

Linda A. Klein
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

May 12, 2017

The Honorable Del Marsh
President Pro Tempore and Presiding Officer, Alabama Senate
11 South Union Street, Suite 722
Montgomery, Alabama 36130

The Honorable Mac McCutcheon
Speaker, Alabama House of Representatives
11 South Union Street, Suite 519-A
Montgomery, Alabama 36130

Dear Senator Marsh, Representative McCutcheon, and Members of the Alabama Legislature:

On behalf of the American Bar Association, I write to express the ABA's strong opposition to H.B. 260 and S.B. 187, known as the "Fair Justice Act." The Fair Justice Act is unlikely to achieve its stated goal of streamlining justice; rather, this legislation suffers from serious problems that will diminish the ability of counsel to provide effective representation and the capacity of courts to deliberate in order to make fair and responsible determinations, increasing the risk of executing an innocent person.

The American Bar Association takes no position for or against the death penalty itself, but our members – who include prosecutors, defense lawyers, and judges – have long been committed to ensuring that capital punishment is fair, unbiased, and accurate. Our expertise provides us with a unique perspective regarding the likely pitfalls and unintended consequences of this legislation.

For example, the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, first adopted in 1989 and then revised in 2003, outline the minimum tasks that capital defense counsel must perform at every stage of a death penalty case. Under the *Guidelines*, capital post-conviction counsel has an ongoing obligation to investigate both the guilt and penalty phases of trial. *See* Guidelines 10.7 and 10.15.1. Counsel must investigate the facts and decisions of prior defense attorneys at all stages of the case, from pre-trial motions and their investigation (including whether it was incomplete or not done at all) to trial to direct appeal. Counsel must review every witness that was called at trial, might have been called, or should have been called but was not even identified by prior attorneys. Additionally, a capital lawyer's "duty to investigate exists regardless of the expressed desires of the client. Nor may counsel sit idly by, thinking that investigation would be futile." *See* Guideline 10.7, Commentary, at 1021.¹

This legislation, in contrast to the recommendations of the *ABA Guidelines*, mandates that a capital petitioner must assert *all* post-conviction claims in his initial petition filed only 180 days (H.B. 260) or 365 days (S.B. 187) after filing his direct appeal brief. This doubled-up process will

¹ In addition to the *ABA Guidelines*, the ABA conducted an Assessment of the administration of capital punishment in Alabama:

http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html. Key provisions in H.B. 260 and S.B. 187 would take Alabama in the opposite direction of the Assessment's recommendations, or create an obstacle to their implementation.

May 12, 2017

Page 2 of 2

not only make Alabama an outlier on how appeals and post-conviction cases are handled, it will also unduly limit counsel's ability to conduct that critical post-conviction investigation. And, as Alabama cases and others around the country have demonstrated, adequate time and meaningful investigations are essential to ensure justice, as it can take several years to uncover evidence that, for example, the prosecution knowingly withheld information from defense counsel or that prior counsel conducted an incomplete investigation regarding a compelling case of the client's innocence. *E.g., Hinton v. Alabama*, 134 S. Ct. 1091 (2014).

Capital cases are highly complex, and attorneys typically need to review thousands of pages of trial records, witness statements, police and medical documents and other evidence to adequately prepare an appeal. The ABA has found that having enough time to review existing evidence and look for previously undiscovered information is critical to increasing the chances that wrongful convictions or other miscarriages of justice will be discovered. The average exoneree spent 11 years on death row before being proved innocent. The Fair Justice Act would reduce the investigative time of these same cases to just six months or one year. While the ABA respects the importance of finality and judicial efficiency, quicker resolution of cases where a life is at stake should not take priority over ensuring fundamental fairness and accuracy of those convictions.

