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; 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 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.

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 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 has 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 Georgia 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 Georgia 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. Even though not all team members support the call for a moratorium, they are unanimous in their belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Georgia's capital punishment system.

II. HIGHLIGHTS OF THE REPORT

A. Overview

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

B. Problem Areas

The assessment findings indicate a need to reform a number of areas within Georgia's death penalty system to ensure that it provides a fair and accurate system for every person who faces the death penalty. The Georgia Death Penalty Assessment Team finds the following problem areas most in need of reform:

- Inadequate Defense Counsel at Trial - Although the State of Georgia has recently instituted a statewide capital defender system, which provides experienced attorneys for indigent defendants in capital proceedings at trial and on direct appeal, it is unclear whether funding will be available to enable it to function as planned. Moreover, it must be noted that the trials and direct appeals of defendants presently on death row preceded the creation of the statewide capital defender system; those defendants may or may not have had adequate counsel.
- Lack of Defense Counsel for State Habeas Corpus Proceedings - The State of Georgia is virtually alone in not providing indigent defendants sentenced to death with counsel for state habeas proceedings. The lack of counsel on state habeas, particularly when combined with the case law that allows habeas judges to adopt the state's findings of fact verbatim, creates a situation where this critical constitutional safeguard is so undermined as to be ineffective.
- Inadequate Proportionality Review - In conducting its proportionality review, since 1994 the Georgia Supreme Court has looked 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 geographical, racial or ethnic, or attributable to any other inappropriate factor.
- Inadequate Pattern Jury Instructions on Mitigation - Research establishes that not all Georgia capital jurors understand what law governs their decision to impose or not impose a death sentence. Forty percent (specifically 40.5%) of interviewed

Georgia capital jurors did not understand that they could consider any evidence in mitigation and 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt. This confusion possibly can be attributed to the fact that the suggested pattern jury instructions provide little to no guidance on mitigating circumstances. The instructions do not list any factors that might be considered in mitigation, explain the burden of proof, or explain that jurors need not be unanimous in finding mitigating circumstances. Death sentences resulting from juror confusion or mistake are not tolerable.

- Racial Disparities in Georgia Capital Sentencing - Both the race of the defendant and the race of the victim predict who is sentenced to death in the State of Georgia, with white suspects and those who kill white victims more likely to be sentenced to death than black suspects and those who kill black victims.[1] "The data show that among all homicides with known suspects, those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks."[2] Based on this data, race clearly matters in capital sentencing in Georgia.
- Inappropriate Burden of Proof for Mentally Retarded Defendants Facing the Death Penalty - "Beyond a reasonable doubt" is the highest standard of proof known to American law. Of the twenty-six states that have adopted statutes prohibiting the execution of the mentally retarded, Georgia is the only state that requires the defendant to prove his/her mental retardation beyond a reasonable doubt.[3] The effect of this is exacerbated by the failure of the Georgia Suggested Pattern Jury Instructions to explain that mental retardation is a mitigating circumstance that may be considered by the jury during the sentencing phase of a capital trial.
- Death Penalty for Felony Murder - Georgia law allows for the imposition of a death sentence when the defendant has been convicted either of malice murder or of felony murder. Malice murders are those murders committed with express malice (intent to kill) or implied malice (an abandoned and malignant heart/a reckless disregard for human life). Felony murder is a killing in the commission of a felony irrespective of malice; a conviction of felony murder does not require a finding of an intent to kill, or of a reckless indifference to life. The death penalty should only be imposed where the jury has found the defendant acted with either express or implied malice.

C. Georgia Death Penalty Assessment Team Recommendations

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

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1 *See* Raymond Paternoster, Glen Pierce, & Michael Radelet, *Race and Death Sentencing in Georgia, 1989-1998*, *in* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT app., at S-T (2006).

