



**Defending Liberty
Pursuing Justice**

**EVALUATING FAIRNESS AND ACCURACY IN
STATE DEATH PENALTY SYSTEMS:**

The Pennsylvania Death Penalty Assessment Report

EXECUTIVE SUMMARY

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

"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

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AMERICAN BAR ASSOCIATION

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 Pennsylvania assessment, the Project has released state assessments in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, 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 focus exclusively on capital punishment laws and processes and do 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 Pennsylvania Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Pennsylvania Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the death penalty in Pennsylvania. 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 Pennsylvania Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Pennsylvania’s death penalty system, the Pennsylvania 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 Following a preliminary chapter on Pennsylvania’s death penalty law, the Pennsylvania Death Penalty Assessment Report devotes a chapter to each of these issues. Each chapter begins with a discussion of the relevant law and concludes with a discussion of the extent to which the Commonwealth of Pennsylvania is in compliance with the ABA’s Recommendations.

Members of the Pennsylvania Death Penalty Assessment Team have varying perspectives on the death penalty. Nonetheless, the Team has concluded that the Commonwealth of Pennsylvania fails to comply or only partially complies with the many of the ABA’s Recommendations and that many of these shortcomings are substantial. Certain of the need to improve the fairness and accuracy of Pennsylvania’s death penalty system, the Pennsylvania Death Penalty Assessment Team unanimously agrees to endorse a series of proposals aimed at addressing these shortcomings. The following section first highlights the Team’s most pertinent findings and then summarizes the Team’s recommendations and observations.

B. Areas for Reform

The Pennsylvania Death Penalty Assessment Team has identified a number of areas in which Pennsylvania’s death penalty system falters in affording each capital defendant fair and accurate procedures.³ While the Team has identified a series of individual problems within Pennsylvania’s death penalty system, we caution that their harms are cumulative. The capital system has a host of interconnected parts; problems in one area can undermine sound procedures in others. The Pennsylvania Death Penalty Assessment Team also notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. With this in mind, the Pennsylvania Death Penalty Assessment Team considers the following areas as most in need of reform:

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

² This report is not intended to cover all aspects of Pennsylvania’s capital punishment system and, as a result, it does not address a number of important issues, including for example, cost and deterrence.

³ Although some counties may be in compliance with some or even many of the recommendations contained in this report, the report focused on assessing laws and practices on a statewide basis. Consequently, while the report may highlight county rules and practices, and while individual counties may comply with various recommendations, the Commonwealth of Pennsylvania, as a state, may be in partial compliance or fail to comply with those recommendations. Furthermore, some of the “Areas for Reform” and “Recommendations” found in the Executive Summary may not be pertinent to certain counties.

- ***Inadequate Procedures to Protect the Innocent*** (see Chapters 2, 3, & 4) – Since the death penalty’s reinstatement, the Commonwealth of Pennsylvania has exonerated at least five death-row inmates– Nicholas Yarris, Neil Ferber, William Nieves, Thomas Kimbell, Jr., and Harold Wilson. Collectively, these men endured nearly fifty years on Pennsylvania’s death row before being exonerated. Despite these exonerations, the Commonwealth of Pennsylvania has not implemented any policies or procedures that would render the conviction of an innocent person less likely, including (1) mandating the preservation of biological evidence for as long as the defendant remains incarcerated, (2) mandating the audio or videotaping of all interrogations in potential capital cases, and (3) implementing lineup procedures that protect against false eyewitness identification.
- ***Failure to Protect Against Poor Defense Lawyering*** (see Chapter 6) – Pennsylvania law fails to guarantee the appointment of two attorneys at all stages of a capital case and the compensation afforded capital attorneys is inadequate for counsel to meet their obligations under the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (ABA Guidelines)*. Additionally, Pennsylvania lacks a statewide independent appointing authority responsible for training, selecting, and monitoring capital defense attorneys to ensure that competent representation is provided to each capital defendant.
- ***No State Funding of Capital Indigent Defense Services*** (see Chapter 6) – The Commonwealth of Pennsylvania provides no funding for indigent defense services, opting instead to rely on county-funded indigent defense systems. As a result, Pennsylvania’s capital indigent defense system fails to afford uniform, quality representation to many capital defendants.
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6 and 13) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants and death-row inmates, including those with mental disabilities, are denied these necessary resources.
- ***Lack of Data on Death-Eligible Cases***⁴ (see Chapter 7) – Without a statewide entity that collects data on all death-eligible cases in the Commonwealth, Pennsylvania cannot ensure that its system ensures proportionality in charging or sentencing, or determine the extent of racial or geographic bias in its capital system.
- ***Significant Limitations on Post-Conviction Relief*** (Chapter 8) – Pennsylvania law imposes numerous restrictions on state post-conviction proceedings that seriously impede the adequate development and judicial consideration of a death-row inmate’s claims. For instance, on a successive post-conviction petition, the petitioner is afforded only sixty days to file the petition. Given that the court will not appoint counsel unless the judge