In addition, the ABA's extensive study of the law applied in both state and federal capital appeals suggests to us that this legislation will, ironically, likely *increase* the overall amount of time that it takes to litigate a capital post-conviction case. The Fair Justice Act prohibits a capital petitioner from amending his petition after the initial deadline has passed and instructs courts to declare later claims "waived." This seriously harms individuals whose first appeals lawyers failed to investigate or otherwise provided inadequate representation. These waived claims will still necessitate subsequent review by state and federal judges who will need to evaluate whether waiver was caused by ineffective counsel and who could send the cases back to lower state courts for additional review. This could have the unintended consequence of adding court proceedings to evaluate whether claims filed after the short initial deadline still deserve review on their merits. Thus, this legislation could result in a *slower* overall process with *more delays* that further burden Alabama's courts. Furthermore, the lack of *detailed, meaningful qualification standards* in the Fair Justice Act only increases the chances of this delay being a regular occurrence in Alabama cases.²

Finally, the ABA understands the frustrations of victims' families, many of whom have suffered through long proceedings and public attention to capital case appeals. But people deserve changes that will address the problems with the administration of the death penalty effectively, not diminish the fairness and accuracy of our justice system. H.B. 260 and S.B. 187 fail in this regard. By mandating stringent deadlines under which the attorneys must operate, the Fair Justice Act increases the chances of miscarriages of justice, including the likelihood that an innocent person will be executed. For this reason, the ABA strongly urges you to oppose this legislation.

Yours truly,



Linda Klein
President

² The ABA encourages all jurisdictions with the death penalty to adopt the qualification standards set forth in our 2003 Guidelines. These well-recognized norms represent the minimal qualifications to ensure effective defense representation in capital cases and have been adopted by numerous courts, state legislatures, and state bar associations. The qualifications in the Fair Justice Act fall well-short of the floor established by the ABA Guidelines [see attached chart].

Comparison of Fair Justice Act and the ABA Guidelines

Guideline No. & Title	Fair Justice Act	Applicability of Guideline to Fair Justice Act
<ul style="list-style-type: none"> • 10.7: Investigation • 10.13: The Duty to Facilitate the Work of Successor Counsel • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(b) & HB 260, Section 2(b):</i> Post-conviction remedies sought pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in death penalty cases shall be pursued concurrently and simultaneously with the direct appeal of a case in which the death penalty was imposed.</p>	<ul style="list-style-type: none"> • Guideline 10.7 requires capital defense counsel at every stage of litigation to conduct a “thorough investigation.” • Guidelines 10.13 and 10.15.1 are performance standards that the ABA encourages the responsible agency (likely the Alabama Supreme Court and the Alabama State Bar Association under the Fair Justice Act) to adopt. Under Guideline 10.13, counsel at one stage of litigation is obligated to “safeguard the interests of the client and [to] cooperate fully with successor counsel.” Guideline 10.15.1 addresses performance standards for counsel representing a capital prisoner during his direct appeal and post-conviction proceedings. Under Guidelines 10.13 & 10.15.1, counsel in direct appeal and post-conviction proceedings “must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by direct appeal.” • The combination of Guidelines 10.7, 10.13, and 10.15.1 compel post-conviction counsel to thoroughly investigate claims regarding ineffective assistance of appellate counsel. Post-conviction counsel will be unable to conduct such an investigation of the efficacy of direct appeal counsel if the direct appeal proceedings have not concluded before post-

