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 Tennessee assessment, the Project has released state assessments of Alabama, Arizona, Florida, Georgia, and Indiana. In the future, it plans to release reports in, at a minimum, Ohio and Pennsylvania. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

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

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

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

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

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Tennessee Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Tennessee Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Tennessee death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

I. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Tennessee's death penalty system, the Tennessee Death Penalty Assessment Team[1] 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 proceedings; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.[2] Following a preliminary chapter on Tennessee's death penalty law, the Tennessee Death Penalty Assessment Report devotes a chapter to each of these twelve issues. Each chapter begins with a discussion of the relevant law and then concludes the extent to which the State of Tennessee is in compliance with the ABA's Recommendations.

Members of the Tennessee Death Penalty Assessment Team have varying perspectives on the death penalty in the State of Tennessee. The Team has concluded, however, that the State of Tennessee fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy of Tennessee's death penalty system. The Team, therefore, unanimously agrees to endorse key proposals that address these shortcomings. The next section highlights the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. Areas for Reform

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

- ***Inadequate Procedures to Address Innocence Claims*** (see Chapter 8) – The State of Tennessee does not properly ensure that claims of factual innocence receive adequate judicial review. While the State of Tennessee has

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

[2] This report is not intended to cover all aspects of a state's capital punishment system and, as a result, it does not address a number of important issues, such as the treatment of death-row inmates while incarcerated.

mechanisms to handle claims of factual innocence, including normal post-conviction proceedings and writs of error *coram nobis*, neither of these mechanisms is working as intended. For example, Tennessee courts have failed to provide relief to one death-row inmate, Paul House, despite the fact that the United States Supreme Court concluded that "it is more likely than not that no reasonable juror would have found [House] guilty beyond a reasonable doubt."[3]

- ***Excessive Caseloads of Defense Counsel*** (see Chapter 6) – Tennessee courts generally appoint the district public defender to represent a capital defendant at trial and through appeal and the Office of the Post-Conviction Defender to represent a death-row inmate in state post-conviction proceedings. However, attorneys working within the district public defender offices are burdened by some of the highest caseloads in the country. In fact, in fiscal year 2006, the courts appointed over 183,000 criminal cases to the district public defender offices, which, at the time, employed only 309 full-time attorneys. In January 2007, the Tennessee Comptroller concluded that district public defender offices across the State were short 123 attorneys. Similarly, the Office of the Post-Conviction Defender has been said to be "on the verge of collapse because of its excessive caseload."
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Tennessee are denied these necessary resources. Even if a capital defendant satisfies the stringent pleading requirements and receives pre-authorization by the trial court to obtain investigative and/or expert services, the Administrative Office of the Courts (AOC) must still approve the court's order and the AOC has used this authority to curtail or deny such funds. Moreover, Tennessee Supreme Court Rule 13 imposes limitations on the hourly rates of compensation for expert and/or investigative services, and has set a cap of $20,000 for all investigative services and $25,000 for all expert services for post-conviction proceedings. Under Rule 13, the defense also is limited to obtaining an expert or investigator within 150 miles of the court in which the proceeding is pending. Although district public defender offices and the Office of the Post-Conviction Defender should generally have access to investigators within their offices, at least three district public defender offices had "no investigator positions other than those occupied by attorneys acting as defenders."
- ***Inadequate Qualification and Performance Standards for Defense Counsel*** (see Chapter 6) – Tennessee's statutory qualification requirements for capital defense attorneys fall far short of the requirements of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) and are insufficient to ensure qualified counsel for every death-sentenced inmate. As noted by the Tennessee Bar Association, Rule 13, which sets qualification standards for appointed capital defense attorneys, "has no mechanism to determine whether counsel will be zealous advocates,

[3] House v. Bell, 126 S. Ct. 2064, 2077, 2086 (2006).

no mechanism to determine whether counsel did anything other than attend the training or to evaluate the quality or content of the training, no mechanism to determine counsel's knowledge of the requisite case law, or any means to measure or monitor the quality of the representation being provided."

