May 15, 2014

Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington D.C. 20530-0001

Dear Attorney General Holder:

On behalf of the American Bar Association, I am writing to offer our support and expertise as the Department of Justice undertakes its analysis of the current use of the death penalty and survey of state-level protocols and policies.

At President Obama’s May 2, 2014 press conference, days after the botched lethal injection of Clayton Lockett, the President noted the troubling facts of that case as well as broader problems with the death penalty like racial bias, risk of wrongful convictions, and lack of proportionality in who receives a death sentence. The American Bar Association shares these concerns and has, through our extensive work and resolutions in this area of law, encouraged every jurisdiction that imposes capital punishment to implement policies and procedures that ensure that death penalty cases are administered fairly, impartially, and in accordance with due process.

Because of the importance of these issues, the ABA’s House of Delegates has adopted many policies surrounding the death penalty since the Supreme Court held states’ capital punishment statutes constitutional in Gregg v. Georgia in 1976. To support the implementation of its various guidelines and protocols designed to ensure fairness, due process, and effective legal representation in the administration of the death penalty, the ABA has two Projects specifically devoted this area of law: the Death Penalty Representation Project and the Death Penalty Due Process Review Project.

As the Department begins its analysis on the state of capital punishment in the United States, I am pleased to share with you the American Bar Association’s recent report, The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments 2006-2013. This report summarizes the work of our Death Penalty Due Process Review Project, which was established in 2001 to conduct research and educate the public and decision-makers on the operation of capital jurisdictions’ death penalty laws and processes in order to promote fairness and accuracy in death penalty systems, both in the United States and abroad. We believe
this report, as well as the ABA’s other work in this area, can serve as valuable tools for the Department of Justice as you begin determining what investigations into the death penalty you will undertake.

Over the last decade, the ABA’s Death Penalty Due Process Review has studied and assessed the death penalty systems in twelve different states and has made extensive, fact-based findings regarding whether that jurisdiction’s current death penalty practices comport with the ABA’s Protocols on the Administration of Capital Punishment and Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. These evaluations were completed by state-based Assessment Teams, typically composed of law school professors, current or former defense attorneys, current or former prosecutors, state bar representatives, current or former judges, and state legislators. Team members were recruited without regard to their position on the death penalty or on a moratorium on executions, and were asked only to approach the issue with an open mind.

Each Assessment Team analyzed its state’s current laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty in thirteen different areas, including: the collection and preservation of DNA evidence; law enforcement interrogation procedures; availability of qualified defense counsel and services; appeal and post-conviction standards; treatment of racial and ethnic minorities; and, clemency. Each State Assessment Report made specific recommendations in each topic area, and several Reports concluded that the state should undertake a moratorium on executions until it appropriately addresses the recommendations contained within the Report that would bring the state into compliance with the ABA’s Protocols on the Administration of Capital Punishment. The findings that are common across states are summarized in The State of the Modern Death Penalty in America, but the detailed, individual State Assessment Reports can be found at the Project’s website.

I believe you will find that these reports provide thoughtful and thorough analyses of each state’s successes and inadequacies in the administration of capital punishment. Furthermore, we believe that these Assessments demonstrate why all states that implement the death penalty should undertake their own comprehensive studies of their capital punishment systems. Indeed, these reports are not designed to serve as substitutes for the kind of comprehensive, state-funded study necessary in each of the states, or for the kind of review that the Department of Justice may undertake. However, the ABA’s twelve state assessments – based on objective, balanced standards – may provide starting points for both the Department’s review as well as other state-initiated studies in the twenty additional jurisdictions that currently have the death penalty in the United States.

I understand that the federal government has limited jurisdiction over state capital punishment systems. Nonetheless, I believe the extensive research and knowledge of the experts who work with the ABA’s Death Penalty Due Process Review Project and Death Penalty Representation Project will be helpful to whatever review the Department of Justice undertakes. Please let me
know how the American Bar Association can assist you and your staff in your efforts to study these important issues and help to ensure that our nation’s criminal justice system is as fair, just, and accurate as possible. If your staff working on this project would like additional specific details on the ABA’s work in this area or regarding any of our specific studies, please have them contact Misty Thomas, Director, Death Penalty Due Process Review Project (misty.thomas@americanbar.org, 202-662-1595).

Sincerely,

James R. Silkenat
President