		<p>conviction proceedings begin or if the petitioner is deprived of the opportunity to amend his post-conviction petition after the filing deadline has lapsed.</p>
<ul style="list-style-type: none"> • 3.1: Designation of a Responsible Agency • 4.1: The Defense Team and Supporting Services • 5.1: Qualifications of Defense Counsel • 7.1: Monitoring; Removal • 8.1: Training • 9.1: Funding and Compensation • 10.1: Establishment of Performance Standards 	<p><i>SB 187, Section 2(c) & HB 260, Amend 1:</i> The Alabama Supreme Court and the Alabama State Bar Association shall maintain a list of attorneys admitted to practice law in the state who are qualified to serve as post-conviction counsel. In establishing such a list, the supreme court and the bar association shall consider all relevant factors, including, but not limited to, the following:</p> <ol style="list-style-type: none"> (1) The attorney’s background; (2) The attorney’s criminal appellate experience and training; (3) An assessment by the supreme court and the bar association as to whether the attorney is competent to provide quality legal representation. 	<ul style="list-style-type: none"> • Guideline 3.1 describes the role and responsibilities of the agency in charge of maintaining the list of qualified counsel and of promulgating qualifying standards. Guideline 3.1(B) states, “The Responsible Agency should be independent of the judiciary and it, not the judiciary or elected officials, should select lawyers for specific cases.” The way this legislation is currently written, the Alabama Supreme Court is one of two entities charged with creating and maintaining the list of qualifying capital counsel in direct contradiction of Guideline 3.1. • Guideline 4.1 requires the defense team to include at least one member to be qualified by training/experience to screen individuals for the presence of mental or psychological disorders and two attorneys be appointed to the case. While the assessment by the supreme court and the bar association could include the ABA Guidelines, there is no guarantee of that. • ABA Guidelines require much more in-depth skills & training than the qualifications listed in this legislation. Guideline 5.1 requires appointed attorneys to have (a) “substantial knowledge and understanding” of the applicable capital law; (b) skill in conducting “complex negotiations and litigation;” (c) skill in legal research, analysis, and writing; (d) skill in oral advocacy; (e) skill and familiarity with experts and

		<p>forensic science; (f) investigative skills and familiarity regarding psychological impairments, including severe mental illness and intellectual disability; (g) ability to investigate and present mitigating evidence; and (h) skill with trial advocacy regarding jury selection, cross-examination, and opening and closing statements. A general requirement that the supreme court and bar determine “competence” fails to ensure that any of these standards are met.</p> <ul style="list-style-type: none">• Under Guideline 7.1, the agency responsible for determining whether attorneys are qualified must also monitor the attorneys’ performances “to ensure the client is receiving high quality legal representation.” Moreover, the agency “should take appropriate action to protect the interests of the attorney’s current and potential clients,” including removal of the attorney when the lawyer has demonstrated clear incompetence. The current legislation does not provide any guidance for the monitoring or removal of attorneys that fail to meet the state’s qualifications for capital counsel.• Guideline 8.1 (C) states “Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.” The current draft of the Fair Justice Act stipulates that the appointing agencies may consider an attorney’s training, but there is no requirement for ongoing training or description of the type of training that qualified counsel must undergo.
--	--	--

		<p>“[T]he standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case.” Guideline 8.1, commentary, at 981.</p> <ul style="list-style-type: none">• Guideline 9.1 requires a guarantee of “funding for the full cost of high quality legal representation” including attorneys and non-attorney members of the defense team. Neither bill being considered provides for any sort of funding. “For better or worse, a system for the provision of defense services in capital cases will get what it pays for.” Guideline 9.1, commentary, at 988.• The ABA Guidelines instruct the responsible agency to create performance guidelines by which to determine who should remain on a list of qualified counsel. The current legislation does not grant the responsible agencies (Alabama Supreme Court and Alabama State Bar Association) the power to create such performance standards. Rather, the current legislation instructs the responsible agencies to create qualification requirements without reference to performance standards. The Commentary to Guideline 10.1 states, “the specific [performance] standards of Guidelines 10.2-15.2 are intended to describe appropriate professional conduct. Compliance with those standards may therefore be relevant to the judicial evaluation of the performance of defense counsel to determine the validity of a capital conviction or death sentence.” Guideline 10.1, Commentary, at 992.
--	--	---

