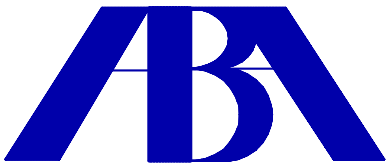

Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Arizona Death Penalty Assessment Report

An Analysis of Arizona's Death Penalty Laws, Procedures, and Practices

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

July 2006

AMERICAN BAR ASSOCIATION

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 in all cases. 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 a number of U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Arizona assessment, the Project has released state assessments of Alabama and Georgia and is conducting state assessments and releasing reports in, at a minimum, Florida, Indiana, Ohio, Pennsylvania, Tennessee, 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.

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' 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 the administration of the death penalty, 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 and 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 death penalty in Arizona. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Arizona Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team believes that the body of recommendations as a whole would, if implemented, significantly improve Arizona's capital punishment system.

I. HIGHLIGHTS OF THE REPORT

A. Overview

To assess fairness and accuracy in Arizona's death penalty system, the Arizona 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 Arizona Death Penalty Assessment Report summarizes the research on each issue and analyzes the State's level of compliance with the relevant ABA Recommendations.

B. Areas Needing Attention

The assessment findings indicate a need to reform a number of areas within Arizona's death penalty system to ensure that it provides a fair and accurate system for every person who faces the death penalty. While the following issues are some of the most serious problems facing Arizona's death penalty system, the danger we face, at its core, is cumulative. The capital system has many interconnected moving parts, any one (or more) of which is capable of failing in any given case. Furthermore, many of the issues and recommendations discussed in this assessment are applicable to the criminal justice system as a whole and are not limited to the capital system. With that in mind, the Arizona Death Penalty Assessment Team finds the following problem areas most in need of reform:

- ***Decentralized Defense Services*** – Although the State of Arizona provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, Arizona's indigent defense services is a mixed and uneven system that lacks level oversight and standards and does not provide uniform, quality representation to indigent defendants in all capital proceedings. With the exception of the newly-established state capital post-conviction public defender office, the State has failed to adopt a statewide public defender office, mandate the establishment of public defender offices providing coverage within each county, adequately fund indigent defense services in each county, or implement close oversight of indigent legal services at the county level.
- ***Insufficiently Compensated Appointed Counsel*** – The compensation paid to appointed attorneys who represent capital defendants is insufficient for counsel to meet their obligations under the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*Guidelines*), despite the fact that the Arizona Rules of Criminal Procedure require defense counsel to be familiar with the *Guidelines* and that the Arizona Supreme Court may mandate compliance with portions of the *Guidelines*.
- ***Lack of a Mechanism to Ensure Proportionality*** – While proportionality review is the single best method of protecting against arbitrariness in capital sentencing, the Arizona Supreme Court is not required to undertake a proportionality review

in capital cases. Since 1992, the Arizona Supreme Court has rejected any arguments that the absence of proportionality review denies capital defendants equal protection and due process of law, or that it is tantamount to cruel and unusual punishment.

- ***Lack of Effective Limitations on the "Especially Cruel, Heinous, or Depraved" Aggravating Circumstance*** – In 2002, the Arizona Capital Case Commission expressed concerns regarding the ambiguity of the (F)(6) statutory aggravating circumstance (a murder committed in an "especially cruel, heinous or depraved manner"), but no changes have yet been made. Currently, the courts, in determining the constitutionality of jury instructions used to explain this aggravating circumstance, require the instructions to contain "essential narrowing factors" and provide "specificity and direction" to the jury, but do not mandate that a uniform and specific definition be used. Given the inherent vagueness of this aggravating circumstance, it is of utmost importance that the State of Arizona adopt a uniform and specific definition of this aggravating circumstance when instructing jurors during the aggravation phase of a capital trial. We note that while the State Bar of Arizona Criminal Jury Instruction Committee has discussed a proposed jury instruction defining this factor, it has not yet been submitted to the State Bar Board of Governors for approval.

C. Arizona Death Penalty Assessment Team Recommendations

In addition to endorsing the recommendations found in each section of this Report, the Arizona Death Penalty Assessment Team makes the following recommendations:

(1) The State of Arizona should create an adequately funded statewide public defender office for capital cases. As with the Arizona Capital Case Commission, the Arizona Death Penalty Assessment Team is most concerned with the availability and quality of trial counsel.