2 *Id.*

3 John H. Blume, Summaries of Relevant Cases and Legislation Resulting From *Atkins v. Virginia*, 536 U.S. 304 (2002), at 48-50 (Dec. 2, 2005) (unpublished manuscript, on file with author). We note that in cases in which the capital trial's guilt/innocence phase took place before July 1, 1988, the State of Georgia requires the defendant to establish his/her mental retardation by a preponderance of the evidence.

1. The State of Georgia should sponsor a study of the administration of its death penalty system to determine the existence or non-existence of unacceptable disparities, racial, geographic, or otherwise.
2. In order to make the concept of proportionality meaningful and to address the racial disparities indicated by the available data, the State of Georgia should establish a statewide clearinghouse to review decisions to seek the death penalty. This clearinghouse should also collect data on all death-eligible cases and make this data available to the Georgia Supreme Court for use in conducting its proportionality review.
3. The State of Georgia should restrict death penalty cases to those where the defendant is found guilty of malice murder, either express or implied.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Georgia, 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, it is the conclusion of the members of the Georgia Death Penalty Assessment Team, except Harry D. Dixon, Jr., that the State of Georgia should impose a moratorium on both capital prosecutions and on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular in the Executive Summary. Although Mr. Dixon agrees with a number of the findings and the recommendations of the report, he does not agree that a moratorium should be imposed on either prosecutions or executions.

The American Bar Association, while calling for a moratorium on executions, has not adopted policies on the issues discussed in recommendations #2 and 3 nor has it endorsed a moratorium on capital prosecutions.

III. SUMMARY OF THE REPORT

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

In this Chapter, we examined the demographics of Georgia's death row, the statutory evolution of Georgia's death penalty scheme, and the progression of an ordinary death penalty case through Georgia'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 Georgia'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

Georgia complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Georgia'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.[4]

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***[5]	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***[6]	***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			
(Chart Continued Below)					

[4] 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.

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

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

Collection, Preservation, and Testing of DNA and Other Types of Evidence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 Georgia requires governmental entities in possession of any physical evidence from a criminal case to preserve all biological material until a defendant is executed and allows inmates convicted of a capital felony, except those convicted of treason or aircraft hijacking, to request post-conviction DNA testing. However, certain procedural ambiguities and restrictions make it difficult for these inmates to obtain hearings on post-conviction DNA motions and/or relief based on the DNA test results. These procedural ambiguities and restrictions are particularly problematic and include:

- The appropriate mechanism for requesting post-conviction DNA testing—either through an extraordinary motion for a new trial or a motion requesting post-conviction DNA testing filed separate and apart from any other motion—is unclear;
- The time and numerical limitations for motions requesting post-conviction DNA testing filed separate and apart from any other motion are unclear;
- Judges are not required to hold a hearing on motions requesting post-conviction DNA testing (regardless of the form of the motion);
- Judges may grant a hearing on a motion for post-conviction DNA testing if, and only if, the motion "states" two specific factors and "shows or provides" eight other specific factors. This requirement is extremely restrictive, given that inmates are not provided with counsel to assist with or to draft the motion; and
- Inmates are limited to one extraordinary motion for a new trial, regardless of the existence of exculpatory DNA evidence.

To eliminate at least some of these ambiguities and restrictions, the State of Georgia should clarify which mechanism is appropriate for requesting post-conviction DNA testing and should outline its corresponding time and numerical limitations, if any.

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 Georgia'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 Georgia'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

Recommendation \ Compliance	*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	

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 #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 Georgia for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions; for example:

- Law enforcement officers in Georgia are required to complete a basic training course that instructs trainees on avoiding suggestive methods of interviewing witnesses;
- At least seven police departments in Georgia regularly record the entirety of custodial interrogations;
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications; and
- The Georgia Suggested Pattern Jury Instructions in Criminal Cases contain an instruction that provides the jury with factors to consider when determining the reliability of an eyewitness identification.

Despite these measures, the State of Georgia does not require law enforcement agencies to adopt procedures on identifications and interrogations. Certain Georgia governmental offices and associations, however, do provide a framework for law enforcement agencies to adopt procedures on identifications and interrogations.