<ul style="list-style-type: none"> • 10.7: Investigation 	<p><i>SB 187, Section 2(d):</i> A circuit court shall not entertain a petition for post-conviction relief from a case in which the death penalty was imposed on the grounds specified in Rule 32.1(a) of the Alabama Rules of Criminal Procedure unless the petition, including any amendments to the petition, is filed within 365 days of the filing of the appellant defendant’s first brief or direct appeal of a case in which the death penalty was imposed pursuant to the Alabama Rules of Appellate Procedure.</p> <p><i>HB 260, Section 2(c):</i> A circuit court shall not entertain a petition for post-conviction relief from a case in which the death penalty was imposed on the grounds specified in Rule 32.1(a) of the Alabama Rules of Criminal Procedure unless the petition, including any amendments to the petition, is filed within 180 days of the filing of the appellant/defendant’s first brief or direct appeal of a case in which the death penalty was imposed pursuant to the Alabama Rules of Appellate Procedure.</p>	<ul style="list-style-type: none"> • In light of the instruction under Guideline 10.7 that counsel at all stages of capital litigation must conduct a thorough investigation, the time frames for filing a petition for post-conviction relief in this legislation are inappropriate. The commentary to Guideline 10.7 outlines the specific duties of counsel: <p style="padding-left: 40px;">It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others. Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses’ recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children. A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources—a time-consuming task—is important</p>
--	---	---

		<p>wherever possible to ensure the reliability and thus persuasiveness of the evidence.</p> <p>Guideline 10.7, Commentary at 1024-25. Moreover, “The duty to investigate exists regardless of the expressed desires of the client. Nor may counsel sit idly by, thinking that investigation would be futile.” See Guideline 10.7, Commentary, at 1021.</p> <ul style="list-style-type: none"> • Because capital post-conviction counsel have a duty to investigate both the guilt and penalty phases of trial and all stages of previous litigation in a particular case – from pre-trial motions and prior investigation (or decision not to investigate) to trial to direct appeal – the investigation during post-conviction proceedings can take months, or even years, to complete. The current legislation does not grant counsel the appropriate time to conduct the investigation required under Guideline 10.7
<ul style="list-style-type: none"> • 10.7: Investigation • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(e) / HB 260, Section 2(d):</i></p> <p>A circuit court, before the filing date applicable to the defendant under subsection (c), for good cause shown and after notice and opportunity to be heard from the Attorney General, or other attorney representing the State of Alabama, may grant <i>one</i> 90-day extension that begins on the filing date applicable to the defendant under subsection (c).</p>	<ul style="list-style-type: none"> • The granting of 1 extension of 90-days regarding the initial filing deadline is unhelpful in granting post-conviction counsel an appropriate amount of time to meet the minimum performance standards under Guideline 10.15.1 or the requirement that counsel conduct a thorough investigation under Guideline 10.7. The investigative needs of post-conviction counsel must be flexible and permit counsel to amend the post-conviction petition as new evidence is uncovered over the course of many months or years.

<ul style="list-style-type: none"> • 5.1: Qualifications of Defense Counsel • 7.1: Monitoring; Removal • 10.7: Investigation • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(g):</i> If post-conviction counsel files an untimely petition or fails to file a petition before the filing date applicable under this act, the circuit court shall direct post-conviction counsel to show good cause demonstrating extraordinary circumstances as to why the petition was not properly filed. After post-conviction counsel’s response, the circuit court may do any of the following:</p> <ol style="list-style-type: none"> (1) Find that good cause has been shown and permit counsel to continue representing the defendant and set a new filing deadline for the petition, which may not be more than 30 days from the date the court permits counsel to continue representation. (2) Find that good cause has not been shown and dismiss any untimely filed petition. (3) Appoint new and different counsel to represent the defendant and establish a new filing deadline for the petition, which may not be more than 270 days after the date the circuit court appoints new counsel. In the instance that this subdivision is applicable and new counsel is appointed, the circuit court in which the petition is pending shall issue a final order on the petition or appeal within 180 days of the filing of the petition. <p><i>HB 260, Section 2(f):</i> In the event post-conviction counsel files an untimely petition or fails to file a petition before the filing date applicable under this act, the circuit court shall direct post-conviction counsel to show good cause demonstrating extraordinary circumstances as to why the petition was not properly filed. After post-conviction counsel’s response, the circuit may:</p>	<ul style="list-style-type: none"> • The provision regarding the discretion a circuit court may exercise regarding an untimely petition highlights the primary problem with this legislation, namely that it provides insufficient time for post-conviction counsel to conduct a thorough investigation. The provision regarding the appointment of replacement counsel fails to meet Guideline 5.1, as the provision does not indicate that the new counsel must be appointed from the roster maintained by the Alabama Supreme Court and the Alabama State Bar Association. • Because this provision is the sole discussion of removal, it conflicts with the recommendations of Guideline 7.1 regarding the monitoring and removal of post-conviction counsel. Although Guideline 7.1 addresses monitoring and removal processes by the Responsible Agency (Alabama Supreme Court and Alabama State Bar Association), presumably counsel who has been removed by a circuit court has failed to meet some level of qualifications for capital representation. This provision is weak in that it does not provide the courts with a recommended assessment protocol to determine (1) when good cause has been shown or (2) when counsel should be removed from a case. • The time frames in this legislation fail to grant post-conviction counsel – including the newly appointed counsel who have been granted an additional 270 days in which to file – adequate time to conduct a thorough investigation of all potential claims for habeas corpus relief as Guideline 10.7 recommends and will cause
---	---	---