- ***Lack of Meaningful Proportionality Review*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and offenders. While the Tennessee Supreme Court and the Court of Criminal Appeals are required to determine whether a death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant," the Tennessee Supreme Court has limited the courts' duty to ensuring that "no aberrant death sentence is affirmed." Accordingly, neither the Tennessee Supreme Court nor the Tennessee Court of Criminal Appeals engages in a meaningful review of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.
- ***Lack of Transparency in the Clemency Process*** (see Chapter 9) – Full and proper use of the clemency process is essential to guaranteeing fairness in the administration of the death penalty. Given the ambiguities and confidentiality surrounding Tennessee's clemency decision-making process, and the fact that no Tennessee Governor has granted clemency in the modern death penalty era, it is difficult to conclude that Tennessee's clemency process is adequate. In fact, the Governor can deny clemency for any reason, even without holding a public hearing on the death-sentenced inmate's eligibility for clemency.
- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Tennessee capital jurors do not understand their roles and responsibilities when deciding whether to impose a death sentence. In one study, over 41 percent of interviewed Tennessee capital jurors did not understand that they could consider any evidence in mitigation, over 46 percent erroneously believed that the defense had to prove mitigation beyond a reasonable doubt, and over 71 percent did not understand that they did not need to be unanimous in finding mitigating circumstances. The same study found that 58.3 percent of interviewed Tennessee capital jurors believed that if they found the defendant's conduct was "heinous, vile, or depraved" they were required by law to sentence the defendant to death and another 39.6 percent believed the death penalty was mandated upon their finding that the defendant would pose a future danger to society, despite the fact that future dangerousness is not a statutory aggravating circumstance.
- ***Racial Disparities in Tennessee's Capital Sentencing*** (see Chapter 12 and Appendix) – The Tennessee Supreme Court's Commission on Racial and Ethnic Fairness noted that when race or ethnicity is given preference in criminal proceedings, favor is given to the "majority" race or ethnicity, and the Tennessee Supreme Court's Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission has recommended that the Tennessee Supreme Court and the Tennessee General Assembly fund an entity to continue the study of

how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee. Despite these findings and recommendations, no state-funded study on the impact of race on the capital system in Tennessee has ever been conducted. A recent study that was conducted as part of this Assessment Report reviewed capital sentencing in Tennessee from 1981 to 2000 and concluded that individuals who killed whites were more likely to receive the death penalty than those who killed blacks.

- ***Geographical Disparities in Tennessee's Capital Sentencing*** (see Chapters 1 and 5 and Appendix) – The Tennessee Comptroller reported that 44.7 percent of all Tennessee capital cases from 1993 to 2003 originated in Shelby County. The cause of these geographic disparities is unclear, but one possible variable is the district attorney general. In Tennessee, individual district attorneys general have complete discretion in selecting those cases in which they will seek the death penalty. No statewide standards exist to guide the exercise of this discretion, and there is a wide variance of attitudes among the district attorneys in different parts of the State.
- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Tennessee does not have adequate protections for people with severe mental disabilities on death row, including those who were disabled at the time of the offense and others who became seriously mentally ill after conviction and sentence.

C. Tennessee Death Penalty Assessment Team Recommendations

As evidenced by the problems discussed above and others identified throughout this report, the State of Tennessee currently does not guarantee a fair and accurate system for all capital defendants. The Assessment Team concludes that the serious problems plaguing Tennessee's death penalty system can be addressed only by means of systemic, institutional changes. Our recommendations therefore seek to ensure fairness and accuracy at all stages of a capital case, while emphasizing the importance of resolving important issues at the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Tennessee Death Penalty Assessment Team makes the following recommendations:

(1) The State of Tennessee should create an independent commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate's claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges, who would review the claim without regard to any procedural bars. This sort of commission, which would supplement either the current post-conviction or clemency process, is necessary, in large part because procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full judicial consideration.

(2) The State of Tennessee 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, comprised solely of defense attorneys, also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. In addition, this independent appointing authority should create and oversee a statewide capital case trial unit and a statewide capital case appellate unit, consisting of attorneys and staff with specialized knowledge and experience in handling death penalty cases.

(3) The State of Tennessee should require that all biological evidence is preserved and properly stored for as long as the defendant remains incarcerated and the Tennessee Bureau of Investigation should expand the services of its criminal laboratories to include Mitochondrial DNA testing of hair without roots or to include Y-STR testing.

(4) The State of Tennessee should develop statewide protocols for determining who is charged with a capital crime, in an effort to standardize the charging decision. In standardizing the charging decision, defense attorneys should always be provided the opportunity to meet with the prosecutor to explain why s/he believes that the defendant should not be charged capitally.

(5) The State of Tennessee should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial, on appeal, in state post-conviction proceedings, and in clemency proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

(6) Given the numerous ways the court may summarily dispose of a petition without first holding an evidentiary hearing, it is imperative that the right to appointed post-conviction counsel attach prior to the filing of the post-conviction petition, not after. Consequently, the State of Tennessee should provide for the appointment of counsel in state post-conviction proceedings for indigent death-row inmates prior to the filing date for a petition for post-conviction relief.