(2) In order to protect against arbitrariness in capital sentencing, the State of Arizona should ensure proportionality in capital cases. Because proportionality is better achieved at the front end rather than the back end, a capital case review committee housed in the Arizona Prosecuting Attorneys' Advisory Council should exercise final discretion as to whether the death penalty may be sought. The County Attorney may choose not to seek death, but if s/he desires that capital charges be filed, a capital case review committee must make the final decision as to the appropriateness of capital charges. Alternatively, the Arizona Supreme Court should conduct a comparative proportionality review during the direct appeal stage of capital cases in which it compares the death sentence under review with sentences imposed on similarly situated defendants.

(3) Pursuant to the Arizona Capital Case Commission recommendation about the importance of continued data collection, the State of Arizona should establish and fund a clearinghouse to collect data on first-degree murder cases. At a minimum, this clearinghouse should collect data on each county's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Arizona Supreme Court for use in any proportionality review.

(4) To encourage transparency and the even application of the death penalty, the State of Arizona should require that all prosecuting agencies involved in capital case prosecutions have written policies for identifying cases in which to seek the death penalty. As recommended by the Arizona Capital Case Commission, these policies should require the solicitation or acceptance of defense input before deciding to seek the death penalty.

(5) The State of Arizona should provide funding for the completion and public release of a study of the administration of its death penalty system to determine the existence or non-existence of unacceptable disparities, socio-economic, racial, geographic, or otherwise.

(6) The State of Arizona should conduct a study of the Maricopa County's Public Defender's Office, Legal Defender's Office, Legal Advocate's Office, and Office of Contract Counsel to determine if any discrepancies in average expenditures on capital cases are problematic and signal differences in the quality of representation.

(7) Crime labs and forensic investigations should be adequately funded so that biological evidence may be tested quickly and accurate determinations as to likely guilt or innocence may be made as early in the investigation process as possible.

Despite the best efforts of a multitude of principled and thoughtful actors in the Arizona criminal justice system, our research establishes that at this point in time, the State of Arizona 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 Arizona Death Penalty Assessment Team, strongly recommend that the State address the issues identified throughout this Report, and in particular the Executive Summary.

II. SUMMARY OF THE REPORT

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

In this Chapter, we examined the demographics of Arizona's death row, the statutory evolution of Arizona's death penalty scheme, and the progression of an ordinary death penalty case through Arizona'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 Arizona's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether Arizona complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Arizona'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.[1]

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*[2]	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*[3]	*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	

While the State of Arizona has "a duty, in the interest of justice, to act in a timely manner to ensure the preservation of evidence it is aware of[,] where that evidence is obviously material and reasonably within its grasp," there is no statewide requirement that all biological evidence be preserved for as long as the defendant remains incarcerated. Prosecutors and law enforcement agencies are allowed– and in some circumstances, compelled– to dispose of items that were seized or otherwise obtained for use in a criminal prosecution once the legal proceeding is no longer "subject to modification." While the statute broadly defines "subject to modification" to include all judicial outlets for relief, there is no requirement that biological evidence be preserved through the

[1] 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.

[2] 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 Arizona meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

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

clemency process and up until execution. Despite this, the Arizona Capital Case Commission reported in December 2002 that Arizona law enforcement officials do retain evidence in all capital cases indefinitely.

Notably, in capital cases, the clerk of the Superior Court is required to permanently retain the entire case file, which includes all original documents and evidence filed with the court. While the clerk is not mandated to retain all biological evidence, s/he is required to retain all biological evidence filed with the court for as long as the defendant remains incarcerated. Lastly, if the defendant files a petition for post-conviction DNA testing, the State must preserve throughout the entire proceeding all evidence in its possession or control that could be subject to DNA testing and, in addition, the court may order the preservation of some available biological evidence to replicate post-conviction DNA testing.

To eliminate some of the identified problems in the collection and preservation of biological evidence, the State of Arizona should require that law enforcement agencies establish and enforce written procedures and policies governing the preservation of biological evidence, as well as require that evidence be preserved for as long as the defendant/inmate remains incarcerated.