	<p>(1) Find that good cause has been shown and permit counsel to continue representing the defendant and set a new filing deadline for the petition, which may not be more than 30 days from the date the court permits counsel to continue representation; or</p> <p>(2) Find that good cause has not been shown and dismiss any untimely filed petition; or</p> <p>(3) Appoint new and different counsel to represent the defendant and establish a new filing deadline for the petition, which may not be more than 270 days after the date the circuit court appoints new counsel. In the instance that this subdivision is applicable, and new counsel is appointed, the circuit court in which the petition is pending shall issue a final order on the petition or appeal within 180 days of the filing of the petition.</p>	<p>post-conviction counsel’s investigation to fall short of the performance standard outlined in 10.15.1.</p>
<ul style="list-style-type: none"> • 10.7: Investigation • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(h):</i> The time for filing a petition for post-conviction relief under Rule 32.1(f) in a case in which the death penalty was imposed shall be six months from the date the petitioner discovers the dismissal or denial, irrespective of the deadlines specified in this act. This provision shall not extend the deadline of a previously filed petition under Rule 32.1 of the Alabama Rules of Criminal Procedure.</p> <p><i>HB 260, Section 2(g) & Amend 2:</i> The time for filing a petition for post-conviction relief under Rule 32.1(f) to seek an out-of-time appeal from the dismissal or denial of a petition in a case in which the death penalty was imposed previously filed under Rule 32.1 of the Alabama Rules of Criminal Procedure shall be six months from the date the petitioner discovers the dismissal or denial,</p>	<ul style="list-style-type: none"> • The time frames provided fail to permit post-conviction counsel adequate time to conduct a thorough investigation of all potential claims for habeas corpus relief as Guideline 10.7 recommends. Guideline 10.7 states that a capital investigation is “a time-consuming task.” Guideline 10.7, Commentary, at 1024-25. • Because the impediment to a thorough investigation affects the post-conviction stage of litigation, counsel will be unable to satisfy the performance standards for capital post-conviction counsel outlined in Guideline 10.15.1.

	<p>irrespective for the deadlines specified in this act, and provided further that this provision shall not extend any deadline as applied to the previously filed petition.</p>	
<ul style="list-style-type: none"> • 10.7: Investigation • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(i) & HB 260, Section 2(h):</i> Any petition for post-conviction relief filed pursuant to this act after the filing date that is applicable to the defendant under this act is untimely. Rule 32.7(b) of the Alabama Rules of Criminal Procedure shall not apply to any amendments to a petition for post-conviction relief filed pursuant to this act after the filing date that is applicable to the defendant under this act. Any amendments to a petition for post-conviction relief filed pursuant to this act filed after the filing date that is applicable to the defendant under this act shall be treated as a successive petition under Rule 32.2(b) of the Alabama Rules of Criminal Procedure.</p>	<ul style="list-style-type: none"> • The inability to amend the petition for post-conviction relief is particularly problematic in light of the truncated investigation that post-conviction counsel will be obligated to perform under this legislation in its current form. The prohibition on amending a capital prisoner’s petition for post-conviction relief will lead post-conviction counsel to fail to reach the minimum standards for investigation and minimum performance requirements of post-conviction counsel outlined under Guidelines 10.7 and 10.15.1.
<ul style="list-style-type: none"> • 10.7: Investigation • 10.15.1: Duties of Post-Conviction Counsel 	<p><i>SB 187, Section 2(j) & HB 260, Section 2(i):</i> The circuit court shall not entertain a petition in a case in which the death penalty has been imposed based on the grounds specified in Rule 32.1(e) of the Alabama Rules of Criminal Procedure unless the petition for post-conviction relief is filed within the time period specified in subsection (c) or (d), or within six months after the discovery of the newly discovered material facts, whichever is later.</p>	<ul style="list-style-type: none"> • This Section of the Fair Justice Act encapsulates the problems throughout the legislation by explicitly stating that petitions for capital post-conviction relief must be filed within the time frame outlined in Section (c) of the Act or within six months after the discovery of new information. Provisions elsewhere in this legislation (<i>e.g.</i>, the provision that all claims must be raised in the initial petition or be deemed successive) indicate that post-conviction counsel will need to ensure that whatever investigation is necessary regarding the newly discovered information is complete within that six-month window. Such a requirement impedes counsel’s ability to comply with Guidelines 10.7 and 10.15.1, which require counsel to maintain an ongoing investigation and indicate that

		investigations may take many years to uncover the full evidence to support the petitioner's claims for relief.
--	--	--

Comparison of Fair Justice Act and the ABA Assessment Recommendations

Alabama Assessment Relevant Recommendations	What is in SB 187 / HB 260	Analysis
Post-Conviction proceedings		
<p>Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.</p> <ul style="list-style-type: none"> <i>In 2006, the Assessment team could not judge whether Alabama was in compliance with this recommendation (insufficient information).</i> 	<p>SB 187, Section (d):</p> <p>A circuit court shall not entertain a petition for post-conviction relief from a case in which the death penalty was imposed on the grounds specified in Rule 32.1(a) of the Alabama Rules of Criminal Procedure unless the petition, including any amendments to the petition, is filed <u>within 365 days</u> of the filing of the appellant defendant's first brief or direct appeal of a case in which the death penalty was imposed pursuant to the Alabama Rules of Appellate Procedure.</p> <p>HB 260, Section (c):</p> <p>A circuit court shall not entertain a petition for post-conviction relief from a case in which the death penalty was imposed on the grounds specified in Rule 32.1(a) of the Alabama Rules of Criminal Procedure unless the petition, including any amendments to the petition, is filed <u>within 180 days</u> of the filing of the appellant/defendant's first brief or direct appeal</p> <p>SB 187, Section (g)/HB 260, Section (e):</p> <p>If post-conviction counsel files an untimely petition or fails to file a petition before the filing date applicable under this act, the circuit court shall direct post-conviction counsel to show good cause demonstrating extraordinary circumstances as to why the petition was not properly filed. After post-conviction counsel's response, the circuit court may do any of the following:</p>	<ul style="list-style-type: none"> Even though the Assessment Team could not judge whether Alabama was in compliance with this recommendation, it expressed concerns that several of its laws governing PC proceedings “may preclude the adequate development and judicial consideration of PC claims,” including the fact that the Rule 32 petition has to be filed within one year of the direct appeal certificate of judgment. In addition, the Assessment team notes: “[g]iven the multiple ways the court may summarily dispose of a petition without an evidentiary hearing and the lack of a right to counsel for death-sentenced inmates seeking post-conviction relief, it is imperative that post-conviction petitioners be given adequate time to fully develop their claims to avoid such disposal on procedural grounds.” With the new requirement that the Rule 32 petition be filed within one year – or, even more concerning, within 6 months in HB260 – <i>of the filing</i> of the defendant’s first brief or direct appeal, SB 187/ HB 260 would not provide that adequate time to fully develop claims – and instead would be an obstacle to the recommendation – as it would restrict even further the timeline within which the Rule 32 petition must be developed. In addition, with Rule 32 running in parallel to the direct appeal, Rule 32 counsel will have to not only prepare the petition for PC relief, but also actively coordinate with direct appeal counsel, which may be difficult and impractical with different attorneys handling the same case at the same time. This would be made worse for counsel retained under Section (g), (3) of SB 187. It requires that new counsel appointed pursuant to a court’s decision that a defendant’s initial failure

	<p>(1) Find that good cause has been shown and permit counsel to continue representing the defendant and set a new filing deadline for the petition, which may not be more than 30 days from the date the court permits counsel to continue representation.</p> <p>(2) Find that good cause has not been shown and dismiss any untimely filed petition.</p> <p>(3) Appoint new and different counsel to represent the defendant and establish a new filing deadline for the petition, which may not be more than 270 days after the date the circuit court appoints new counsel.</p>	<p>to file Rule 32 petition was for good cause file the petition within only 270 days of appointment. This punishes individuals whose first appointed counsel was ineffective.</p>
<p>Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.</p> <ul style="list-style-type: none"> <i>In 2006, the Assessment team could not judge whether Alabama was in compliance with this recommendation (insufficient information).</i> 	<p><i>SB 187, Section (f)/HB 260 Section (e):</i></p> <p>Within 90 days of the filing of the state's answer to a properly filed petition for post-conviction relief, the circuit court shall issue an order setting forth those claims in the petition that should be summarily dismissed and those claims, if any, that should be set for an evidentiary hearing. If the properly filed petition for post-conviction relief is still pending at the time of the issuance of the certificate of judgment on direct appeal, the court in which the petition is pending shall issue a final order on the petition or appeal within 180 days.</p>	<ul style="list-style-type: none"> The compressed timeline created by SB 187 / HB 260 may not allow trial judges to provide sufficient time to provide for discovery (or may perhaps further disincentive a judge's already discretionary grant of discovery in PC proceedings), because of the artificially determined timelines requiring them to rule on the Rule 32 petition within 180 days of the direct appeal ruling.
<p>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.</p>	<p><i>SB 187, Section (f)/HB 260, Section (e):</i></p> <p>Within 90 days of the filing of the state's answer to a properly filed petition for post-conviction relief, the circuit court shall issue an order setting forth those claims in the petition that should be summarily dismissed and those claims, if any, that should be set for an evidentiary hearing. If the properly filed petition for post-conviction relief is still pending at the time of the issuance of the certificate of judgment on direct</p>	<ul style="list-style-type: none"> The Assessment recommendation requires that judges have the sufficient amount of time to decide post-conviction claims, and that they not be hindered by artificial deadlines. Instead, SB 187/HB 260 require that the post-conviction judge rule within six months of issuance of judgment on direct appeal. This narrow timeline doesn't take into consideration the courts' existing dockets, which are often very busy, making the six month period actually quite short. Additionally, the complexity of the claims raised and the

<ul style="list-style-type: none"> <i>In 2006, Alabama was found partially in compliance with this recommendation.</i> 	<p>appeal, the court in which the petition is pending shall issue a final order on the petition or appeal within 180 days.</p>	<p>robustness of the records and evidence in capital PC cases can vary widely. The bills' tight deadlines for all judicial consideration, regardless of the complexity of the case and issues, may result in courts having insufficient time to fully review and consider – let alone address in a written opinion - the issues of fact and law. This runs directly counter to the Assessment Team's recommendation.</p>
<p>Recommendation #7: The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.</p> <ul style="list-style-type: none"> <i>In 2006, Alabama was found not in compliance with this recommendation.</i> <p>Recommendation #8: For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.</p> <p><i>See also:</i> Assessment Team's Defense Services Recommendations 1, 2, 3</p>	<p><i>SB 187, Section (c) / HB260 (as amended in House Judiciary Committee, Amdmt 1)</i></p> <p>The Alabama Supreme Court and the Alabama State Bar Association shall maintain a list of attorneys admitted to practice law in the state who are qualified to serve as post-conviction counsel. In establishing such a list, the supreme court and the bar association shall consider all relevant factors, including, but not limited to, the following:</p> <p>(1) The attorney's background; (2) The attorney's criminal appellate experience and training; (3) An assessment by the supreme court and the bar association as to whether the attorney is competent to provide quality legal representation.</p>	<ul style="list-style-type: none"> While there has been some progress on general provision of counsel in Alabama since the Assessment, the bills don't require a professional and well-trained post-conviction counsel statewide organization, as recommended, but rather sets forth very minimal and insufficient qualification requirements for post-conviction counsel. SB187 does provide for appointment of counsel, but: <ol style="list-style-type: none"> Doesn't provide funding; The attorney's qualifications required by the bill are not in compliance with ABA guidelines. ABA Guidelines require much more in-depth skills & training. Guideline 5.1 requires appointed attorneys to have (a) "substantial knowledge and understanding" of the applicable capital law; (b) skill in conducting "complex negotiations and litigation;" (c) skill in legal research, analysis, and writing; (d) skill in oral advocacy; (e) skill and familiarity with experts and forensic science; (f) investigative skills and familiarity regarding psychological impairments, including severe mental illness and intellectual disability; (g) ability to investigate and present mitigating evidence; and (h) skill with trial advocacy regarding jury selection, cross-examination, and opening and closing statements. Counsel must also satisfy the significant <i>ongoing</i> training requirements of Guideline 8.1. A general requirement that the supreme court and bar determine "competence" fails to ensure that any of these standards are met.

<p>and 4 (referring to the ABA Guidelines)</p> <p><i>In 2006, Alabama was found not in compliance with this recommendation.</i></p>		<ul style="list-style-type: none">• Guideline 4.1 requires the defense team to include at least one member of the defense should be qualified by training/experience to screen individuals for the presence of mental or psychological disorders and that two attorneys be appointed to the case. While the “assessment by the supreme court and the bar association” could include the ABA Guidelines, there is no guarantee of that.• Guideline 9.1 requires a guarantee of “funding for the full cost of high quality legal representation” including attorneys and non-attorney members of the defense team. Neither bill provides for any sort of funding. “For better or worse, a system for the provision of defense services in capital cases will get what it pays for.” Guideline 9.1, commentary, at 988. <p>In addition, HB 260 (unless Amendment 1 is adopted by the Committee) <i>entirely removes</i> any qualifications requirement for the attorneys, and only requires that they be appointed.</p>
---	--	---

<p>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.</p> <ul style="list-style-type: none"> <i>In 2006, Alabama was found not in compliance with this recommendation.</i> 	<p>SB 187, Section (i)/HB 260, Section (h)</p> <p>Any petition for post-conviction relief filed pursuant to this act after the filing date that is applicable to the defendant under this act is untimely. Rule 32.7(b) of the Alabama Rules of Criminal Procedure shall not apply to any amendments to a petition for post-conviction relief filed pursuant to this act after the filing date that is applicable to the defendant under this act. Any amendments to a petition for post-conviction relief filed pursuant to this act filed after the filing date that is applicable to the defendant under this act shall be treated as a successive petition under Rule 32.2(b) of the Alabama Rules of Criminal Procedure.</p>	<ul style="list-style-type: none"> In 2006, our review of Alabama case law did not show that the recommended exceptions to the bar against successive petitions (as listed in Recommendation 10) were being successfully used to overcome Alabama’s strict bar against successive petitions. In addition, the Assessment team noted in Alabama, ineffective assistance of counsel claims are never allowed in successive Rule 32 petitions. With a shortened timeline for filing the Rule 32 petition, PC counsel’s only “remedy” might be to file successive petitions when there were issues not identifiable (or simply missed) during their rushed preparation to comply with the new filing deadlines. However, current practice in Alabama has showed that filing successive petitions has not been effective or successful to raise new claims, even under a less compressed timeline. Perhaps most importantly, with the direct appeal running concurrently to Rule 32, it’s virtually impossible for Rule 32 counsel to raise IAC claims in the initial PC conviction. The bar on raising it in a successive petition guarantees that many IAC claims (for both trial and direct appeal counsel) cannot be raised at all by PC conviction counsel under this new bill.
---	---	--