(7) Tennessee Supreme Court Rule 13 should be amended to allow a defendant to obtain expert and/or investigative services at any time after s/he has been charged with a potentially death-eligible criminal offense, so that the defense has the opportunity to demonstrate to the prosecutor why capital charges may be inappropriate.

(8) To ensure that death is imposed against the very worst offenses and offenders, the Tennessee Supreme Court and the Court of Criminal Appeals should include in its review and determination of proportionality those cases in which the death penalty could have been sought, but was not, and cases in which the death penalty was sought, but not imposed.

(9) The State of Tennessee should ensure that trial judges file complete Rule 12 reports for all cases resulting in a first-degree murder conviction, as mandated by Tennessee Supreme Court Rule 12. This data should be compiled and made available to the Tennessee Supreme Court and Tennessee Court of Criminal Appeals for use in ensuring proportionality, in addition to being made available for use by defense attorneys and prosecutors.

(10) In clemency proceedings, the State of Tennessee should provide each death-row inmate the opportunity for a hearing before the Board of Pardon and Parole and, regardless of whether the inmate requests such a hearing, should encourage the Governor to exercise his/her discretion to meet with the inmate and his/her counsel prior to rendering a final decision on clemency.

(11) The State of Tennessee should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified.

(12) The State of Tennessee should sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, and should develop and implement proposals to eliminate any such disparities.

(13) Although the State of Tennessee excludes individuals with mental retardation from the death penalty, it does not explicitly exclude individuals with other types of serious mental disorders from being sentenced to death and/or executed. The State of Tennessee should adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life imprisonment without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alterative punishment to the death penalty). Policies and procedures that

allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

(14) The State of Tennessee should adopt a uniform standard for determining a defendant's competency through trial, appellate, and post-conviction proceedings. Whenever a capital defendant's competency is in question at trial, on appeal, or during post-conviction proceedings, the courts should apply the standard that currently is used in determining a defendant's competency to stand trial (i.e., the criminal defendant has "the capacity to understand the nature and object of the proceedings against him[/her], to consult with counsel, and to assist in preparing his[/her] defense").[4] Furthermore, the State of Tennessee should stay post-conviction proceedings if a death-row inmate is found incompetent.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Tennessee, our research establishes that at this point in time, the State of Tennessee 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 Tennessee Death Penalty Assessment Team that the State of Tennessee should impose a temporary moratorium on executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report, and in particular the Executive Summary. Any reforms that are implemented should apply retroactively to all capital defendants and death-row inmates.

II. SUMMARY OF THE REPORT

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

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

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[4] *See* State v. Reid, 197 S.W.3d 694, 699 (Tenn. 2006) (citing State v. Reid, 164 S.W.3d 286, 306 (2005)).

A summary of Tennessee's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.[5]

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

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*[6]	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*[7]	*Not Applicable*
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.			X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.		X			
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.			X		

The State of Tennessee does not require the preservation of biological evidence for as long as a death-row inmate remains incarcerated and, under Tennessee law, any and all biological evidence could be destroyed before any post-conviction proceedings are initiated. In fact, Tennessee law only mandates the preservation of evidence subject to

[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.

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

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

DNA analysis and, even then, only when an inmate's post-conviction petition for DNA testing is not summarily dismissed.

The State allows a defendant to obtain DNA testing of biological evidence during pre-trial discovery or during post-conviction proceedings. Strict pleading requirements, however, have the potential to preclude inmates from successfully obtaining post-conviction DNA testing. For example, the court will summarily dismiss the petition seeking post-conviction DNA testing if the petitioner failed to allege or satisfy a pleading requirement. Most significantly, the court is never required to hold a hearing on the merits of an inmate's petition for DNA testing.

Accordingly, the State should, at a minimum, adopt the Tennessee Death Penalty Team's recommendations previously discussed on page vii of the Executive Summary, that would require that all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentifications 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 of false confessions must be reduced. In this chapter, we reviewed Tennessee's laws, procedures, and practices on law enforcement identifications and interrogations and assessed their level of compliance with the ABA's policies.

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

Law Enforcement Identifications and Interrogations

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their accuracy. Sets 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	

Law Enforcement Identifications and Interrogations (Con't.)					
Compliance / **Recommendation**	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.			X		
Recommendation #5: 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 State of Tennessee has taken certain measures that reduce the risk of inaccurate eyewitness identifications and false confessions. For example, law enforcement officers in Tennessee are required to complete a basic training course that includes instruction on constitutional law and interpersonal communications, which, in turn, encompasses instruction on interviewing witnesses and victims.