⁴ It should be noted that the Criminal Justice Committee of the Interbranch Commission for Gender, Racial, and Ethnic Fairness has undertaken “the development of a system of data collection on death sentences,” but no state law yet mandates the collection of data in death penalty cases.

determines that an evidentiary hearing is warranted, the harm of this short time period is exacerbated.

- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are intolerable, yet research establishes that the overwhelming majority of Pennsylvania capital jurors fail to understand their roles and responsibilities when deciding whether to impose a death sentence. Specifically, studies reveal that an astonishing 98.6 percent of Pennsylvania capital jurors failed to understand “at least some” portion of the jury instructions. Of those questioned, 82.8 percent of Pennsylvania capital jurors did not believe “that a life sentence really meant life in prison.” Additionally, 58.7 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the trial; 68 percent failed to understand that they need not be unanimous in finding the existence of mitigating circumstances; and 32 percent erroneously believed that the defense had to prove mitigating circumstances beyond a reasonable doubt. Similarly, despite the fact that Pennsylvania law expressly prohibits consideration of future dangerousness as an aggravating circumstance, 37 percent of interviewed Pennsylvania capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to impose the death penalty.
- ***Racial and Geographical Disparities in Pennsylvania’s Capital Sentencing*** (see Chapter 12) – The Pennsylvania Supreme Court’s Committee on Racial and Gender Bias in the Justice System concluded that there existed “strong indications” that Pennsylvania’s death penalty system did not “operate in an evenhanded manner.” Specifically, the Committee found that “although Pennsylvania’s minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities,” and that Pennsylvania was “second only to Louisiana in the percentage of African Americans on death row.” In its final report, the Committee noted that African American defendants in Philadelphia County were sentenced at a “significantly higher rate” than similarly situated non-African American defendants. In fact, the Committee found that one third of the African American death-row inmates in Philadelphia County would have received sentences of life imprisonment if they had not been African American.

C. Pennsylvania Death Penalty Assessment Team Recommendations

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

- (1) To help protect the innocent, the Commonwealth of Pennsylvania should
 - (a) require all law enforcement agencies to videotape the entirety of

- custodial interrogations or, where videotaping is impractical, audiotape the entirety of the custodial interrogation; (b) implement mandatory lineup procedures, utilizing national best practices that protect against false eyewitness identifications; and (c) mandate that all biological evidence be preserved for as long as the defendant remains incarcerated.
- (2) The Commonwealth should establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to the Pennsylvania Supreme Court for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines.
 - (3) The Commonwealth of Pennsylvania should adopt uniform statewide indigent defense standards that conform to the *ABA Guidelines*, including establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a capital case, and establishing minimum rates for attorney compensation. The Commonwealth also should ensure that the salaries of attorneys in the county public defender offices are commensurate with those of the district attorneys' offices.
 - (4) The Commonwealth of Pennsylvania should create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. The organization should serve as a statewide resource center to assist defense attorneys with capital trials, appeals, post-conviction, and clemency proceedings.
 - (5) The Commonwealth of Pennsylvania should provide statewide funding for capital indigent defense services.
 - (6) The Commonwealth of Pennsylvania should ensure that all death-row inmates receive meaningful review in state post-conviction proceedings. At a minimum, the sixty day deadline to file successive petitions should be extended and exceptions should be added to the statute to ensure that petitions asserting claims of innocence and/or serious constitutional deficiencies will be considered by the court.
 - (7) The Commonwealth of Pennsylvania should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature. In addition, the Commonwealth should mandate that all capital juries be instructed on the definition of life imprisonment.
 - (8) The Commonwealth of Pennsylvania should sponsor a comprehensive study to determine the existence or non-existence of unacceptable disparities, whether racial, socio-economic, geographic, or otherwise, in its death penalty system, and should develop and implement proposals to eliminate any such disparities.

- (9) The Commonwealth of Pennsylvania should ensure that the defense has access to sufficient investigative and expert resources to investigate and fully develop its claims, including potential mental retardation and mental disability claims.

Despite the best efforts of the many principled and thoughtful actors who play roles in the criminal justice process in the Commonwealth of Pennsylvania, our research establishes that, at this point in time, Pennsylvania 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. It is therefore the conclusion of the members of the Pennsylvania Death Penalty Assessment Team that, in order to ensure fairness and accuracy in its death penalty system, the Commonwealth must appropriately address the issues and recommendations of this Report, and in particular the Executive Summary.

III. SUMMARY OF THE REPORT

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

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

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

DNA testing has proven to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depend 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 Pennsylvania'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 Pennsylvania complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

The following chart summarizes Pennsylvania's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.⁵

⁵ 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 | | | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| <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: The State should 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: The state should ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations. | | | | | X | |
| Recommendation #6: The state should provide adequate funding to ensure the proper preservation and testing of biological evidence. | | | | | X | |

The Commonwealth of Pennsylvania does not require the preservation of biological evidence for as long as a death-row inmate remains incarcerated. The only uniform preservation rule that exists in Pennsylvania is triggered when a death-sentenced inmate applies for post-conviction DNA testing and requires preservation only through the duration of the post-conviction DNA testing proceedings.

Pennsylvania courts have held that police and prosecutors have a duty to preserve “material exculpatory evidence,” which is evidence that possesses an “exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Pennsylvania courts also have held, however, that the destruction of evidence that is merely “potentially useful” is not a due process violation unless the defendant can demonstrate bad faith on the part of the police or prosecutor.

Although Pennsylvania does not require the preservation of all physical evidence for the duration of an inmate’s incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery, and (2) seek post-conviction DNA

testing. Strict pleading requirements, however, have the potential to preclude inmates from obtaining post-conviction DNA testing. Notably, there is no statutory requirement that the court hold an evidentiary hearing on a petitioner’s motion requesting post-conviction DNA testing. Rather, the court may simply make a decision regarding the sufficiency of the motion on the pleadings of both parties.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendation, previously discussed on page vi of the Executive Summary, that all biological evidence in potential capital cases 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 wrongful convictions and ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and false confessions must be reduced. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices on law enforcement identifications and interrogations and assessed their level of compliance with the ABA’s policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations.

| 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, | | | | | X | |

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|--|--|
| detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations | | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|--|--|

| Law Enforcement Identifications and Interrogations (Con't.) | | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| 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 #5: The state should 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 | | | |

The Commonwealth of Pennsylvania has implemented some measures that reduce the risk of inaccurate eyewitness identifications and false confessions. For example, the basic training curriculum that all law enforcement officers must complete includes instruction on a number of topics relating to identifications, ranging from increasing the reliability of identifications to defining the civil and criminal ramifications of an unconstitutional pre-trial identification. Along with training on conducting pre-trial identifications, the curriculum encompasses training on custodial interrogations, including instruction on the advisement of *Miranda rights* and the criminal and civil liability for violating an individual’s right against self-incrimination and his/her right to counsel. In total, Pennsylvania law enforcement officers receive eight hours of instruction on “interviewing and interrogations,” two hours of instruction on the “identification of suspects,” and two hours of instruction on “admissions and confessions.” However, the Commonwealth of Pennsylvania does not require law enforcement agencies to adopt specific procedures governing identifications and interrogations.

In the effort to protect against false or coerced confessions by recording custodial interrogations, Pennsylvania law enforcement agencies fall dramatically short. As of 2005, only two law enforcement agencies in Pennsylvania– the Bethlehem and Whitehall Police Departments– regularly recorded custodial interrogations.

In order to ensure that all enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the Commonwealth of Pennsylvania should implement mandatory lineup procedures, utilizing national best practices that protect against false eyewitness identifications. In addition, the Commonwealth should mandate that all law enforcement agencies videotape the entirety of custodial interrogations or, where videotaping is impractical, to audiotape the entirety of the custodial interrogation,

as recommend by the Pennsylvania Death Penalty Assessment Team on page vi of the Executive Summary.

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 Pennsylvania and assessed whether Pennsylvania’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices.

| 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 | |

Pennsylvania law does not require crime laboratories to be accredited, but all seven of the Pennsylvania State Police crime laboratories and a handful of local and private crime laboratories have voluntarily obtained national accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As a prerequisite for ASCLD/LAB accreditation, laboratories must enact certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

A noteworthy incident, however, at the Bethlehem Regional Laboratory, a laboratory accredited by the ASCLD/LAB, underscores the need for stricter accreditation standards and quality control. An annual audit at the Bethlehem lab revealed a number of errors in the work of serologist Ranae Houtz, including that she had failed to note a semen stain, raising serious concerns about the reliability and accuracy of Houtz’s work. By the time Houtz was forced to resign in April of 2003, she had analyzed evidence in 615 cases, spanning twenty-seven counties over the course of three years.

Unfortunately, the Ranae Houtz incident was not an isolated occurrence. The work of former Pennsylvania State Police chemist Janice Roadcap has also been challenged, raising serious questions as to the integrity of criminal lab work in Pennsylvania. In 1988, Barry Laughman was convicted and sentenced to life imprisonment for the rape and murder of his elderly neighbor. At trial, Roadcap testified that, although the semen on the victim's body belonged to an individual with Type A blood, it still could have originated from Barry Laughman, who has Type B blood. Even more disturbing is evidence that Roadcap altered her lab notes in a murder case which resulted in then-fourteen year old Steven Crawford serving twenty-eight years in prison before being freed in 2002. Roadcap served as a chemist at the Pennsylvania State Police's Harrisburg Regional Laboratory for almost twenty-five years, handling an untold number of cases in eighteen counties, before retiring in 1991.

As with its crime laboratories, the Commonwealth of Pennsylvania does not require county coroner or medical examiner offices to be accredited. To date, no Pennsylvania county coroner office or medical examiner office has obtained voluntary accreditation through the National Association of Medical Examiners (NAME). While Pennsylvania does not require such accreditation, it has established the Coroner's Education Board to create minimum training standards and continuing education requirements for newly elected coroners and deputy coroners. In the few counties, such as Allegheny and Delaware Counties, which instead employ a medical examiner, qualifications for the position appear to vary, although all require that the medical examiner be a pathologist.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where the prosecutor has enormous discretion in deciding whether or not to seek the death penalty. In this chapter, we examined Pennsylvania's laws, procedures, and practices relevant to prosecutorial professionalism and assessed their compliance with the ABA's policies on prosecutorial professionalism.

The following chart summarizes Pennsylvania's overall compliance with the ABA's policies on prosecutorial professionalism.

| 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 Commonwealth of Pennsylvania does not require district attorneys' offices to establish policies on the exercise of prosecutorial discretion. Nor does it require that these offices establish policies on evaluating cases that rely upon eyewitness identifications, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

Furthermore, the Commonwealth does not require that prosecutors handling capital cases receive any special training. Presently, training requirements for prosecutors vary from county to county.

Pennsylvania, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Commonwealth has entrusted the Office of the Disciplinary Counsel, the Disciplinary Board of the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court with investigating grievances and disciplining prosecutors; and
- The Pennsylvania Supreme Court has adopted the Pennsylvania Rules of Professional Conduct, which require 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 mitigating information known to the prosecutor.

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, full and fair compensation to the lawyers who undertake capital cases, and resources for defense investigators and experts. States must address capital 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 Pennsylvania’s laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA’s policies on defense services.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on defense services.

| Defense Services | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| <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: Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)—The Defense Team and Supporting Services | | | | X | | |
| Recommendation #2: Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel | | | X | | | |
| Recommendation #3: Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency | | | | X | | |

| | | | | | |
|----------------------------------------------------------------------------------------|--|---|---|--|--|
| Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation | | | X | | |
| Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training | | X | | | |

Pennsylvania has no statewide system for providing indigent defense services. Instead, trial, appellate, and post-conviction counsel are provided on a county-by-county basis with judges generally having the primary authority to appoint counsel. Pennsylvania does not provide for the appointment of counsel in clemency proceedings, nor on a successive petition for post-conviction relief unless the court determines that the petition warrants an evidentiary hearing.

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

- The Commonwealth of Pennsylvania 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;
- The Commonwealth of Pennsylvania provides no state funding for indigent defense services, as numerous counties fail to provide adequate funding for defense counsel, experts, and investigators in death penalty cases; and
- Pennsylvania law does not guarantee the appointment of two attorneys at all stages of the legal proceedings, nor does it guarantee access to investigators and mitigation specialists.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendations, previously discussed on pages vii-viii of the Executive Summary, to:

- (1) Adopt uniform statewide indigent defense standards that conform to the *ABA Guidelines*, including establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a capital case, and establishing minimum rates for attorney compensation. The Commonwealth also should ensure that the salaries of attorneys in the county public defender offices are commensurate with those of the district attorneys’ offices.
- (2) Create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. The organization should serve as a statewide resource center to assist defense attorneys with capital trials, appeals, post-conviction, and clemency proceedings; and

- (3) Provide statewide funding for capital indigent defense services.

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 primary method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Pennsylvania’s laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with ABA policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on the direct appeal process.

| 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 Pennsylvania Supreme Court is no longer statutorily required to conduct proportionality review in capital cases. In 1997, the Pennsylvania Legislature specifically repealed the statutory requirement that the Pennsylvania Supreme Court undertake proportionality review when reviewing a death sentence on direct appeal.

To ensure that a death sentence is not excessively severe or an abuse of discretion and that prosecutorial discretion to seek the death penalty is evenhandedly exercised across

the Commonwealth, Pennsylvania should immediately implement meaningful proportionality review that includes a review of cases in which the death penalty was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendations, previously discussed on pages vi and vii of the Executive Summary, that the Commonwealth should establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to the Pennsylvania Supreme Court for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines.

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 some capital defendants may 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 Pennsylvania’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.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on state post-conviction proceedings.

| State Post-Conviction Proceedings | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| 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: 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 | | | | X | | |

| | | | | | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|---|--|--|
| discovery. | | | | | |
| Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expiditing the proceedings. | | | X | | |

| State Post-Conviction Proceedings (Con't.) | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-------------------------|-------------------|------------------------------------------------------------|----------------|
| Recommendation | Compliance | In Compliance | Partially in Compliance | Not in Compliance | Insufficient Information to Determine Statewide Compliance | Not Applicable |
| | 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 a capital case. | | | | 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 Commonwealth of Pennsylvania has adopted a post-conviction framework which impedes the adequate development and judicial consideration of a death-row inmate’s post-conviction claims. For example, the Commonwealth allows the post-conviction judge numerous opportunities to summarily deny the petition without an evidentiary hearing. Furthermore, under Pennsylvania law, the petitioner does not have a right to post-conviction discovery but, to obtain discovery, must demonstrate good cause on his/her initial petition or exceptional circumstances on any successive petition. In practice, Pennsylvania judges far too often exercise their discretion to severely limit the scope of post-conviction discovery or to deny discovery altogether. Additionally, on a successive post-conviction petition, the petitioner is afforded only sixty days to file the petition. Given that the court will not appoint counsel unless the judge determines that an evidentiary hearing is warranted, the harm of this short time period is exacerbated.

Based on this information, the Commonwealth of Pennsylvania should adopt the Pennsylvania Death Penalty Assessment Team’s recommendation, as detailed on page vii, that the Commonwealth ensure that all death-row inmates receive meaningful review in state post-conviction proceedings. At a minimum, the sixty-day deadline to file successive petitions should be extended and exceptions should be added to the statute to ensure that petitions asserting claims of innocence and/or serious constitutional deficiencies will be heard by the court.

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 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 Pennsylvania’s laws, procedures, and practices concerning the clemency process and assessed whether they comply with the ABA’s policies on clemency.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on clemency.

| Clemency | | | | | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| 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: 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 | | |
| 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 Pennsylvania Constitution grants the Governor the sole authority to grant reprieves, commutations, and pardons in all criminal cases, except impeachment. However, the Governor is prohibited from granting a pardon or commuting a sentence without a unanimous recommendation from the Pennsylvania Board of Pardons (Board).

Under Pennsylvania law, neither the Governor nor the Board of Pardons is required to conduct any specific type of review or consider any specific factors when considering a petition for clemency on behalf of a death-row inmate. Indeed, the Governor’s discretion in granting or denying clemency is virtually unfettered, so long as s/he has the unanimous recommendation of the Board in support of clemency. Similarly, the Board, in deciding to recommend a grant of clemency to the Governor, has “no objective criteria” to which it must adhere. Rather, each Board member is “free to rely upon the information that he/she feels is most important” in his/her decision-making.

The Board, however, has stated that it will not review the guilt or innocence of a death-row inmate. Indeed, “if there is some legal technicality [which bears on guilt or innocence], such as the introduction of hearsay evidence, [an] illegal confession, [or an] illegal search and seizure,” the Board has eschewed any responsibility of reviewing such claims, claiming that responsibility lies with the courts to “resolve those matters,” and not the Board itself.

Since the re-enactment of the death penalty in Pennsylvania, no Governor has granted clemency to a death-row inmate. In fact, the Board has not even considered a pardon or commutation application for a death-row inmate since 1967.

Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, the jury instructions must present fully and accurately the 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, confusing jurors about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on capital jury instructions.

| 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 Pennsylvania, as in many states, appear to have difficulty understanding their roles and responsibilities, as described by trial judges in their jury instructions. In fact, an astonishing 98.6 percent of Pennsylvania capital jurors have failed to understand “at least some” jury instructions.

More specifically, research illustrates a startling amount of misunderstanding among Pennsylvania jurors in regard to mitigation evidence. In a study conducted by the Capital Jury Project, 58.7 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the trial; 68 percent failed to understand that they need not be unanimous in finding the existence of any particular mitigating circumstance; and 32 percent erroneously believed that the defense had to prove mitigating circumstances beyond a reasonable doubt. In another study conducted by Professor Wanda Foglia of Rowan University, only 42 percent of interviewed Pennsylvania capital jurors understood that they could consider any mitigating factor while only 30 percent understood that it was not necessary for all jurors to agree on the presence of individual mitigating factors.

In addition to mitigation evidence, capital jurors also often have difficulty understanding the bifurcated nature of a death penalty case. For example, an overwhelming 83.3 percent of interviewed Pennsylvania capital jurors indicated that they had discussed the defendant’s appropriate punishment “a great deal” or a “fair amount,” even before the sentencing phase had begun, despite the fact that this is prohibited by law. Similarly, despite the fact that Pennsylvania law expressly prohibits consideration of future dangerousness as an aggravating circumstance, 37 percent of interviewed Pennsylvania 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.

Another major source of juror miscomprehension appears to lie with the meaning of life imprisonment. Nearly 83 percent of Pennsylvania capital jurors did not believe “that a life sentence really meant life in prison.” Significantly, over 20 percent of jurors actually believed that if the defendant was not sentenced to death, s/he would be released from prison in nine years or less.

Given the alarming rate of juror miscomprehension, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendations previously discussed on page vii of the Executive Summary, which provide that (1) the Commonwealth should redraft its capital jury instructions with the objective of preventing common juror misconception that have been identified, and (2) that the Commonwealth should mandate that all capital juries be instructed on the meaning of life imprisonment.

The lack of clear and comprehensible sentencing instructions in the Commonwealth of Pennsylvania creates a palpable risk that jurors will misconstrue the law and impose a sentence that does not accurately reflect the jury’s determination of the proper sentence.

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 Pennsylvania’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.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on judicial independence.

| Judicial Independence | | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| 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: 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 | |
| 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 | |

| Judicial Independence (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 #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 | |

Pennsylvania’s partisan judicial election format, combined with its retention election format, for Supreme Court Justices and the judges of the Superior Court, Commonwealth Court, and Courts of Common Pleas create serious concerns about the fairness of the judicial election process in Pennsylvania. Elections, whether partisan or not, raise significant questions about both the fairness of the judicial selection process and the independence of judges. By maintaining general partisan elections and retention elections for all state judges, the Commonwealth of Pennsylvania has left its judiciary particularly vulnerable to political sway.

Alarming, during the past two decades, the costs of judicial elections in Pennsylvania have steadily risen. Between 1989 and 1999, thirty Supreme Court candidates garnered \$13 million in campaign contributions. In 2001, two Supreme Court candidates amassed more than \$1 million each in campaign funds, and, in 2003, another six Supreme Court candidates amassed more than \$3.3 million in contributions. And judicial campaign contributions continue to rise, despite the fact that 88 percent of Pennsylvania voters believe that campaign contributions influence judges’ decisions “at least some of the time.”

The 2002 amendments to the Pennsylvania Code of Judicial Conduct, which permit judges and judicial candidates to announce their views on certain issues so long as they do not commit or appear to commit to a specific position on a case or issue that is likely to come before the court, also have changed the landscape of Pennsylvania’s judicial elections. During the 2003 Supreme Court judicial elections, the two candidates, Joan Orié Melvin and Max Baer, adopted decidedly different approaches in their campaigns. Melvin refused to announce her views, expressing concern that it would affect her impartiality in future cases should she be elected. Baer, on the other hand, candidly discussed his general views on legal issues, announcing general positions on abortion and the death penalty, and ultimately won the election.

While the Code now permits candidates to express their views on disputed legal and political issues, some comments risk amounting to pre-judgments and blur the boundaries

of appropriate judicial conduct. For instance, when a candidate expresses support for the death penalty, s/he creates the perception that the judicial candidate will be more likely to uphold the death penalty, regardless of whether or not it is warranted.

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 Pennsylvania’s laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA’s policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty.

| Racial and Ethnic Minorities | | | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|----------------------|--------------------------------|--------------------------|-------------------------------------------------------------------|-----------------------|
| | | <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 | Compliance | | | | | |
| Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it. | | | X | | | |
| Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence. | | | X | | | |
| Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor. | | | X | | | |
| Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination. | | | X | | | |

| Racial and Ethnic Minorities (Con't.) | | | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|---------------|-------------------------|-------------------|------------------------------------------------------------|----------------|
| Compliance | | In Compliance | Partially in Compliance | Not in Compliance | Insufficient Information to Determine Statewide Compliance | Not Applicable |
| Recommendation | | | | | | |
| <p>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.</p> | | | | X | | |
| <p>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.</p> | | | X | | | |
| <p>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>.</p> | | | | | X | |
| <p>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.</p> | | | | X | | |
| <p>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.</p> | | | | | X | |
| <p>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.</p> | | | | X | | |

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

In 1999, the Pennsylvania Supreme Court established the Committee on Racial and Gender Bias in the Justice System (Committee) to "determine whether racial or gender bias plays a role in the justice system." Following its review, the Committee concluded that there existed "strong indications" that Pennsylvania's death penalty system did not "operate in an evenhanded manner." For example, the Committee found that African American defendants in Philadelphia County were sentenced at a "significantly higher rate" than similarly situated non-African American defendants. Specifically, the Committee found that "although Pennsylvania's minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities," and that Pennsylvania was "second only to Louisiana in the percentage of African Americans on death row." In fact, the Committee concluded that one third of the African American death-row inmates in Philadelphia County would have received sentences of life imprisonment if they had not been African American.

In response to their findings, the Committee issued 173 recommendations, twenty-three of which dealt specifically with the administration of the death penalty. The twenty-three recommendations ranged from reducing the number of peremptory strikes in capital cases to having district attorney's offices adopt written standards and procedures for deciding in which cases to seek the death penalty. Most notably, the Committee recommended a "large-scale, state-sponsored and state-funded research effort" to evaluate Pennsylvania's death penalty. The Committee declared that:

Not until the Commonwealth undertakes a comprehensive data collection effort and subjects the data to rigorous analysis, can the question of the role of race and ethnicity in capital cases be fully addressed.

Less than two years later, after the Committee issued its recommendations, the Pennsylvania Supreme Court created the Interbranch Commission for Gender, Racial, and Ethnic Fairness to implement the Committee's recommendations. One of the remedial strategies pursued by the Commission is the development of a data collection system for death penalty cases. Another strategy pursued by the Commission is ethnically diversifying juries as well as court staff. The Commission, however, has yet to implement the vast majority of the Committee's recommendations.

Because Pennsylvania has not conducted a more comprehensive study designed to determine the extent to which racial and ethnic bias exists in Pennsylvania's capital punishment system, the full extent of the issue cannot be known nor can steps be taken effectively to eliminate the role of race in capital sentencing. The Commonwealth of Pennsylvania should therefore adopt, at a minimum, the Pennsylvania Death Penalty Assessment Team's recommendation, found on page vii of the Executive Summary, to complete a study to determine the existence or non-existence of unacceptable disparities—

racial, socio-economic, geographic, or otherwise– in its death penalty system and to develop and implement proposals to eliminate any such disparities.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 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 was mentally retarded at the time of the offense. In this chapter, we reviewed Pennsylvania’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.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on mental retardation.

| 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 | |

| Mental Retardation (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 #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 | | | | |
| 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 | | | | |

Five years after *Atkins v. Virginia*, the Pennsylvania Legislature has yet to adopt a statute banning the execution of mentally retarded individuals. Nonetheless, in accordance with *Atkins*, Pennsylvania law permits a death-row inmate to raise a claim of mental retardation as a bar to execution either pre-trial or post-conviction.

Pennsylvania comports with some of the ABA recommendations on mental retardation, including that:

- Pennsylvania 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 [that] . . . originates before age 18”; and
- While the burden of proof is on the defendant to prove mental retardation, s/he is only required to prove mental retardation by a preponderance of the evidence.

We also reviewed Pennsylvania’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.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on mental illness.

| 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 | |

| 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 #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 | |
| 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 | | |

| 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 #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 Commonwealth of Pennsylvania has taken limited steps to protect the rights of individuals with mental disorders or disabilities by educating law enforcement officials and prison authorities about mental illness and by adopting certain relevant court procedures. For example, as part of their basic training curriculum, all law enforcement officers receive instruction on identifying individuals with mental illness, including the characteristics of schizophrenia, bipolar disorder, depression, personality disorders, impulse control disorders and paraphilias. Additionally, Pennsylvania has adopted some mechanisms, such as the provision for the filing of “next friend” petitions, to protect

individuals with mental disorders or disabilities from waivers that are a product of their mental or disability.

Despite these steps, the Commonwealth of Pennsylvania fails to provide a system in which the rights of individuals with mental illness are fully protected:

- The Commonwealth of Pennsylvania does not formally commute a death sentence upon a finding that the inmate is incompetent to proceed on factual matters requiring the prisoner's input;
- The Commonwealth of Pennsylvania does not permit the courts to stay post-conviction proceedings for an incompetent death-row inmate and instead may appoint a "next friend" to pursue post-conviction relief on behalf of the inmate; and
- The Commonwealth of Pennsylvania does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing, nor does it have a pattern jury instruction on the administration of medication for a mental disorder or disability.

Based on this information, the Commonwealth of Pennsylvania should adopt the Pennsylvania Death Penalty Assessment Team's recommendation, as detailed on page vii, that the Commonwealth ensure that the defense has access to sufficient investigative and expert resources to investigate and fully develop its claims, including potential mental retardation and mental disability claims.