To its credit, the State of Arizona has enacted a broad post-conviction DNA testing statute, which has likely reduced the risk of executing innocent persons.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Incorrect identifications and confessions can mislead police, prosecutors, defense attorneys, judges and juries into focusing the case on one person, too often resulting in an erroneous conviction. 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 Arizona'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 Arizona's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the following chart.

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 photospreads, 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: 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: Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.				X	
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 Arizona for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Arizona are required to complete a basic training course that includes instruction on interviewing and questioning techniques;
- At least twenty-eight police departments in Arizona regularly record the entirety of custodial interrogations; and

- Arizona courts have created an instruction that provides the jury with factors to consider when determining the reliability of eyewitness identifications.

Despite these measures, the State of Arizona does not require law enforcement agencies to adopt procedures on identifications and interrogations. The Commission on Law Enforcement Accreditation Standards for Law Enforcement Agencies, Inc. (CALEA), however, provides a framework for law enforcement agencies to adopt procedures on identifications and interrogations. A number of law enforcement agencies in Arizona have obtained accreditation under CALEA, which requires agencies to establish written directives on "conducting follow-up investigations," including identifying suspects. CALEA does not require these agencies to adopt specific procedures on conducting lineups and photospreads, however. It is possible that in complying with CALEA, an agency could create specific procedures for lineups and photospreads that are in compliance with the ABA's Recommendations, but we were unable to obtain the written directives adopted by law enforcement agencies statewide to assess whether they comply with the Recommendations. In the four law enforcement manuals we did obtain, none of the law enforcement agencies appear to mandate compliance with the ABA Recommendations, despite evidence that some or all of these agencies comply in practice.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Arizona should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA's Recommendations.

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 understated. In this Chapter, we examined these issues as they pertain to Arizona and assessed whether Arizona's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

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

Crime Laboratories and Medical Examiner Offices					
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 validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Arizona does not require crime laboratories or medical examiner offices to be accredited, but all crime laboratories in the Department of Public Safety Scientific Criminal Analysis Bureau (Bureau), in addition to the Mesa Police Department Crime Laboratory, Phoenix Police Department Laboratory Services Bureau, Scottsdale Police Department Crime Laboratory, and the Tucson City-County Crime Laboratory, 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 Arizona statutory law, however, require Bureau crime laboratories to publish these standards and procedures, nor must they be published or made available for inspection before becoming effective. Therefore, the contents of the Bureau standards and procedures, along with those of other crime laboratories around the State, are unknown.

In addition to the mystery surrounding the Bureau's standards and procedures, the adequacy of the funding provided to Bureau crime laboratories also is in question. According to the staff of the Arizona legislature's Joint Legislative Budget Committee, the Bureau's staffing increases have not kept pace with this increasing caseload. As of May 2004, the Bureau had 60,000 samples waiting to be analyzed. It is estimated that between two and ten years may be needed for crime-lab technicians to process the backlog and keep pace with the new samples that arrive for processing.

The Bureau laboratories are not the only ones with backlog problems. For example, as of June 2004, the Tucson laboratory took 119 days to process evidence in its high-priority cases that include murders, sexual assaults, and cases going to trial. As the Tucson Police Department Crime Lab Superintendent explained, "We really aren't staffed right and don't have the resources available."

Lastly, not only does Arizona fail to require that county medical examiners be accredited, but the State, while generally requiring county medical examiners to be "licensed physician[s] in good standing certified in pathology and skilled in forensic pathology," allows each county board of supervisors to decide against appointing a county medical examiner and instead establish a list of licensed physicians available to perform a county medical examiner's duties. Unfortunately, should a county board of supervisors decide

against appointing a county medical examiner, the physicians appointed to the list are not required to be certified in pathology or skilled in forensic pathology.