In addition to these statewide measures, at least twelve law enforcement agencies regularly record the entirety of custodial interrogations to protect against false or coerced confessions. Unfortunately, the Tennessee Bureau of Investigation, the State's primary criminal investigative agency, implies a preference against the audio or videotaping of interrogations, allowing the practice only "on a limited basis" and only when specially authorized.

The State of Tennessee does not require law enforcement agencies to adopt procedures governing identifications and interrogations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Tennessee should require all law enforcement agencies to adopt procedures on lineups and photospreads that are

consistent with the ABA's recommendations. In addition, the State should mandate that all law enforcement agencies record the entirety of custodial interrogations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

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

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

Crime Laboratories and Medical Examiner Offices

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

The State of Tennessee does not require crime laboratories to be accredited, but the Tennessee Bureau of Investigation (TBI) Forensic Services Division's three labs, which process evidence for every law enforcement agency and medical examiner in the State, are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As a prerequisite for accreditation, laboratories must take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

Despite these measures, however, an incident of evidence mishandling by the Tennessee Bureau of Investigation is partially responsible for the United States Supreme Court concluding that "it is more likely than not that no reasonable juror would have found [the defendant, Paul House,] guilty beyond a reasonable doubt."[8] In *House v. Bell*,[9] the

[8] House v. Bell, 126 S. Ct. 2064, 2086 (2006).

prosecution presented evidence at trial that the defendant's clothing contained blood from the victim. However, subsequent investigation and testimony at the defendant's *habeas corpus* hearing revealed that a vial and a quarter of autopsy blood from the victim was unaccounted for; the blood on the jeans may have come from the autopsy samples; the blood was transported by TBI officers to the FBI together with the pants in conditions that could have caused the vials to spill; some blood did spill at least once during the blood's journey from Tennessee authorities through FBI hands to a defense expert; the pants were stored in a plastic bag bearing a large bloodstain and a label from a TBI agent; and the box containing the blood samples may have been opened before arriving at the FBI lab. The failure to introduce any of this evidence at trial led the United States Supreme Court to find that "[w]hereas the bloodstains seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin."[10]

Furthermore, the forensic services offered by the Tennessee Bureau of Investigation's crime laboratories are somewhat limited. For example, TBI crime laboratories do not perform Mitochondrial or Y-STR testing, which is necessary for old, degraded evidence.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team's recommendation previously discussed on page vii of the Executive Summary, which states that the Tennessee Bureau of Investigation should expand its criminal laboratory services to include Mitochondrial DNA testing of hair without roots or to include Y-STR testing.

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 Tennessee's laws, procedures, and practices relevant to prosecutorial professionalism and assessed their compliance with the relevant ABA policies. A summary of Tennessee's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

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9 *Id.*

10 *Id.* at 2083.

Prosecutorial Professionalism					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Each prosecutor's office should have written polices governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				X	
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.				X	
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.				X	
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	X				

The State of Tennessee does not require the offices of district attorneys general to establish policies on the exercise of prosecutorial discretion in seeking the death penalty or on evaluating capital cases that rely upon eyewitness identifications, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. The State of Tennessee also fails to require that prosecutors handling capital cases receive any specialized training.

We recognize, however, that the State of Tennessee has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, including that:

- The State has entrusted the Board of Professional Responsibility of the Tennessee Supreme Court and the Disciplinary Counsel with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Tennessee Supreme Court has adopted the Tennessee 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 the court all unprivileged mitigating evidence known to the prosecutor;
- Under Tennessee law, prosecutors are responsible for disclosing not only evidence of which they are aware, but also "favorable evidence known to others acting on the government's behalf;" and
- The State of Tennessee has created the Tennessee District Attorneys General Conference to assist in the coordination of the duties of the prosecuting attorneys and their staffs.

Nonetheless, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Team's Recommendation previously discussed on page vii of the Report, which calls for the State to develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision. In standardizing the charging decision, defense attorneys should always be provided the opportunity to meet with the prosecutor to explain why s/he believes that the defendant should not be charged capitally.

