Alabama Board of Executive Clemency's criteria for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

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

Clemency

Recommendation \ Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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.				X	
Recommendation #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.				X	
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction.			X		
Recommendation #4: Clemency decision makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.			X		
Recommendation #5: Clemency decision makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.			X		
Recommendation #6: 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 Counsel in Death Penalty Cases.			X		
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.		X			
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.			X		
Recommendation #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 petitioners.					X
Recommendation #10: Clemency decision makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.				X	
Recommendation #11: Clemency determinations should be insulated from political considerations or impacts.			X		

The Alabama Constitution gives the Governor the exclusive authority to grant reprieves and commutations to people under sentence of death. The process an inmate follows in

applying for clemency and the process the Governor follows in considering a clemency application is largely undefined and each Governor may conduct the process and s/he wishes. A hearing is not guaranteed and the Governor is not required to consider any specific facts, evidence, or circumstances, or perform any specific procedures when making his/her decision regarding a clemency petition.

Not only is the process largely undefined, but parts of the clemency decision making process are confidential as well. For example, the Governor is not required to release to the public the evidence s/he considered during the clemency process. Furthermore, the Governor is not required to release his or her reasons for granting or denying an inmate's clemency petition.

Given the ambiguities and lack of structure surrounding Alabama's clemency process, the State of Alabama should adopt more explicit factors to guide the consideration of clemency petitions and should open the hearing and decision making process to ensure transparency.

Chapter Ten: Voir Dire and Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this Chapter, we reviewed Alabama's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies on capital jury instructions.

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

Capital Jury Instructions

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should work with certain specialists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.			X		
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.			X		
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions.				X	

Capital Jury Instructions (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state.			X		
Recommendation #5: 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.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	X				

Jurors in Alabama appear to be having difficulty understanding their roles and responsibilities, as described by the judge in his/her charge to the jury. This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions. Consequently, it is no surprise that 54.7% of interviewed capital jurors in Alabama did not understand that they could consider any evidence in mitigation and that 53.8% believed that the defense had to prove mitigating factors beyond a reasonable doubt. Similarly, 55.8% of interviewed capital jurors in Alabama did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. Alabama capital jurors not only are confused about the scope of mitigation evidence that they may consider, but also about the applicable burden of proof and the unanimity of finding required for mitigating factors.

Capital jurors in Alabama also have had difficulty understanding the requirements associated with finding the existence of statutory aggravating factors. A full 40% of capital jurors interviewed in Alabama do not understand that they must find that one or more statutory aggravating circumstances exist beyond a reasonable doubt. In addition, capital jurors fail to understand the effect of finding that the defendant's conduct was

"heinous, vile or depraved" or that the defendant would be dangerous in the future. Although a sentence of death is not required upon a finding of one or more aggravating circumstances, 56.3% of interviewed Alabama capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt. Similarly, 52.1% of interviewed Alabama capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

Some additional problems include:

- Alabama statutes, rules, and case law not only fail to require judges to distribute written copies of the judge's oral charge to jurors, but the Alabama Rules of Criminal Procedure state that the judge generally is *not to provide* the jury with a copy of the charges against the defendant or the "given" written jury instructions, except in a "complex" case when the court has discretion to give the jury a copy of the "given" written instructions;
- Even though Alabama includes "life without parole" as the only sentencing option for capital murder besides death, Alabama capital juries remain vulnerable to underestimating the total number of years a capital murderer sentenced to life without parole serves in prison and making their sentencing decisions based on inaccurate beliefs as to the state's parole practices. In interviews with capital jurors in Alabama, the median estimate of the amount of time served in prison by capital murderers not sentenced to death was fifteen years, despite Alabama's mandatory life without parole minimum sentence; and
- Alabama does not allow the jury to recommend life imprisonment unless (1) it fails to unanimously agree on the existence of one or more aggravating circumstances or (2) the jury unanimously agrees that one more aggravating circumstances have been proven beyond a reasonable doubt, but at least seven jurors believe that the aggravating circumstances do not outweigh the mitigating circumstances. Alabama law does not allow the jury to recommend life imprisonment if the aggravating circumstances outweigh the mitigating circumstance.

Chapter Eleven: Judicial Independence

With increasing frequency, judicial elections, appointments, and confirmations are being influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. In addition, judge's decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, undermining society's confidence that individuals in court are guaranteed a fair hearing. In this Chapter, we reviewed Alabama's laws, procedures, and practices on the judicial election/appointment and decision making processes and assessed whether they comply with the ABA's policies on judicial independence.