- The Georgia Association of Chiefs of Police has adopted the Sample Law Enforcement Manual (SLEOM), which is derived from the Model Law Enforcement Operations Manual authored by the Georgia Department of Community Affairs. The SLEOM contains a number of specific procedures for conducting lineups and photospreads, some of which are at least in partial compliance with the ABA Recommendations. However, the extent to which Georgia law enforcement agencies have adopted the SLEOM as a mandatory internal procedure is unknown.
- A number of law enforcement agencies in Georgia have obtained certification under the Georgia Association of Chiefs of Police Law Enforcement Certification Program (GLECP) and/or under the Commission on Law Enforcement Accreditation Standards for Law Enforcement Agencies (CALEA), which require agencies to establish written directives on "conducting follow-up investigations," including identifying suspects. Neither the GLECP nor CALEA, however, requires these agencies to adopt specific procedures on conducting lineups and photospreads. It is possible that in complying with the GLECP and 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 all law enforcement agencies to assess whether they comply with the recommendations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Georgia 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 Georgia and assessed whether Georgia's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

A summary of Georgia'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 validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Georgia does not require crime laboratories or medical examiner offices to be accredited, but all of the crime laboratories in the Division of Forensic Sciences of the Georgia Bureau of Investigation (the Division) are accredited and are required by the accrediting bodies and by Georgia statutory law to adopt written standards and procedures on handling, preserving, and testing forensic evidence. Neither the accrediting bodies nor Georgia statutory law, however, require Division crime laboratories to publish these standards and procedures. In fact, Georgia statutory law explicitly exempts these standards from the Georgia Administrative Procedure Act, which means that the standards do not have to be published or made available for inspection in order to become effective. Therefore, the contents of the Division standards and procedures are unknown.

In addition to the secrecy surrounding the Division standards and procedures, the adequacy of the funding provided to Division crime laboratories is also in question. The Division's annual reports indicate that Division crime laboratories are experiencing "budget shortfalls" and "budget constraints," resulting in a personnel shortage and case backlog. The Division's 2004 annual report states: "The individual caseload for scientists remains high, but the overall case production of the [Division] has fallen well short of the demand for services. The result is a greatly increased backlog over the previous year. The backlog is expected to be in excess of 36,000 cases by the end of FY'05."

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 Georgia'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 Georgia'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 Georgia does not require district attorney's 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. The State of Georgia, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Georgia has entrusted the State Bar of Georgia with investigating grievances and disciplining members of the State Bar of Georgia, including prosecutors.
- The State Bar of Georgia has established the Georgia Rules of Professional Conduct, which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.
- The State of Georgia has established the Prosecuting Attorneys' Council to assist prosecuting attorneys throughout the state in a number of different ways, including by offering courses discussing the concept of guided prosecutorial discretion and capital litigation.
- The Georgia Supreme Court 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. Individual jurisdictions 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 Georgia'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 Georgia'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			

Georgia's new indigent legal representation system, which largely became effective on January 1, 2005, has improved the delivery of defense services to capital defendants by establishing a state-funded capital defenders office—the Office of the Georgia Capital Defender (GCD)—that handles all death penalty cases, except in cases of a conflict of interest. The system, nonetheless, falls short of being in full compliance with the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) for a number of reasons:

- The State of Georgia does not guarantee counsel at every stage of the legal 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, indigent death-sentenced inmates are not entitled to appointed counsel for state post-conviction or clemency proceedings.
- Georgia statutory law contains only minimal qualification requirements for attorneys handling death penalty cases. We commend the Georgia Public Defender Standards Council (GPDSC)—the body responsible for overseeing the indigent legal representation system— for adopting the ABA Guidelines as the GPDSC Death Penalty Defense Standards. However, the GPDSC adopted the ABA Guidelines only where they do not contradict Georgia law and we have been told that the standards have a "fiscal impact," thus requiring ratification by the General Assembly to become effective.
- The State of Georgia has failed to remove the judiciary from the attorney appointment process.
- The amount of funding provided by the State of Georgia to GCD does not appear to be sufficient to cover the costs associated with all of the pending death penalty cases. The budget for the GCD was based on a projected forty death

penalty cases and an additional nine conflict death penalty cases per year. However, as of early December 2005, forty-seven capital prosecutions—thirty-five handled by GCD and twelve handled by a conflict defender—had commenced. In addition to these new cases beginning in 2005, there were also twelve capital cases already in the trial stage in which the GCD represents the defendant.

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 Georgia'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 Georgia's overall compliance with the ABA's policies on the direct appeal process is illustrated in the chart below.

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			

Section 17-10-35(c)(3) of the Official Code of Georgia Annotated requires that in reviewing the proportionality of a death sentence, the Georgia Supreme Court must determine whether the defendant's sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In conducting its proportionality review, however, the Georgia Supreme Court limits its review to cases where the death penalty was actually imposed upon similar circumstances. In fifty-five death-sentence cases between 1994 and 2004, the Georgia Supreme Court's proportionality review consisted of reviewing only cases in which a death sentence had been imposed. The Court only expands its review to cases where the death penalty was not imposed when a defendant claims that his/her sentence is disproportionate to that of his/her co-conspirator.

Additionally, the Georgia Supreme Court's opinions generally devote only one or two sentences to explaining the proportionality review analysis. These sentences generally repeat the language of section 17-10-35(c)(3) by stating, "[T]he death sentence is not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case."

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

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 #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		
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 Georgia has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—i.e., there are no filing deadlines for state habeas petitions and courts permit second and successive petitions under certain circumstances. But some laws and procedures have the opposite effect, such as:

- Georgia law allows the habeas judge, after requesting that either party file proposed findings of fact and conclusions of law, to copy verbatim a party's proposed findings and conclusions in the final order of the court—which

undermines a habeas judge's duty to exercise independent judgment in deciding cases;

- Georgia law allows the habeas judge to shorten the time periods for filing motions, pursuing discovery, and filing briefs—which potentially inhibits the full development of the record upon which the habeas court bases its decision; and
- Georgia law applies the "cause and prejudice" standard for waivers of constitutional and state law claims—which means that review of potentially viable claims can be barred even without the petitioner's "knowing, understanding, and voluntary" waiver.

The effect of this on the adequate development and judicial consideration of claims is even more acute in a habeas proceeding where the petitioner may not necessarily be represented by counsel. In Georgia, death-sentenced inmates do not have a right to appointed counsel after direct appeal, leaving death-sentenced inmates 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 Georgia's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Georgia State Board of Pardons and Paroles' 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 Georgia'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		
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		

Clemency (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 State Board of Pardons and Paroles (the Board) is required to conduct a "complete and fair" review of all petitions for commutations. However, the scope of a "complete and fair" review is not detailed in either the Official Code of Georgia Annotated or the Rules of the State Board of Pardons and Paroles. Thus, it is unclear whether the Board is required to consider any of the factors included in Recommendations #2-5.

In conducting a "complete and fair" review, the Board or some of its members "generally" hold an appointment/hearing on the merits of an inmate's request for clemency. However, the Board is not required to hold an appointment/hearing on every petition, and if and when the Board holds an appointment/hearing, the purpose of the appointment/hearing is to hear from "representatives for the condemned inmate," not from the inmate himself/herself, and it is closed to the public. A separate appointment/hearing may be held to hear arguments from those opposing the clemency request.

Not only is the criteria considered by the Board unknown and the appointment/hearing to consider the inmate's clemency request not necessarily open to the inmate, but other parts of the clemency decision making process are confidential as well.

- The Board is not required to release to the public the evidence it considered during the clemency process.
- The Board is not required to release its reasons for granting or denying an inmate's clemency petition.
- The Board is not required to release its vote count on the inmate's petition.

Given the ambiguities and confidentiality surrounding Georgia's clemency process, the State of Georgia should adopt more explicit factors to guide the consideration of clemency petitions and should open the appointment/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 Georgia'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 Georgia'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	
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 juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.					X

The State of Georgia has suggested pattern jury instructions covering the sentencing phase of a capital trial. These instructions are informative: they include, for example, definitions of mitigating and aggravating circumstances and an explanation of the meaning of and difference between the alternative sentencing options to death. But the instructions are not broad enough to fully inform jurors of the applicable law.

Jurors' understanding of the meaning of mitigation, and of how they may bring mitigating factors to bear in their consideration of capital punishment, is vital to the capital sentencing process. Apart from the definition of mitigating circumstances, however, the suggested pattern jury instructions do not include specific information on the consideration of mitigating circumstances.

- The suggested pattern jury instructions do not contain a list of mitigating circumstances and the Georgia Supreme Court has found that judges do not have to instruct juries on the relevant mitigating circumstances present in the case.
- The suggested pattern jury instructions do not contain the burden of proof for mitigating circumstances or the requisite number of jurors necessary to find the existence of mitigating circumstances.

Additionally, although the suggested pattern jury instructions contain a definition of mitigating circumstances, the Georgia Supreme Court has found that judges do not have to provide the definition, as mitigation is a term of common usage and meaning.

Given the limited instruction that is provided to juries on mitigating evidence, it is no surprise that 40.5% of interviewed Georgia capital jurors did not understand that they could consider any evidence in mitigation and that 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt. Similarly, 89% of interviewed Georgia capital jurors did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. Georgia capital jurors are confused not only 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.

The State of Georgia should revise the suggested pattern jury instructions (i.e., include a list of mitigating circumstances and the burden of proof for mitigating circumstances) to ensure that jurors understand applicable law.

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. 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 Georgia'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 Georgia'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	

Due to the Eleventh Circuit's decision in *Weaver v. Bonner* and the resulting amendments to the Georgia Code of Judicial Conduct, judicial campaigns in Georgia have changed in two ways: (1) judicial candidates are no longer prohibited from personally soliciting campaign contributions; and (2) judicial candidates are no longer prohibited from using false, misleading, and deceptive communications. These changes, combined with the rising costs and increasing political nature of Georgia judicial campaigns, have called into question the fairness of the appointment/election process in Georgia for a number of reasons:

- Judicial candidates continue to campaign on criminal justice issues, including the death penalty. In a 2004 judicial election, a judicial candidate running for an open seat on the Georgia Court of Appeals ran television commercials characterizing his opponents as "high-priced criminal defense lawyers [who] work for the kind of people they once sent to jail." Similarly, in the Cobb County judicial race of 2004, a judicial candidate challenging an incumbent superior court judge distributed campaign literature featuring a picture of the current district attorney with the message, "I support the death penalty, but some judges don't. Consider Dorothy Robinson [the incumbent judge]."
- The rising costs of judicial campaigns tend to increase the influence of money in the judicial selection process. In 2004, two candidates for one contested Georgia Supreme Court seat raised a combined total of more than $815,000. Just two years earlier in 2002, candidates for two contested Georgia Supreme Court seats raised a combined total of approximately $700,000.
- The rising costs of judicial campaigns require candidates and/or their agents to solicit an increasing amount of campaign contributions. Although authorized to personally solicit campaign contributions, judicial candidates are encouraged to establish a committee to secure and manage campaign funds. They are not restricted from soliciting funds from individuals or organizations that could have an interest in the cases s/he will decide as a judge.

Chapter Twelve: The Treatment of 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 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 Georgia'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 Georgia's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the chart below.

The Treatment of 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			
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		

The Treatment of 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 #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		

Between February 1, 1993 and August 1, 1995, the State of Georgia, through the Georgia Supreme Court's Commission on Racial and Ethnic Bias in the Court System, investigated the impact of racial bias in the criminal justice system and made recommendations to "correct[] any problems or misconceptions that exist within the court system and to assure equal opportunity and treatment now and in the future." The Commission's investigation did not include an assessment of the impact of racial bias in the administration of the death penalty because "[t]he large number of factors involved in a death penalty decision . . . , combined with the numerous entities involved in these decisions, . . . [we]re beyond the resources of the Commission to adequately assess."

The Commission's report included a number of findings and recommendations on the criminal justice system as a whole, but it does not appear that the recommendations have been effectively implemented in the State of Georgia.

- The Commission found that "[t]here is a pervasive lack of adequate [criminal] data from which conclusions and policy decisions could be made. The Commission had wanted to investigate potential racial disparities among persons convicted for offenses such as criminal trespass or simple burglary. Limitations in the available databases precluded such analyses." Today, the State of Georgia does not collect demographic information on defendants and victims in all death penalty cases, including death-eligible or death-sought cases. Rather, it only collects information on cases in which the defendant was sentenced to death. The State of Georgia should collect this data to facilitate the evaluation of the impact of racial discrimination on the death penalty system
- The Commission expressed "concern" in its report over the fact that "the number of persons receiving a death sentence or charged with a death penalty offense is disproportionately African-American." Since the release of the Commission's report, it does not appear as if the racial disparities identified as a "concern" by the Commission have diminished. For example, as of August 1998, fifty-five of the 119 inmates on Georgia's death row were black and of the 88 persons awaiting death penalty trial, 53 were black males, 26 were white males, 2 were black females, 4 were white females, and 3 were Hispanic males.[7]
- The Commission found that "[o]ver 81% of minority attorneys and 58% of whites shared the perception that [jury] verdicts are influenced by jurors' racial stereotypes." Despite this finding, neither Georgia statutory law nor case law requires jury instructions informing jurors that it is improper to consider any racial factors in their decision making and instructing them to report any evidence of racial discrimination in jury deliberations. In an effort to address this finding, the State of Georgia should revise the pattern jury instructions to include an instruction consistent with Recommendation #8.

The State of Georgia should examine the impact of racial discrimination in the criminal justice system, especially in capital sentencing, and should develop new procedures that facilitate eliminating discrimination on the basis of race.

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 Georgia's laws, procedures, and practices pertaining to mental retardation

[7] Michael Mears, Georgia Capital Defender Office, *Georgia Needs a Racial Justice Act, at* http://www.gacapdef.org/docs/articles_mears_racial_justice_act.htm (last visited on Oct. 7, 2005).

and the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Georgia'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 and the Death Penalty					
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			

Mental Retardation and Mental Illness and the Death Penalty (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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		

Because Georgia has prohibited the execution of mentally retarded offenders since 1989, the *Atkins* decision had little to no effect in the State of Georgia. In fact, Georgia was the first state to statutorily prohibit the execution of certain mentally retarded offenders. The procedures adopted by the State of Georgia to determine mental retardation, however, do not fully comply with the ABA's recommendations on mental retardation, and some of the state's procedures are particularly problematic.

- Georgia's statutory definition of mental retardation is similar to the American Association on Mental Retardation's definition, as required by Recommendation #1. The Georgia Supreme Court, however, has recognized the IQ range of "70 or below" as being "an indication of significantly subaverage intellectual functioning." The Court has not addressed the issue of whether an IQ score in the low to mid-70s disqualifies a defendant or death-row inmate from being found to have mental retardation, and Georgia trials courts, in at least some mental retardation cases, have interpreted the statute to permit the jury to consider IQ scores as high as 75 as possibly being supportive of a mental retardation verdict, in view of the possibility of a 5 point margin of error.
- The State of Georgia places the burden of proving mental retardation on the defendant, rather than requiring the prosecution to disprove the defendant's substantial showing of mental retardation, as required by Recommendation #5.
- The State of Georgia requires defendants to prove their mental retardation beyond a reasonable doubt—which is inconsistent with Recommendation #5—except in

cases in which the capital trial's guilt/innocence phase took place before July 1, 1988, in which case the burden of proof is by a preponderance of the evidence.

To comply with the ABA's recommendations, the State of Georgia should expand the application of the preponderance of the evidence standard to all death penalty cases.