Chapter Six: Defense Services

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

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

Defense Services					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*)—The Defense Team and Supporting Services		X			
Recommendation #2: Guideline 5.1 of the *ABA Guidelines*—Qualifications of Defense Counsel		X			
Recommendation #3: Guideline 3.1 of *the ABA Guidelines*—Designation of a Responsible Agency			X		
Recommendation #4: Guideline 9.1 of the *ABA Guidelines*—Funding and Compensation			X		
Recommendation #5: Guideline 8.1 of *the ABA Guidelines*—Training		X			

Tennessee's capital indigent defense system is provided on a statewide basis, with the District Public Defender Offices handling the majority of capital cases at trial and on appeal and the Office of the Post-Conviction Defender handling the majority of cases in state post-conviction proceedings. While the State of Tennessee does not provide counsel automatically in clemency proceedings, the Post-Conviction Defender may choose to represent a death-row inmate during clemency proceedings. Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls far short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) for a number of reasons:

- The State of Tennessee does not statutorily mandate that two attorneys be appointed to death-row inmates in state post-conviction proceedings, and because of overwhelming caseloads, the Office of the Post-Conviction Defender presently lacks the resources to appoint two attorneys in all post-conviction proceedings;
- The State of Tennessee requires only six hours of specialized training in capital defense for attorneys representing a capital defendant at trial and six hours every two years thereafter, and does not mandate capital defense training for counsel on appeal and in state post-conviction proceedings. No training is mandated for other members of the defense team;
- The State of Tennessee has not removed the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the potential appointment or retention of attorneys for reasons other than their qualifications; and
- As the Tennessee Bar Association's Study Committee on the Effective Assistance of Counsel in Capital Cases concluded, the State of Tennessee

> "perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation."[11] Tennessee Supreme Court Rule 13, which sets qualification standards for capital attorneys, "has no mechanism to determine whether counsel will be zealous advocates, no mechanism to determine whether counsel did anything other than attend the training or to evaluate the quality or content of the training, no mechanism to determine counsel's knowledge of the requisite case law, or any means to measure or monitor the quality of the representation being provided."

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Team's recommendations previously discussed on page vii of the Executive Summary, including that:

(1) The State of Tennessee should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial, on appeal, in state post-conviction proceedings, and clemency proceedings so that they are consistent with the *ABA Guidelines*;

(2) The State of Tennessee 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, comprised solely of defense attorneys, also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. In addition, this independent appointing authority should create and oversee a statewide capital case trial unit and a statewide capital case appellate unit, consisting of attorneys and staff with specialized knowledge and experience in handling death penalty cases;

(3) Given the numerous ways the court may summarily dispose of a post-conviction petition without first holding an evidentiary hearing, the State of Tennessee should provide for the appointment of counsel in state post-conviction proceedings for indigent defendants prior to the filing date of a petition for post-conviction relief; and

(4) Tennessee Supreme Court Rule 13 should be amended to allow a defendant to obtain expert and/or investigative services at any time after s/he has been charged with a potentially death-eligible criminal offense, so that the defense has the opportunity to demonstrate to the prosecutor why capital charges may be inappropriate.

<u>Chapter Seven: Direct Appeal Process</u>

[11] TENNESSEE BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE STUDY COMMITTEE ON EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES 47 (Dec. 31, 2004).

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

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

Direct Appeal Process

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.		X			

Section 39-13-206(c)(1)(D) of the Tennessee Code Annotated (T.C.A.) requires both the Tennessee Supreme Court and the Court of Criminal Appeals to determine whether a death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." The Tennessee Supreme Court, however, has limited the scope of its and the Court of Criminal Appeal's duty to ensuring that "no aberrant death sentence is affirmed." Accordingly, a death sentence will be found disproportionate only "if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed."

Interestingly, in conducting its proportionality review, Tennessee courts may consider capital cases in which death was sought, even though a sentence of either life imprisonment or life imprisonment without parole was imposed. However, capital cases in which death was sought, but resulted in a sentence of life imprisonment or life imprisonment without parole do not serve as a basis for invalidating a death sentence

under section 39-13-206(c)(1)(D) of the T.C.A. Tennessee courts also fail to include as part of the proportionality review cases in which the death penalty could have been sought but was not, thereby frustrating the purpose of this review.

Based on this information, the State of Tennessee should at a minimum adopt the Tennessee Death Penalty Assessment Team's recommendations previously discussed on pages vii-viii of the Executive Summary, including that:

(1) The Tennessee Supreme Court and the Court of Criminal Appeals should include in its review and determination of proportionality those cases in which the death penalty could have been sought, but was not, and cases in which the death penalty was sought, but not imposed; and

(2) The State of Tennessee should ensure that trial judges file complete Rule 12 reports for all cases resulting in a first-degree murder conviction, as mandated by Tennessee Supreme Court Rule 12. This data should be compiled and made available to the Tennessee Supreme Court and Tennessee Court of Criminal Appeals for use in ensuring proportionality, in addition to being made available for use by defense attorneys and prosecutors.

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 might 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 Tennessee's laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA's policies on state post-conviction.

A summary of Tennessee's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the following chart.

State Post-Conviction Proceedings

Compliance / **Recommendation**	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay		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*
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.					
Recommendation #2: The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X	
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X	
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	X				
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.			X		
Recommendation #7: The State should establish post-conviction defense organizations, similar in nature to the capital resource 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 *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.* The State should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.		X			
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.		X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.		X			

State Post-Conviction Proceedings (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.		X			
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.			X		

The State of Tennessee has adopted some laws and procedures that facilitate the adequate development and judicial consideration of all post-conviction claims—for example, Tennessee law requires an automatic stay of execution upon the filing of an initial post-conviction petition and may provide counsel after the filing of a post-conviction petition. But some laws and procedures have the opposite effect. The State of Tennessee:

- Does not provide for the appointment of counsel until after the court sets an evidentiary hearing date and provides a limited period of time for appointed post-conviction counsel to investigate, fully develop, and amend all claims in an amended post-conviction petition; and
- Allows the post-conviction judge numerous opportunities to summarily deny the petition without an evidentiary hearing.

The effect of these laws and procedures on the adequate development and judicial consideration of motions and/or claims is even more acute in post-conviction proceedings where the petitioner has no constitutional right to effective counsel, which underscores the importance of establishing qualification standards consistent with the *ABA Guidelines* and of providing for the appointment of counsel in state post-conviction proceedings prior to the filing of a petition for post-conviction relief.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all 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 Tennessee's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Tennessee Board of Probation and Parole's criteria for considering and deciding petitions, and assessed whether they comply with the ABA's policies on clemency.

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

Clemency					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.				X	
Recommendation #3: Clemency decision-makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, 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 *ABA Guidelines.*		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		

Clemency (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.				X	

The State of Tennessee provides the Governor with the sole constitutional and statutory power to grant or deny clemency, including reprieves, commutations, and pardons for all criminal convictions, except impeachment. The Governor, however, may request a non-binding recommendation from the Tennessee Board of Probation and Parole (Board) on whether clemency should be granted or denied. While guidelines governing the Board's decision-making process have been established, the process by which the Governor decides to grant or deny clemency remains problematic. For example:

- The Board of Probation and Parole is required to consider nine specific factors in considering a petition for clemency, but there are additional factors that should be considered as a matter of course;
- Neither the Tennessee Code Annotated nor the Rules of the Tennessee Board of Paroles recommend that the Governor consider the findings of the Board's investigation or any specific facts when assessing a death-sentenced inmate's eligibility for clemency;
- Neither the Governor nor the Board of Probation and Parole is required to hold a public hearing on the death-sentenced inmate's clemency request;
- While the Office of the Post-Conviction Defender may represent death-sentenced inmates petitioning for clemency, the State of Tennessee does not mandate the appointment of counsel in this situation; and
- While all clemency hearings involving death-sentenced inmates are open to the public, the information contained within the Board's records is confidential. Given the apparent conflict of these two rules, it is unclear how they work together.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team's recommendation previously discussed on pages vii and viii of the Executive Summary, including that:

(1) In clemency proceedings, the State of Tennessee should provide each death-row inmate the opportunity for a hearing before the Board of Pardon and Parole and, regardless of whether the inmate requests a hearing, should encourage the Governor to exercise his/her discretion to meet with the inmate prior to the Governor rendering a final decision on clemency; and

(2) The State of Tennessee should create an independent commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate's claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges for review. This sort of commission, which would supplement either the current post-conviction or clemency process, is necessary, in large part because procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full judicial consideration.

Chapter Ten: Capital Jury Instructions

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

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

Capital Jury Instructions

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise them as necessary to ensure jurors understand applicable law, and monitor the extent to which jurors understand revised instructions.		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				X	

Capital Jury Instructions (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
usage and, where appropriate, by directly answering jurors' questions about applicable law.					
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		

Tennessee capital jurors appear to have difficulty understanding their roles and responsibilities, as described by trial judges in their instructions. Specifically, research illustrates a startling amount of misunderstanding among Tennessee jurors in regards to mitigation evidence. In fact, 41.3 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence in their deliberations and 71.7 percent failed to understand that unanimity was not required in finding mitigation established.

Tennessee capital jurors also had difficulty in understanding the applicable burden of proof for mitigating and aggravating circumstances. Over 46 percent of interviewed Tennessee capital jurors erroneously believed that mitigation had to be proven beyond a reasonable doubt, while 20.5 percent erroneously believed that aggravation need not be proven beyond a reasonable doubt. Strikingly, 58.3 percent of capital jurors believed the death penalty was required upon finding that the defendant's conduct was "heinous, vile, or depraved." Another 39.6 percent believed the death penalty was mandated upon their finding that the defendant would pose a future danger to society, despite the fact that future dangerousness is not a statutory aggravating circumstance.

In 1999, the Tennessee Bar Association's Jury Reform Commission highlighted jurors' miscomprehension of jury instructions in its first report and recommended establishing a long-term committee or working group to rewrite the pattern jury instructions. To date, no committee or working group has been appointed to redraft the *Tennessee Pattern Capital Jury Instructions*. Without clear and comprehensible capital sentencing instructions, the State of Tennessee risks jurors misconstruing the law and imposing a sentence that does not accurately reflect the jury's determination of the proper sentence.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team's recommendation previously discussed on page viii of the Executive Summary, which provides that the State should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified.

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 Tennessee's laws, procedures, and practices on the judicial selection and decision-making processes and assessed whether they comply with the ABA's policies on judicial independence.

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

Judicial Independence					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.		X			

Judicial Independence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 the defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Tennessee's partisan judicial election format for trial judges, combined with Tennessee's legislatively mandated judicial evaluation program for appellate judges, call into question the fairness of the judicial selection process in Tennessee:

- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. For example, the Tennessee Conservative Union and the Republican Party of Tennessee funded a campaign against then-Supreme Court Justice Penny White in 1996, assailing her decision to join an opinion setting aside a death sentence on the basis that the defendant had been denied his constitutional right to present mitigation evidence. As a result, voters chose not to retain Justice White. In addition to the example of Justice White, a slew of news editorials attacked Justice Adolpho Birch for his votes in capital cases from 1996 through 1998, and an unsuccessful effort was made to prevent his retention on the Tennessee Supreme Court. One Tennessee newspaper report has even gone so far as to intimate that the Tennessee Supreme

Court delayed deciding capital cases until after the 1988 judicial retention elections for political reasons; and

- Tennessee's judicial evaluation program, which was created to "assist the public in evaluating the performance of incumbent appellate judges," may in some ways conflict with the goal of fostering judicial independence.[12] Although the Judicial Evaluation Commission (JEC) safeguards the process by delineating criteria by which to review judges, some of the performance standards appear not to be strictly defined. For example, criteria such as "knowledge and understanding of the law" may allow the JEC to review actual decisions by a judge and "integrity" purportedly could be enlarged to encompass a judge's personal views on the death penalty.

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

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

Racial and Ethnic Minorities

Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.		X			
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.		X			

[12] TENN. CODE ANN. § 17-4-201(a)(1) (2006); *see also* American Judicature Society, Tennessee: Current Methods of Judicial Selection, *at* http://www.ajs.org/js/TN_methods.htm (last visited Feb. 14, 2007).

Racial and Ethnic Minorities (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.			X		
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X		
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.			X		
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.			X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision-making and that they should report any evidence of racial discrimination in jury deliberations.		X			
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.				X	

Racial and Ethnic Minorities (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

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

In 1994, the Tennessee Supreme Court created the Commission on Racial and Ethnic Fairness (Commission) to "provide a fair and balanced assessment of how race and ethnicity affect Tennessee's system of justice and how the system addresses those issues."[13] In 1997, the Commission concluded in its final report that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] . . . , institutionalized bias is relentlessly at work."[14] Furthermore, the report concluded that when race or ethnicity is given preference in criminal proceedings, favor is given to the "majority" race or ethnicity. In response to its findings, the Commission specified forty-six recommendations to help eliminate bias in the judicial system.

In 1998, the Tennessee Supreme Court created the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission (Committee) to plan, oversee, and monitor the implementation of the Commission's recommendations. In 2000, the Committee released its report to the Tennessee Supreme Court, delineating specific proposals for each of the Commission's findings and general recommendations, including that: (1) the Tennessee Supreme Court and General Assembly should fund an entity to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee; and (2) the State should reduce the number of peremptory challenges permitted in criminal cases as such challenges may be based on racial or ethnic bias.

None of the State's efforts, including those of the 1994 Commission and the 1998 Committee, have studied the administration of the death penalty or recommended any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in

[13] FINAL REPORT OF THE TENNESSEE COMMISSION ON RACIAL AND ETHNIC FAIRNESS TO THE SUPREME COURT OF TENNESSEE 15 (1997) [hereinafter RACIAL AND ETHNIC FAIRNESS REPORT], *available at* http://www.tncourts.gov/geninfo/publications/racethn4.pdf (last visited Feb. 14, 2007).

[14] *Id.* at 5.

death penalty proceedings. Furthermore, *The Tennessean* reported that, in 2001, fifteen of the fifty-two black inmates on death row were sentenced to death by all-white juries, raising concerns about possible racial bias in jury selection and/or jury deliberations.

Former Tennessee Supreme Court Chief Justice Birch also has voiced concerns that racial bias may be permeating the death penalty process in Tennessee. In *State v. Chalmers*, Justice Birch noted that "numerous studies have indicated that racial bias may play a significant role in determining which defendants receive the death penalty."[15] A recent study that reviewed capital sentencing in Tennessee from 1981 to 2000 and was conducted as part of this ABA Tennessee Death Penalty Assessment Report has given credence to Justice Birch's concerns. The study concluded that "those who kill whites are more likely to be sentenced to death than those who kill blacks."[16] In addition to the race of victims and suspects in homicide cases, the study took account of legally relevant factors that are legitimately related to the imposition of the death penalty, namely two prevalent aggravating factors in death penalty sentencing: (1) whether the crime took the life of more than one victim; and (2) whether the homicide involved accompanying felonies, such as rape or robbery. The study found that individuals who killed whites were 4.75 times more likely to receive the death penalty than those who killed blacks in the absence of these aggravating factors. When at least one of these aggravating factors was present, individuals who killed whites were 3.15 times more likely to be sentenced to death than individuals who killed blacks.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team's recommendation previously discussed on page viii of the Executive Summary, which calls for the State to sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, and develop and implement proposals to eliminate any such disparities.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant was mentally retarded at the time of the offense. In this chapter, we reviewed Tennessee's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

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

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[15] State v. Chalmers, 28 S.W.3d 913, 922-23 (Tenn. 2000) (Birch, J. dissenting).

[16] Glenn Pierce, Michael Radelet & Raymond Paternoster, *Race and Death Sentencing in Tennessee, 1981-2000*, *in* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH SENTENCING SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT app. A (2007).

Mental Retardation

Recommendation \ Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the AAIDD (formerly the AAMR). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.			X		
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.			X		
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	
Recommendation #4: For cases commencing after *Atkins v. Virginia* or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	X				
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				

Mental Retardation (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X	
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.	X				

The State of Tennessee statutorily prohibited the execution of mentally retarded offenders in 1990, but the statute applied only to mentally retarded defendants sentenced after the statute's effective date of July 1, 1990. In 2001, the Tennessee Supreme Court extended the application of the statute to death-row inmates who had concluded their post-conviction relief prior to 1990. However, these statutory and judicially-created procedures do not fully comply with the ABA's recommendations on mental retardation, and some are particularly problematic, for example:

- While no state should impose an IQ maximum lower than 75, the State of Tennessee requires that a capital defendant exhibit an IQ of 70 or less in order to be found mentally retarded. The Tennessee Supreme Court has explicitly rejected the claim that the Tennessee Code Annotated should be interpreted to broadly exclude defendants from capital punishment whose IQ score *range* met seventy or below;
- While adaptive behavior limitations are a key part of finding mental retardation and generally are considered to be "expressed in conceptual, social, and practical adaptive skills,"[17] the Tennessee Court of Criminal Appeals has demonstrated a lack of understanding of adaptive deficits and has stated that courts "must not become so entangled with the opinions of experts that [they] lose sight of the nature of the criminal offense itself."[18] In determining whether an individual exhibits deficits in adaptive behavior, courts thus "cannot forget to examine the nature of the criminal conduct and the circumstances involved in that conduct."[19] In fact, the Court of Criminal Appeals has found that "the more complex the crime . . . the less likely that the person is mentally retarded."[20]

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[17] *See* James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on Feb. 14, 2007).

[18] Van Tran v. State, 2006 WL 3327828, *25 (Tenn. Crim. App. Nov. 9, 2006) (unpublished opinion).

[19] *Id.*

[20] *Id.*

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

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

Mental Illness					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
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 mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	

Mental Illness (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but 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 for 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 the conduct, (b) to exercise rational judgment in relation to the conduct, or (c) to conform one's conduct to the requirements of the law.			X		
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to the 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 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		

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

The State of Tennessee has taken steps to protect the rights of individuals with mental disorders or disabilities by educating certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, a number of law enforcement agencies have chosen to provide training on the recognition of mental illness in defendants and incarcerated individuals. Additionally, the State of Tennessee has adopted some mechanisms–including 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 disorder or disability. Despite these steps, the State of Tennessee does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Tennessee does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner's input;
- The State of Tennessee 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;
- The State of Tennessee 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 to the defendant for a mental disorder or disability.

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

and state post-conviction proceedings and stay post-conviction proceedings if a death-row inmate is found incompetent.