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

Judicial Independence					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.			X		
Recommendation #2: A judge who has made any promise 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.				X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; Bar associations and community leaders should oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.				X	
Recommendation #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.				X	
Recommendation #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.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Alabama's partisan judicial election format, combined with the rising costs and increasing political nature of Alabama judicial campaigns, have called into question the fairness of the judicial election process in Alabama for a number of reasons:

- Judicial candidates sometimes campaign on criminal justice issues, including the death penalty. For example, in 1996, an Alabama Court of Criminal Appeals judge, who was also a candidate for the state's supreme court, accused the

Alabama Supreme Court of being "too left and too liberal" in capital cases and challenged the court to set execution dates in twenty-seven cases that were pending in the federal courts on *habeas corpus* review; and

- The prospect of soliciting contributions from special interests and being publicly pressured to take positions on issues they must later decide as judges threatens to discourage many people from seeking judicial office. Between 1994 and 1998, political parties were the largest source of campaign funds for judicial candidates, contributing $6.3 million, or 34 percent of all contributions. In addition to political parties, attorneys, law firms, and legal political action committees contributed nearly $4 million, approximately 22 percent of the total raised. Other business interests contributed approximately $5.86 million, or 32 percent. Between 1994 and 1998, approximately 63 percent of the cases heard by the Alabama Supreme Court involved campaign contributors who had given to a judge hearing the case.

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this Chapter, we examined Alabama'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 Alabama's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the chart below.

Racial and Ethnic Minorities					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #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.			X		
Recommendation #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 potentially 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.		X			

Racial and Ethnic Minorities (con't.)

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #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.			X		
Recommendation #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.			X		
Recommendation #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 this 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 a *prima facie* case is established, the state should have the burden of rebutting it by substantial evidence.			X		
Recommendation #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.		X			
Recommendation #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.		X			
Recommendation #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*.			X		

Racial and Ethnic Minorities (con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.		X			
Recommendation #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.				X	
Recommendation #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.			X		

Whatever the cause, Alabama's death penalty system reflects serious racial disparities. Specifically, twenty-eight out of the thirty-four people—over 82%—who have been executed in Alabama since 1976 were convicted of killing white people, despite the fact that over sixty-five percent of all murders each year in Alabama involve black victims. Eighty percent of Alabama's current death row prisoners were convicted of murdering white people. Thus, it appears that those convicted of killing white victims are far more likely to receive a death sentence than those convicted of killing non-white victims.

Although the State of Alabama agreed to examine the impact of racial discrimination in its criminal justice system, specifically in sentencing, there is no indication that it has done so, nor has it taken steps to develop new strategies to eliminate the role of race in capital sentencing. Furthermore, the State of Alabama does not currently collect and maintain the data necessary to fully evaluate the impact of race in capital sentencing.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. This discretion includes, but is not limited to, the ability to define mental retardation and the burden of proof for mental retardation claims. In this Chapter,

we reviewed Alabama's laws, procedures, and practices pertaining to mental retardation and the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Alabama's overall compliance with the ABA's policies on mental retardation and the death penalty is illustrated in the chart below.

Mental Retardation and Mental Illness					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death row inmates.			X		
Recommendation #3: Jurisdictions should 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 sufficient training, funds, and resources.			X		
Recommendation #4: For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.				X	
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		

Mental Retardation and Mental Illness (con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.			X		

Despite the United States Supreme Court decision in *Atkins v. Virginia* banning the execution of mentally retarded offenders, the State of Alabama still has not passed a law banning the execution of the mentally retarded, defining mental retardation in this context, or establishing procedures for when and how these determinations will be made. Consequently, the Alabama courts have been forced to create a piecemeal process for dealing with claims of mental retardation. Some of the problems with this piecemeal process include:

- In defining mental retardation, there appears to be judicial uncertainty as to whether an IQ score in the low or mid-70s disqualifies a defendant or death row inmate from being found to have mental retardation. In deciding this issue, the Alabama Court of Criminal Appeals has inconsistently applied a somewhat broader definition of mental retardation than the Alabama Supreme Court;
- Alabama does not have any policies in place to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. Instead, capital defendants who may be mentally retarded are assigned (or not assigned) counsel under the same rules and fee structure as every other capital defendant. No training is required to assist counsel in recognizing mental retardation in their clients, in understanding its possible impact on their client's ability to assist with their defense, on the validity of their confessions (where applicable), and on their eligibility for capital punishment.
- Given the lack of legislation regarding the procedures to be used for finding mental retardation in the capital context, there is no set procedure for when -- prior, during, or after trial -- a determination of mental retardation will be made. However, Alabama courts have encouraged "defendants to raise, and trial courts to resolve, mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial."