

EXECUTIVE SUMMARY

INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. 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 capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. 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 several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Indiana assessment, the Project has released state assessments of Alabama, Arizona, Florida and Georgia. In the future, it plans to release reports in, at a minimum, Ohio, Pennsylvania, and Tennessee. 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.

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

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have 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) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on 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 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.

This executive summary consists of a summary of the findings and proposals of the Indiana Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Indiana Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Indiana 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.

II. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Indiana's death penalty system, the Indiana Death Penalty Assessment Team¹ researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (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) racial and ethnic minorities; and (12) mental retardation and mental illness.² The Indiana Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Indiana death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Indiana complies with the ABA Recommendations.

While taking no view of the morality of the death penalty, the members of the Assessment team are of the unanimous view that so long as Indiana imposes the death penalty, it should be reserved for the very worst offenders and offenses and be imposed only after full and fair proceedings. Many aspects of Indiana's criminal justice system do a good job in this regard, such as the provision of two adequately compensated lawyers with funding for expert and other assistance throughout most proceedings. In addition, Governors of both political parties should be commended for considering a wide array of factors in a thoughtful and deliberative clemency process. Clemency, however, like federal *habeas corpus*, comes near the end of the litigation of a capital case. Where errors or irregularities exist, it is in the best interest of all involved parties that the error is addressed at the earliest opportunity.

The Indiana Death Penalty Assessment Team notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. Additionally, the cost of a capital case far exceeds the cost of a case seeking a life sentence. The Indiana Death Penalty Assessment Team is concerned that the necessary expenditure of resources on capital cases affects the system's ability to render justice in non-capital cases.

The Team has concluded that the State of Indiana fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in Indiana's death penalty system. The next section highlights

¹ The membership of the Indiana Death Penalty Assessment Team is included *infra* on pp. 3-5 of the Indiana Death Penalty Assessment Report.

² This report is not intended to cover all aspects of Indiana's capital punishment system and, as a result, it does not address a number of important issues.

the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. Areas for Reform

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

- ***Inadequate Qualification Standards for Defense Counsel*** (see Chapter 6 and 8) – Although the State of Indiana provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls far short of the requirements set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* for trial and appellate attorneys.
- ***Lack of an Independent Appointing Authority*** (see Chapter 6) – The State of Indiana 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, thereby increasing the possibility that attorneys will be appointed or retained for reasons other than their qualifications. The lack of any type of performance review is especially troubling in light of the stakes of a death penalty trial or appeal.
- ***Lack of Meaningful Proportionality Review of Death Sentences*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and offenders; however, the Indiana Supreme Court does not engage in a meaningful review of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.
- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Indiana capital jurors do not understand their roles and responsibilities when deciding whether to impose a death sentence. In one study, over 52 percent of interviewed Indiana capital jurors did not understand that they could consider any evidence in mitigation, 58.2 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt, and over 71 percent did not understand that they did not need to be unanimous in finding the existence of mitigation circumstances. The same study also found that 36.6 percent of interviewed Indiana capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Indiana law.

- ***Racial Disparities in Indiana’s Capital Sentencing*** (see Chapter 12) – The Indiana Criminal Law Study Commission’s 2002 report found that those convicted of killing white victims are sentenced more severely than those convicted of killing non-white victims. The ABA’s racial disparity study backs up these findings.
- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Indiana has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.

C. Indiana Death Penalty Assessment Team Recommendations

Although a perfect system is unfortunately not possible, the following recommendations would improve Indiana’s death penalty proceedings significantly. Our recommendations seek to ensure fairness at all stages, while emphasizing the importance of resolving important issues during the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Indiana Death Penalty Assessment Team makes the following recommendations:

- (1) The State of Indiana should require that all biological evidence be preserved for as long as the defendant remains incarcerated.
- (2) The State of Indiana should require all law enforcement agencies to 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 the custodial interrogation.
- (3) The State of Indiana should develop minimum education and training requirements for all county coroners.
- (4) The State of Indiana should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). Furthermore, workload requirements should be amended to state that no attorney may have more than two capital cases at any given time.
- (5) The State of Indiana should create an independent appointing authority made up solely of defense counsel that is responsible for appointing defense attorneys. The independent appointing authority should be required to appoint at least two attorneys at every stage of a capital case. In making these appointments, there should be a presumption that trial counsel will not represent the death row inmate on appeal, regardless of the attorney’s qualifications.
- (6) The State of Indiana should offer training for all defense counsel and prosecutors involved in capital cases. The training for defense attorneys

should be consistent with the requirements set forth in the *ABA Guidelines*; training for prosecutors should be incorporated into the Indiana Prosecuting Attorneys Council's training for all new prosecutors, in addition to training for experienced prosecutors who are involved in a capital case or are considering filing a notice of intent to seek the death penalty.

- (7) The State of Indiana should collect data on potentially death-eligible murder cases. At a minimum, data should be collected regarding each county's sentencing information. Relevant information on all death-eligible cases should be made available to prosecutors to assist them in making informed charging decisions and the Indiana Court of Appeals and Indiana Supreme Court for use in ensuring proportionality.
- (8) To ensure that death is imposed against the very worst offenses and offenders, the Indiana Supreme Court should employ at least the same searching and thoughtful sentencing review it applies in non-capital cases to capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.
- (9) Despite the seemingly broad language of the Post-Conviction Relief Rules, the Indiana Supreme Court does not allow petitioners to raise free-standing claims of error or even fundamental errors in a post-conviction proceeding. Significant claims of error in death penalty cases should be allowed to be raised during a post-conviction proceeding unless they have been knowingly and voluntarily waived by the defendant.
- (10) The State of Indiana should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature.
- (11) The State of Indiana should complete and release its ongoing study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system.
- (12) Although the State of Indiana excludes individuals with mental retardation from the death penalty, it does not explicitly exclude individuals with other types of serious mental disorders from being sentenced to death and/or executed. The State of Indiana should adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not "competent" for

execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Indiana, 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. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. Unfortunately, hundreds of Hoosiers are murdered under a variety of heinous circumstances every year. Despite this, only a few of these cases result in a prosecutor seeking a death sentences, fewer still result in the imposition by a death sentence by a jury or judges, and only a handful over the past three decades have resulted in the execution of a defendant.

By way of illustration, we offer five examples of murder cases and their various outcomes:

- (1) Gary Burris was left in a trash can as a baby and raised in a house of prostitution before being declared a ward of the county at age twelve due to neglect. At age twenty three, Burris was convicted of killing a taxicab driver in the course of a robbery along with two accomplices. One of the accomplices testified at trial against him in exchange for a sentence of fifteen years.³ Burris was sentenced to death and executed.
- (2) Zachariah Melcher strangled his wife, who was eight months pregnant, and their eleven-month old son. He then stuffed their bodies in a plastic storage container.⁴ Fifteen months after being charged with capital murder, Melcher was offered a plea agreement to life imprisonment.
- (3) Arthur Baird strangled his wife, who was six months pregnant, and later stabbed both of his parents to death with a butcher knife. Mental health experts testified that Baird, who had no criminal history, suffered from delusions and believed that someone else was controlling his actions, but because he was able to appreciate the wrongfulness of the murders, a jury

³ See Clark County Prosecuting Attorney, The Death Penalty, Clark County Death Penalty Cases, at <http://www.clarkprosecutor.org/html/death/dpclark.htm> (last visited Jan. 29, 2007).

⁴ See *id.*

rejected his insanity defense at trial.⁵ Baird was sentenced to death, a decision that was affirmed by judges in several different cases and courts over the course of two decades. His sentence was commuted to life imprisonment without parole by Governor Daniels in 2005.

- (4) Darryl Jeter, who was on probation and driving a stolen car, killed a state trooper who came to his aid when his vehicle was stopped alongside the highway. The trooper's wife was pregnant with their first child.⁶ Upon the recommendation of a Lake County jury, Jeter was sentenced to life imprisonment without parole.
- (5) Three men, Roger Long, Jerry Russell and John Redmond, kidnapped a 44-year-old mentally disabled woman walking to the grocery store, confined her in an attic for two weeks, repeatedly forced her to perform oral, anal and vaginal intercourse, then beat her to death with a baseball bat and left her body in a wooded area.⁷ Long, Russell and Redmond were never charged with capital murder. Each is currently serving a sentence of life without parole, plus additional sentences for criminal deviate conduct, criminal confinement, and conspiracy to commit murder.

Of these eight men, only Gary Burris, who had been abandoned in a trash can as a baby and become a ward of the county after being raised in a house of prostitution, was executed. Although his offense of murder in the course of robbery is certainly a very serious one, it is difficult to conclude that either Gary Burris or his offense is the worst of the eight defendants or offenses presented here. The seemingly random process of charging decisions, plea agreements, and jury recommendations is just part of a death penalty system that has aptly been called Indiana's "other lottery." Although escaping the death penalty may be a prize bestowed upon some defendants, we are deeply troubled that it is not imposed in a fair or consistent manner upon only the very worst offenders who have committed the very worst of offenses.

Because of these sorts of inconsistencies in Indiana's application of the death penalty, and because the State of Indiana is in full compliance with just ten out of seventy-nine recommendations included in this Assessment Report, the members of the Indiana Death Penalty Assessment Team conclude that the State of Indiana should impose a temporary moratorium on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular in the Executive Summary. During this moratorium, trials would continue, and people still could be sentenced to death and move through the appeals process, but the temporary halt in executions would allow the state to examine its death penalty system and implement necessary reforms.

⁵ *See id.*

⁶ *See Man Sentenced to Life for Killing Indiana Trooper: Jury Rejects*, CHICAGO SUN TIMES, Jul. 15, 2006, available at http://findarticles.com/p/articles/mi_qn4155/is_20060715/ai_n16543426 (last visited Jan. 29, 2007).

⁷ *Long v. State*, 743 N.E.2d 253 (Ind. 2001); Associated Press, *Judge Sentences Third Foddrill Suspect to Life in Prison*, Nov. 12, 1999.

III. SUMMARY OF THE REPORT

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

In this chapter, we examined the demographics of Indiana's death row, the statutory evolution of Indiana's death penalty scheme, and the progression of an ordinary death penalty case through Indiana's death penalty 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 Indiana'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 Indiana complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Indiana'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 following chart.⁸

⁸ 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.

Collection, Preservation, and Testing of DNA and Other Types of Evidence						
Recommendation	Compliance	In Compliance	Partially in Compliance ⁹	Not in Compliance	Insufficient Information to Determine Statewide Compliance ¹⁰	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 that investigative personnel are prepared and accountable for their performance.			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 Indiana does not statutorily require the preservation of evidence, except for evidence in the state’s possession or control that could be subjected to DNA testing after a post-conviction petition for DNA testing has been filed.

Indiana courts have held that police and prosecutors have a duty to preserve exculpatory evidence pre-trial, so long as it could be expected to play a “significant role in the suspect’s defense.”¹¹ Indiana courts have made it difficult to prove a violation of this duty, however, and in order to meet this standard, the evidence must have had “exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other

⁹ 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 Indiana meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

¹⁰ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Indiana death penalty. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

¹¹ *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000).

reasonably available means.”¹² Indiana courts also have held that the destruction of “potentially useful evidence” is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.¹³

While the State of Indiana does not require the preservation of all physical evidence for the entire period of incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery; and (2) seek post-conviction DNA testing. However, certain procedural requirements and restrictions have the potential to preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, judges are not required to hold a hearing on an inmate’s motion requesting post-conviction DNA testing. Rather, after the petitioner provides notice of the petition to the prosecuting attorney and the prosecuting attorney is given the opportunity to respond, the court may, but is not required to, order a hearing on the petition.

Based on this information, the State of Indiana should at a minimum adopt the Indiana Death Penalty Assessment Team’s recommendation, previously discussed on page v of the Executive Summary, that a law be passed requiring all biological evidence to be preserved for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this chapter, we reviewed Indiana’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 Indiana’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations is illustrated in the following chart.

¹² *Id.* at 675-76.

¹³ *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004).

Law Enforcement Identifications and Interrogations					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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 ABA's 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: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial		X			
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating of 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 Indiana for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Indiana are required to complete a basic training course of 480 hours; and
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

In addition to these statewide measures, at least twenty-two law enforcement agencies in Indiana regularly record some or all custodial interrogations in an effort to protect against false or coerced confessions.

Despite these measures, the State of Indiana does not require law enforcement agencies to adopt procedures governing identifications and interrogations. Although modern technology makes recording these important events easy and inexpensive, many police agencies do not record them. Moreover, Indiana courts do not require a jury instruction that specifically provides the factors to be considered by the jury in gauging lineup accuracy.

Based on this information, the State of Indiana should at a minimum adopt the Indiana Death Penalty Assessment Team’s recommendation, previously discussed on page v of the Executive Summary, that all law enforcement agencies be required to 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, to audiotape the entirety of the custodial interrogation.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Indiana and assessed whether Indiana’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

A summary of Indiana’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					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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	

Indiana law does not require crime laboratories to be accredited, but all four of the Indiana State Police crime labs and the Indianapolis-Marion County Forensic Services Agency voluntarily have obtained accreditation. As a prerequisite for accreditation, the accreditation program requires laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence. Further, Indiana law requires that any laboratory which conducts DNA analysis (1) must implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB); and (2) must adhere to the quality assurance guidelines issued by the Technical Working Group on DNA Analysis Methods.

Despite these measures, however, problems have been discovered in at least two crime laboratories. For example, the Marion County Prosecutor's Office appointed a special prosecutor in 2004 to investigate problems at the Indianapolis-Marion County Forensic Services Agency and mold was found on five evidence samples at the Indiana State Police crime laboratory in Fort Wayne in 2005.

Like crime laboratories, the State of Indiana does not require county coroners to be accredited, but as of February 2006, 380 county and deputy coroners had voluntarily obtained accreditation. Even though the State of Indiana does not require such accreditation, it has established the Coroners Training Board to create standards for continuing education and training for county coroners; enact mandatory training and continuing education requirements for deputy coroners; and set minimum requirements for continuing education instructors. The Indiana Constitution currently makes it difficult, if not impossible, for the Coroners Training Board to set mandatory education and training standards for county coroners.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, previously discussed on page v of the Executive Summary, that the state develop minimum education and training requirements for all county coroners.

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 Indiana'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 Indiana's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

Prosecutorial Professionalism					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				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 Indiana does not require prosecuting attorneys' offices to establish policies on the exercise of prosecutorial discretion. We recognize, however, the State of Indiana has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Indiana Supreme Court has adopted the Indiana Rules of Professional Conduct, which requires prosecutors to, among other things, disclose to the

defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged information known to the prosecutor;

- The Indiana Supreme Court holds 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;
- The State of Indiana has created the Indiana Prosecuting Attorneys' Council to serve the needs of prosecutors by offering training and technical support.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, previously discussed on page v-vi of the Executive Summary, that training for prosecutors on capital cases should be incorporated into the Indiana Prosecuting Attorneys Council's training for all new prosecutors, in addition to capital training for experienced prosecutors who are involved in a capital case or are considering filing a notice of intent to seek the death penalty.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this chapter, we examined Indiana'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 Indiana's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	Recommendation #1: Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> (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			

Indiana’s indigent trial and appellate legal representation system is provided on a county-by-county basis. In all counties, judges have sole or primary authority to appoint counsel. State post-conviction counsel is provided by the statewide Indiana Public Defender’s Office. While the State of Indiana does not provide for counsel to be appointed in clemency proceedings, the federal courts have held that federal *habeas* counsel may represent the defendant in clemency proceedings. Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls far short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) for a number of reasons:

- The State of Indiana 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. Rather, this responsibility is divided among several entities: (1) the county public defender boards; (2) the county public defender offices; (3) the State Public Defender; (4) the Indiana Public Defender Council; (5) the Indiana Public Defender Commission; and (6) the judiciary. Most of these entities are not independent of the judiciary, thereby failing to protect against the possibility of appointment or retention of attorneys for reasons other than their qualifications;
- Indiana law does not contain any qualification or training requirements for attorneys representing death row inmates in state post-conviction proceedings;
- The State of Indiana requires only twelve hours of training, professional development, and continuing legal education within two years of appointment for defense attorneys and no training for other members of the defense team involved in capital cases; and

- Indiana law imposes no limitation on the number of capital cases that any lawyer may be assigned at any time and includes a presumption that trial counsel will also litigate the appeal.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendations, previously discussed on page v-vi of the Executive Summary, to:

- (1) Adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction proceedings so that they are consistent with the *ABA Guidelines*. Furthermore, workload requirements should be amended to state that no attorney may have more than two capital cases at any given time.
- (2) Create an independent appointing authority made up solely of defense counsel that is responsible for appointing defense attorneys. The independent appointing authority should be required to appoint at least two attorneys at every stage of a capital case. In making these appointments, there should be a presumption that trial counsel will not represent the death row inmate on appeal, regardless of the attorney's qualifications.
- (3) Offer training for all defense counsel involved in capital cases. The training for defense attorneys should be consistent with the requirements set forth in the *ABA Guidelines*.

Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and penalty phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Indiana'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 Indiana's overall compliance with the ABA's policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
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 Indiana Supreme Court has aptly acknowledged that “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹⁴ Based on the state constitutional power to review and revise sentences and the appellate rule that provides for revision of “inappropriate” sentences when “certain broad conditions are satisfied,”¹⁵ the Court reduces many sentences each year in non-capital cases.

Although the Court long explained that it “automatically reviews every death sentence and applies a level of scrutiny more intensive than for other criminal penalties,”¹⁶ the Court’s review of capital cases seems less searching and has resulted in very few reductions of death sentences. The Court encourages appellate counsel to make comparative proportionality arguments, but has expressly declined to hold that it must engage in proportionality review. To ensure that death is imposed against the very worst offenses and offenders, we urge the Indiana Supreme Court to employ at least the same searching and thoughtful review it applies in non-capital cases to capital cases. Ideally, this review would consider not only other death penalty cases but also those cases in which the death penalty could have been sought or was sought and not imposed.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team’s recommendations, previously discussed on page vi of the Executive Summary, to:

- (1) Collect data on potentially death-eligible murder cases to be made available to the Indiana Court of Appeals and Indiana Supreme Court for use in ensuring proportionality; and

¹⁴ Serino v. State, 798 N.E.2d 852, 854 (Ind. 2003).

¹⁵ See generally Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

¹⁶ Bivins v. State, 642 N.E.2d 928, 948 (Ind. 1994).

- (2) Employ at least the same searching and thoughtful sentencing review the Tennessee Supreme Court and Court of Appeals applies in non-capital cases to capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

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 the adequate development and judicial consideration of all claims. In this chapter, we examined Indiana’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 Indiana’s overall compliance with the ABA’s policies on state post-conviction proceedings is illustrated in the following chart.

State Post-Conviction Proceedings						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
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				

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #3: Trial 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, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . 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			

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , 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 Indiana has adopted some laws and procedures that facilitate the adequate development and judicial consideration of all post-conviction claims—for example, Indiana law requires an automatic stay of execution upon a request by the petitioner that is attached to the post-conviction petition and Indiana law provides a right to counsel for all post-conviction petitioners to assist in the presentation and litigation of post-conviction claims. But some laws and procedures have the opposite effect. The State of Indiana:

- Does not specify a finite amount of time to file a post-conviction petition after one’s conviction and sentence become final and leaves the decision for setting a time for filing up to the post-conviction judge within an expedited period that can only be extended with approval of the Indiana Supreme Court;
- Permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own, which might undermine the judge’s duty to exercise independent judgment in deciding cases.
- Despite the seemingly broad language of the Post-Conviction Relief Rules, does not allow petitioners to raise free-standing claims of error or even fundamental errors in a post-conviction proceeding.

The effect of these laws and procedures on the adequate development and judicial consideration of motions and/or claims is even more acute in post-conviction proceedings where the petitioner does not have a constitutional right to effective counsel.

Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team’s recommendations, previously discussed on page v-vi of the Executive Summary, to (1) establishing qualification standards consistent with the *ABA Guidelines*; and (2) allow petitioners to raise free-standing claims of error and especially fundamental errors in post-conviction proceedings.

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

Clemency						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
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, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.			X			
Recommendation #4: Clemency decision-makers should consider the inmate’s mental retardation, mental illness, or mental competency, if applicable, the inmate’s age at the time of the offense, and any evidence of lingering doubt about the inmate’s guilt.			X			
Recommendation #5: Clemency decision-makers should consider an inmate’s possible rehabilitation or performance of positive acts while on death row.			X			
Recommendation #6: Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .				X		

Clemency (Con't.)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<i>Recommendation</i>							
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.					X		
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.				X			
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.				X			
Recommendation #10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.				X			
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.		X					

The Indiana Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for all offenses, including capital crimes, except treason and impeachment. Additionally, the General Assembly has created the Indiana Parole Board (Board), which assists the Governor by making pardon, clemency, reprieve, and remission recommendations.

The clemency process in Indiana seems to have worked quite well in recent years, as Governors of both political parties have seemingly engaged in a thorough investigation and deliberative review before making clemency decisions. There is no guarantee these practices will continue, as the process the Governor and the other Board members follow in considering a clemency application is largely undefined. For example:

- The Indiana Parole Board is responsible for conducting an investigation into all factors relevant to the issue of clemency and for submitting a recommendation to the Governor, but many of the issues that should be considered as a matter of course when considering a clemency application are listed as factors that the Board “may,” but is not required to consider; and
- While recent Governors have demonstrated a commitment to a thorough investigation of many facets of death penalty cases, nothing requires the Governor

to consider the findings of the Board’s investigation or any specific factors when assessing a death-sentenced inmate’s clemency petition.

Not only is the clemency process largely undefined, but parts of the clemency application process also are problematic. For example,

- The State of Indiana does not provide for the appointment of counsel to indigent inmates petitioning for clemency; and
- It does not appear that sufficient time is provided to prepare and litigate a petition for clemency. The entire process must be completed in less than a month. Thus, upon being provided the forms necessary to petition for clemency, the inmate is given approximately one week to file the petition or to sign a waiver.

Chapter Ten: 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 Indiana’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 Indiana’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, 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 by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.				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 to clarify jurors' understanding of alternative sentences.		X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.		X			

Jurors in Indiana, as in many states, appear to be having difficulty understanding their roles and responsibilities, as described by trial judges in their instructions to juries. In particular, studies have shown that Indiana capital jurors have difficulty understanding two crucial concepts: (1) mitigation evidence, and (2) the effect of future dangerousness.

Indiana's pattern jury instructions define the term "mitigating circumstance," but Indiana courts have declined, on occasion, to offer this pattern jury instruction. Indiana appellate decisions have upheld the trial court's failure to define words used in the jury instructions if the "terms are in general use and can be understood by a person of ordinary intelligence."¹⁷ The pattern jury instructions also state clearly that unlike aggravating circumstances, mitigating circumstance need not be proven beyond a reasonable doubt, nor does the jury have to be unanimous in finding that a mitigating circumstance exists. Despite this information, a recent study found that:

- Approximately fifty-two percent of interviewed capital jurors in Indiana did not know that they could consider any evidence in mitigation
- Approximately seventy-one percent of interviewed capital jurors in Indiana did not understand that they did not need to be unanimous in finding the existence of mitigating circumstances; and
- Approximately fifty-eight percent of interviewed Indiana capital jurors believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.

Accordingly, Indiana capital jurors are confused not only about the scope of mitigation evidence that they may consider but also about the applicable burden of proof. Further, contrary to the ABA's recommendations, the pattern jury instructions do not inform jurors that residual doubt about guilt can be a mitigating factor and nor do they state that the jury may recommend a life sentence even if they find that no mitigating circumstances exist.

Similarly, capital jurors in Indiana have difficulty understanding the requirements associated with finding the existence of certain statutory and non-statutory aggravating circumstances. Specifically, capital jurors fail to understand the effect of finding that the defendant would be dangerous in the future. For example, the same study found that approximately thirty-six percent of interviewed Indiana capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

In an effort to prevent these common juror misconceptions, the State of Indiana should adopt the Indiana Death Penalty Assessment Team's recommendations previously discussed on page vi of the Executive Summary and redraft its capital jury instructions.

¹⁷ McNary v. State, 428 N.E.2d 1248, 1252 (Ind. 1981).

Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society’s confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Indiana’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 Indiana’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

Judicial Independence						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
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 publicly 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	

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

Indiana's partisan judicial election format for superior and circuit court judges, combined with the retention election format for all judges, raise concerns about the fairness of the judicial election process in Indiana. The nature of the judicial election and retention process has the potential to influence judges' decisions in death penalty cases. The regular use of candidate questionnaires can undermine the impartiality or the appearance of impartiality of judicial candidates who may eventually sit on the bench. Furthermore, one survey of Indiana judges who were subject to periodic retention elections revealed that three-fifths believe that judicial retention elections have "a pronounced effect on judicial behavior."¹⁸

Despite these concerns, we commend Chief Justice Shepard for his vocal support of judicial independence and hope that these sorts of efforts continue.

Chapter Twelve: Racial and Ethnic Minorities

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 the discriminatory practices. In this chapter, we examined Indiana's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

¹⁸ Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 37 (1995). The survey included judge respondents from ten states who were subject to retention elections. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 n.3 (1994). Six judges in Indiana were included, or 85 percent of the judges in the State that are subject to retention elections. *Id.*

A summary of Indiana’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Racial and Ethnic Minorities					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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		
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 <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the state should have the burden of rebutting it by substantial evidence.			X		

Racial and Ethnic Minorities (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
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 <i>voir dire</i> .				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		

The State of Indiana has taken some steps to explore the impact of race on Indiana's criminal justice system, but has not yet done so in a comprehensive manner.

The Supreme Court created its Race and Gender Fairness Commission in 1999 to "study the status of race and gender fairness in Indiana's justice system and investigate ways to improve race and gender fairness in the courts, legal system, and state and local government, as well as among legal service providers and public organizations."¹⁹ In 2002, the Commission issued a report presenting its findings regarding race and gender issues, including recommendations for strategies to eliminate racial discrimination in the

¹⁹ See Indiana Courts, Commission on Race and Gender Fairness, About, at <http://www.in.gov/judiciary/fairness/about.html> (last visited Jan. 9, 2007).

judicial system. The report presented recommendations for addressing the problems raised in the report, including that:

- (1) The Prosecuting Attorneys Council and the Public Defender Council be encouraged to include one session of programming a year promoting awareness, understanding and sensitivity to issues of racial, gender and ethnic fairness;
- (2) A Blue Ribbon Panel be convened with representation from all branches and levels of government, ethnic and racial communities, including academics, law enforcement and medical and mental health professionals to review the sentencing structure and offense classifications that appear to have a disparate impact on ethnic minorities and females; and
- (3) Trial courts throughout Indiana presiding over criminal proceedings be ordered to keep (a) statistics of the race, gender, and ethnicity of criminal defendants, the offense(s) charged, and the amount of bail, if any, and (2) statistics of the race, gender, and ethnicity of persons convicted of crimes, the offense(s) on which they were found guilty, the results of any plea bargain and sentence or probation, if any. These statistics should be submitted quarterly to the Office of State Court Administration beginning in July 2003.

The number of recommendations in the Commission's report that have been or will be implemented is unclear.

In 2001, the Indiana Criminal Law Study Commission (ICLSC), a commission comprised of individuals appointed by the Governor to review Indiana's criminal procedure, monitor its penal codes, and draft recommendations to ensure the just and efficient operation of the criminal justice system, began studying the application of Indiana's capital sentencing law. During the first phase of the study, the Indiana Criminal Justice Institute (Institute) staffed the ICLSC and studied six key issues in relation to the capital sentencing law, including race neutrality. The ICLSC's final report was issued in January 2002, and specifically examined the issue of whether Indiana imposes capital sentencing in a race neutral manner by studying the cases of 224 individuals who received varying sentences for murder.

The findings of the study's first phase broadly describe general sentencing outcomes and do not specifically spotlight death sentences. Nevertheless, the findings reveal that white offenders received harsher sentences for murder than offenders belonging to racial or ethnic minority groups. The report concluded that this disparity may be related to the combination of two factors: (1) the majority of murders in Indiana are intra-racial; and (2) the victim's race, more than the offender's race, influences the severity of sentencing. "When the victim is White, White offenders and Non-White offenders appear to be sentenced similarly, but when the victim is Non-White, Non-White offenders appear to be sentenced less severely than White offenders."²⁰ African-Americans remain,

²⁰ Mary Ziemba-Davis et al., *Sentencing Outcomes for Murder in Indiana: Initial Findings*, in THE APPLICATION OF INDIANA'S CRIMINAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW

however, greatly over-represented in the class of offenders receiving the death penalty when compared to their representation in the population at-large.

The Institute subsequently launched, but has not released, a second phase of the study, *Indiana's Murder Sentencing Study*, to continue the work begun in "Sentencing Outcomes for Murder in Indiana." The study is to examine more than 200 variables that may affect sentencing in Indiana, from the number of victims to the races of the offender and victim. The results of the study are supposed to be distributed in a series of publications that will be shared with the Governor, the ICLSC, Indiana's Sentencing Policy Study Committee, other policymakers, and criminal justice practitioners.

Because the State of Indiana has not released the more comprehensive study designed to determine whether racial bias exists in Indiana's capital punishment system, the full extent of the issue cannot be known nor can steps to develop new strategies to eliminate the role of race in capital sentencing be fully implemented. Based on this information, the State of Indiana should, at a minimum, adopt the Indiana Death Penalty Assessment Team's recommendation, found on page vi of the Executive Summary, to complete and release *Indiana's Murder Sentencing Study* to determine the existence or non-existence of unacceptable disparities, racial, socio-economic, geographic, or otherwise in its death penalty system.

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. In this chapter, we reviewed Indiana's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

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

STUDY COMMISSION 123I (2002), available at http://www.in.gov/cji/special-initiatives/law_book.pdf (last visited Dec. 27, 2006). Although focused on post-conviction sentencing, the study refers to a separate unpublished report on the relationship between the race of the victim and the State's decision to charge the death penalty in Marion County, Indiana between 1979 and 1989. *Id.* at 123B n.3. This report apparently found that the State was 3.7 times more likely to seek the death penalty in cases involving white victims than in cases involving black victims. *Id.*

Mental Retardation					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	
Recommendation #4: For cases commencing after <i>Atkins v. Virginia</i> 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				

Mental Retardation (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> 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 Indiana statutorily prohibited the execution of the mentally retarded in 1994, eight years before the United States Supreme Court’s decision in *Atkins v. Virginia*, but the statute only applied to mentally retarded defendants sentenced after the statute’s effective date. To deal with this, the Indiana Supreme Court has held that the law applies retroactively. Indiana comports with many of the ABA recommendations in this area, including that:

- Indiana courts adhere to the American Association on Intellectual and Developmental Disabilities (AAIDD) definition of mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18;
- Indiana law allows for a determination of mental retardation as a bar to execution in the pretrial stages; and
- While the burden of proof is on the defense to prove mental retardation, s/he is only required to prove mental retardation by a preponderance of the evidence.

We also reviewed Indiana’s laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

A summary of Indiana’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

Mental Illness					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.		X			
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	
Recommendation #4: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.				X	
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.	X				

Mental Illness (Con't.)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #6: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
Recommendation #7: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
Recommendation #9: Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.				X	
Recommendation #10: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.		X			

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

The State of Indiana has taken some minimal steps to protect the rights of individuals with mental disorders or disabilities by requiring or providing the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, all law enforcement officers receive—as part of their basic training course—four hours of training on mental illness, although this does not include information about how to identify mentally ill suspects. Despite this, the State of Indiana does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Indiana does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner's input;
- The State of Indiana prohibits the execution of individuals found to be "insane" to be executed, yet the standard used to assess an individual's insanity is unclear and somewhat ad hoc. Those defendants with severe, longstanding mental illness are not exempted. Rather, "Indiana has no specific statutory provision addressing either the standard of insanity or any procedural requirements to guard against the execution of the insane"²¹; and
- The State of Indiana does not have a pattern jury instruction on the administration of medication for a mental disorder or disability.

Based on this information, the State of Indiana should adopt the Indiana Death Penalty Assessment Team's recommendation, previously discussed on page vi-vii of the Executive Summary, to adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

²¹ Baird v. State, 833 N.E.2d 28, 33 (Ind. 2005) (Boehm, J., dissenting).