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 the prosecutor has enormous discretion in deciding whether or not to seek the death penalty. In this Chapter, we examined Arizona'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 Arizona'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	

Prosecutorial Professionalism (Con't.)					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
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 Arizona does not require county attorney's offices to establish policies on the exercise of prosecutorial discretion or on the evaluation of cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. The State of Arizona, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Arizona has entrusted the State Bar of Arizona and the Disciplinary Commission of the Arizona Supreme Court with investigating grievances and disciplining members of the State Bar of Arizona, including prosecutors.
- The Arizona Supreme Court has established the Arizona Rules of Professional Conduct, which addresses prosecutorial discretion in the context of the role and responsibilities of prosecutors.
- The State of Arizona has established the Arizona Prosecution Attorneys' Advisory Council to assist prosecuting attorneys throughout the State in a number of ways, including: preparing manuals of procedure; assisting in the preparation of trial briefs, forms, and instructions; conducting research and studies that would be of interest and value to all prosecuting attorneys and their staffs; providing training programs for prosecuting attorneys and other criminal justice personnel; maintaining liaison contact with study commissions and agencies of all branches of local, state, and federal government that will be of benefit to law enforcement and the fair administration of justice in the State; and establishing training standards for prosecuting attorneys and assisting in meeting those standards by promulgating rules and procedures relating to such standards.
- The Arizona Supreme Court has stated by rule and through case law that prosecutors are responsible for disclosing not only evidence of which they are aware, but also material evidence known to others acting on the State'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 defense attorneys and resources for investigators and experts. Individual jurisdictions must address representation issues in a way that will ensure all capital defendants receive effective representation during all stages of their cases. In this

Chapter, we examined Arizona's laws, procedures, and practices relevant to defense services and assessed their compliance with the ABA's policies on defense services.

A summary of Arizona'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		
Recommendation #4: Guideline 9.1 of the ABA *Guidelines*—Funding and Compensation				X	
Recommendation #5: Guideline 8.1 of the ABA *Guidelines*—Training			X		

Arizona's indigent defense services is a mixed and uneven system that lacks level oversight and standards and that does not provide uniform, quality representation to indigent defendants in all capital proceedings across the State. The State's failure to adopt a statewide public defender office for anything other than state post-conviction proceedings, mandate the establishment of public defender offices providing coverage within each county, adequately fund indigent defense services in each county, or to implement close oversight of indigent legal services at the county level has resulted in the State being incapable of delivering quality counsel in all capital cases.

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

- The State of Arizona does not guarantee counsel in clemency proceedings. Indigent defendants charged with a capital felony for which the death penalty is being sought have a right to appointed counsel at trial, on direct appeal, in state post-conviction proceedings, and in federal habeas corpus. However, indigent death-sentenced inmates are not entitled to appointed counsel for clemency proceedings.
- The State of Arizona has failed to remove the judiciary from the process of appointing counsel.

- The State of Arizona does not require that indigent defendants charged with or convicted of a capital felony be appointed two attorneys at any stage of the proceedings other than at trial.
- Requests for experts are not *ex parte* unless "a proper showing is made concerning the need for confidentiality."
- Despite the fact that the Arizona Capital Case Commission unanimously recognized that "establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona," the State of Arizona still does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony pre-trial, at trial, on appeal, or in state post-conviction proceedings.
- The State of Arizona provides only one to two percent of the funding for the cost of capital representation, significantly underfunding these indigent defense services.

Chapter Seven: The 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 unlawful, excessively severe, or an abuse of discretion. One of the best ways to ensure that the direct appeal process works as it is intended is through 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. In this Chapter, we examined Arizona'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 Arizona's overall compliance with the ABA's policies on the direct appeal process is illustrated in the following chart.

The 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 Arizona Supreme Court is not required to undertake a proportionality review in capital cases. As late as 1991, the Court would determine whether a death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In 1992, however, the Arizona Supreme Court held that proportionality reviews were not mandated by statute or by the United States or Arizona Constitutions. Since then, the Court has rejected any arguments that the absence of proportionality review denies capital defendants equal protection and due process of law, or that it is tantamount to cruel and unusual punishment.

Today, Arizona has no codified procedures, nor any other binding authority, to help ensure proportionate death sentencing. To ensure that a sentence of death is not excessively severe or an abuse of discretion and that prosecutorial discretion to seek the death penalty is evenhandedly exercised across the State, Arizona should immediately implement meaningful proportionality review that includes a review of 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 Arizona's laws, procedures, and practices relevant to state post-conviction proceedings and assessed their compliance with the ABA's policies on state post-conviction.

A summary of Arizona'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		
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 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			

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 #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 Arizona 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. Furthermore, we applaud the recent creation of a state capital post-conviction public defender office. Some laws and procedures do not facilitate the adequate development and judicial consideration of claims, however, such as:

- Post-conviction cases in Arizona 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; and
- Arizona law only applies the "knowing, understanding, and voluntary" standard to waivers of constitutional and state law claims that are 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.

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 Arizona's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Arizona 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 Arizona's overall compliance with the ABA's policies on clemency is illustrated in the chart below.

Clemency					
Compliance / **Recommendation**	***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 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		
Clemency (Con't.)					

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation and access to investigative and expert resources and provided with sufficient time to develop claims and to rebut 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 Arizona Board of Executive Clemency (the Board) is not required to conduct any specific type of review in considering petitions for commutations. No statutory restrictions exist regarding what the Board may consider in making its recommendation to the Governor and according to the current Board Chair, the Board will consider everything the applicant submits. Thus, while the Board clearly is not required to consider any of the factors included in Recommendations #2 through #5, it is unclear whether this information is being considered in practice.

In conducting commutation reviews, the Board will hold a one or two-part public hearing on the merits of an inmate's request for clemency. The Phase I hearing, which the Board may waive for death-row inmates, will be held without the inmate being present, although anyone can submit relevant written materials or testify orally. The Phase II hearing consists of, among other things, an interview of the applicant and a review of "all relevant information." Upon the conclusion of the Phase II hearing, the Board will render a "final decision" as to whether to recommend clemency to the Governor, but the power to grant or deny clemency lies with the Governor, who, in making this decision may grant or deny clemency for any reason s/he "deems proper." If the Governor grants clemency, s/he must publish the reasons for the clemency grant in a newspaper of general circulation and a copy of the Governor's rationale also must be filed with the Secretary of State. In addition, the Governor must provide the legislature with the details of each case in which clemency was granted at the start of each regular legislative session. There is no requirement that the Governor explain his/her reasoning for denying clemency.

Not only are the criteria considered by the Board and the Governor unknown, but other parts of the clemency decision-making process are problematic as well. For example:

- Once a recommendation is made by the Board, the Governor's process for granting or denying clemency appears to be shielded from public scrutiny, particularly in clemency denials.
- There is no requirement that the Board or the Governor (or his/her representative) meets with the petitioning inmate.

Given this, the State of Arizona should adopt more explicit factors to guide the consideration of clemency petitions and open the 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 jurors about the applicable law and the extent of their responsibilities. In this Chapter, we reviewed Arizona'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 Arizona'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		

The U.S. Supreme Court's 2002 decision in *Ring v. Arizona* invalidated Arizona's capital sentencing scheme and required the State to use juries, instead of judges, in capital sentencing. Because Arizona did not use jury sentencing prior to the *Ring* decision, the State consequently did not have pattern jury instructions regarding capital sentencing. While the Criminal Jury Instruction Committee of the Arizona State Bar currently is working to draft pattern jury instructions for death penalty cases and expects to have instructions drafted and promulgated by October 2006, the content and future efficacy of these pattern jury instructions are unknown. In the meantime, judges have been largely on their own in deciding what jury instructions to give in capital cases. While there is case law on jury instructions that can help instruct individual judges as to the legality or illegality of individual instructions, Arizona case law does not provide an appropriate level of guidance.

Some additional problems include:

- As the Arizona Supreme Court's Committee on More Effective Use of Jurors noted in 1993, jurors too often have difficulty understanding jury instructions. The Committee went on to recognize the "failure of too many judges to fully and fairly respond to questions" from the jury and recommended that judges receive instructions on how best to respond to jury questions. Given the awesome responsibility of deciding between life and death that was given to Arizona juries in 2002, this has taken on an increased importance, yet it does not appear that Arizona has taken steps to provide judges any additional guidance;

- Arizona law provides three sentencing options for people convicted of a capital crime: death, imprisonment for life, and imprisonment for natural life. Currently, Arizona law does not require courts to instruct the jury on the definitions of "imprisonment for life" or "imprisonment for natural life." In order to enable capital jurors to make informed sentencing decisions and in light of the fact that capital jurors generally underestimate the total number of years defendants convicted of capital murder, but not sentenced to death, spend in prison, the State of Arizona should provide definitions of the various sentencing options.

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 and/or of judges' decisions in capital cases. 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. In this Chapter, we reviewed Arizona'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 Arizona'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	

Judicial Independence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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	

The Arizona judicial selection process reflects a blend of two systems. On one hand, the Arizona Constitution requires all state appellate court judges and Superior Court judges for counties with a population of 250,000 or more (presently only Maricopa and Pima counties) to be appointed by the Governor on the basis of merit from a list of nominees compiled by a nominating commission. On the other hand, the State Constitution requires Superior Court judges from counties with a population of fewer than 250,000 to be elected in nonpartisan elections, unless voters select the merit selection system.

The State of Arizona has taken measures to promote judicial independence, for example:

- Arizona's predominant reliance on a merit-based judicial appointment system has insulated the judicial process from political pressures and campaign demands, and in turn, protected the independence of the judiciary;
- The State of Arizona has tried to limit the effects of politics in its judicial selection process by regulating the political composition of both the nominating commissions and the judicial nominees referred to the Governor for appointment; and

- The Arizona Commission on Judicial Conduct recently opened its disciplinary process, making complaints filed against judges public as of January 1, 2006.

Chapter Twelve: Racial and Ethnic Minorities

A pattern of racial discrimination persists today, in part because courts tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can infect the entire trial process with a racial impact. To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out discriminatory practices. In this Chapter, we examined Arizona'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 Arizona'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 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.		X			
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		

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 #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 #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		
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, Arizona's death penalty system reflects racial disparities, particularly those associated with the race of the victim. For instance, the Arizona Capital Case Commission reported that from 1995 through 1999, the percentage of

indictments resulting in death sentences for cases in which both the defendant and the victim were white was *nearly eight times higher* than those cases in which both the defendant and the victim were minorities. During this same period, the percentage of indictments resulting in death sentences for cases consisting of a minority defendant and a white victim was *five times higher* than those cases consisting of a white defendant and a minority victim. According to the Commission's own data, prosecutors statewide also opted to seek the death penalty less frequently when the homicide victim was a minority, more frequently when the victim was white. Judges also opted to impose the death penalty less frequently when the homicide victim was a minority, more frequently when the homicide victim was white.

Furthermore, while the Arizona Capital Case Commission has the data necessary to conduct a more statistically sophisticated study of possible racial disparities in capital sentencing and the Commission recognized the need for additional study, no further studies have been released.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the U.S. Supreme Court held the execution of mentally retarded offenders to be unconstitutional. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to adopt 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 Arizona's laws, procedures, and practices pertaining to mental retardation and the death penalty and assessed their compliance with the ABA's policies on mental retardation and the death penalty.

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

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			

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 #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	
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		

The State of Arizona enacted a statute prohibiting the execution of mentally retarded offenders in 2001, a year before the U.S. Supreme Court decided *Atkins v. Virginia*. Because the original Arizona statute only dealt with prospective cases of mentally retarded defendants, the legislature amended the statute in 2002 to comply with the retroactive nature of the *Atkins* decision. Some of the procedures adopted by the State of Arizona to determine mental retardation are particularly problematic.

- While Arizona's statutory and case law definition of mental retardation is similar to the American Association of Mental Retardation's (AAMR) definition, its definition of subaverage general intellectual functioning appears to be more

restrictive. In reliance on *Atkins*, the Arizona Supreme Court has stated that an "IQ below 70-75 indicates subaverage intellectual functioning." However, if each IQ test is administered as dictated by Arizona statute, the defendant will not be immune from execution on the grounds that s/he has mental retardation if the defendant has an IQ score higher than seventy on each test. It consequently is unclear whether the State of Arizona considers IQ scores between seventy and seventy-five to indicate significantly subaverage intellectual functioning. Furthermore, the statute allows for a determination of mental retardation to be made solely on the basis of an IQ score.

- The State of Arizona places the burden of proving mental retardation on the defendant by "clear and convincing evidence," rather than requiring the prosecution to disprove the defendant's substantial showing of mental retardation, as required by Recommendation #5. Only if the trial court determines that the defendant has an IQ of sixty-five or below is the defendant entitled to a rebuttable presumption of mental retardation.