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 Florida assessment, the Project has released state assessments of Alabama, Arizona, and Georgia. In the future, it plans to release reports in, at a minimum, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. 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 Florida Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Florida Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Florida death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

II. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Florida's death penalty system, the Florida 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; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.[2] The Florida Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Florida death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Florida complies with the ABA Recommendations.

Members of the Florida Death Penalty Assessment Team have varying perspectives about the death penalty and the necessity for a moratorium in the State of Florida. Thus, the Team does not take a position on these issues. Nor does it take a position on the individual ABA recommendations contained in this report. On the issue of the death penalty, however, Harry Shorstein provides the following comment: "I am a proponent of the Death Penalty. It is my hope that this report will facilitate efforts to effect positive changes in the policies and administration of the Death Penalty."

The Team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in the death penalty system. Therefore, the Team has unanimously agreed to endorse certain key proposals that are meant to address this situation. 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 Florida Death Penalty Assessment Team has identified a number of areas in which Florida'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 Florida's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can

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[1] The membership of the Florida Death Penalty Assessment Team is included *infra* on pp. 3-6 of the Florida 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.

undermine sound procedures in others. With that in mind, the Florida Death Penalty Assessment Team views the following problem areas as most in need of reform:

- ***Florida Leads the Nation in Death-Row Exonerations*** (see Chapter 2)[3] – Since 1973, the State of Florida has exonerated twenty-two death-row inmates, which is more than any other state in the nation.[4] Combined, these death-row exonerees served approximately 150 years in prison before being released.[5] During that same time, Florida executed sixty death-row inmates.[6] Therefore, the proportion exonerated exceeds thirty percent of the number executed.
- ***Inadequate Compensation for Conflict Trial Counsel in Death Penalty Cases*** (see Chapter 6) – The State of Florida has in place a statutory fee cap of $3,500 for conflict trial counsel in death penalty cases. Moreover, conflict trial counsel are usually ineligible for compensation until the final disposition of the case unless they have been providing legal services on the case for more than one year. Florida's Justice Administrative Commission (JAC) has been statutorily mandated to develop a schedule of partial payment of fees for cases that are not resolved in six months,[7] but it does not appear that the JAC has promulgated such schedule. The statutory fee cap, even if it may be exceed in "extraordinary and unusual cases," and the failure to regularly provide for partial payments have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.
- ***Lack of Qualified and Properly Monitored Capital Collateral Registry Counsel***[8] (see Chapters 6 and 8) – Florida's statutory qualification requirements for capital collateral registry attorneys fall short of the requirements of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines)[9] and are insufficient to ensure qualified counsel for every death-sentenced inmate. Registry attorneys, who are being appointed with greater frequency to capital

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[3] The definition of innocence used by the Death Penalty Information Center in placing defendants on the list of exonerated individuals is that they had "been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *See* Death Penalty Information Center, Cases of Innocence 1973 – Present, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited on August 14, 2006).

[4] *Id.*

[5] One inmate, Frank Lee Smith, was exonerated after he died of cancer while on death-row.

[6] Death Penalty Information Center, Execution Database, *at* http://www.deathpenaltyinfo.org/getexecdata.php (last visited Aug. 14, 2006).

[7] FLA. STAT. § 27.5304(10) (2006).

[8] "Capital collateral registry attorneys" are private lawyers who are appointed from the statewide registry to represent death-sentenced inmates during post-conviction proceedings in cases of a conflict of interest or when the defendant was convicted and sentenced to death in the Northern Region of Florida, which no longer has a Capital Collateral Regional Counsel Office.

[9] American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

collateral cases since the closure of the Capital Collateral Regional Counsel Office in the Northern Region of Florida, need only minimal trial and appellate experience to qualify for appointment and are not adequately monitored. As a result, the performance of these attorneys has been criticized on a number of occasions. In his testimony to the Commission on Capital Cases, Justice Raoul Cantero of the Florida Supreme Court stated that the representation provided by registry attorneys is "[s]ome of the worst lawyering" he has ever seen.[10] Specifically, "some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven't raised the right ones."[11] Former Florida Supreme Court Chief Justice Barbara Pariente has echoed Justice Cantero's concerns, stating in a letter to the Commission that "[a]s for [post-conviction] registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence."[12] Testimony to the Commission from a registry attorney also indicates that there is little or no oversight of registry attorneys, so that the State of Florida is "handing out funding with no accountability."[13] The lack of qualified and properly monitored capital collateral registry counsel is particularly troublesome given that death-sentenced inmates do not have a state or federal constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.

- ***Inadequate Compensation for Capital Collateral Registry Attorneys*** (see Chapters 6 and 8) – In at least some instances, registry attorneys handling capital collateral cases are not fully compensated at a rate that is commensurate with the provision of high quality legal representation. The Spangenberg Group[14] estimates that on average 3,300 "attorney hours" are required to take a case from denial of *certiorari* by the United States Supreme Court after direct appeal to the Florida Supreme Court to denial of *certiorari* from state post-conviction proceedings.[15] The compensation of registry attorneys during capital collateral proceedings in Florida, however, is subject to a statutory fee cap of $84,000 (or 840 hours at $100/hour), which must cover fees of lead counsel as well as any attorney designated by lead counsel to assist him/her. While the Florida Supreme Court has held that this statutory cap may be exceeded in "extraordinary or unusual cases,"[16] the Florida

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[10] Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, FLA. B. NEWS, March 1, 2005.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. *See* Spangenberg Group, Introduction, *at* http://www.spangenberggroup.com/ (last visited on August 14, 2006). Members of The Spangenberg Group have achieved recognition as the country's leading experts on the delivery of indigent defense services. *See* Spangenberg Group, Overview, *at* http://www.spangenberggroup.com/over.html (last visited on August 14, 2006).

[15] SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998).

[16] Olive v. Maas, 811 So. 2d 644, 653 (Fla. 1986).

Legislature, in apparent rejection of this position, has: (1) prohibited the use of state funds for payments in excess of the statutory cap; and (2) authorized the imposition of sanctions against any attorney who seeks compensation in excess of the caps.[17] The Circuit Court for the Second Judicial Circuit recently found that in order for such prohibition and sanction to be constitutional, it must be construed to allow the use of state funds to compensate those attorneys in excess of the statutory maximums and to prohibit the imposition of any sanction, but the Circuit Court's order has been appealed, making it unclear, at least temporarily, whether these attorneys will receive compensation in excess of the statutory cap, even in "extraordinary or unusual cases."[18]

- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt.[19] The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved"[20] beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.[21]
- ***Lack of Unanimity in Jury's Sentencing Decision in Capital Cases*** (see Chapter 10) – The Florida Supreme Court recently noted that "Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote."[22] Based on this information, the Florida Supreme Court called upon the Florida Legislature "to revisit Florida's death penalty statute to require some unanimity in the jury's recommendations."[23] Additionally, a recent study found that Florida's practice of permitting capital sentencing

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17 FLA. STAT. § 27.7002(5), (6) (2006).

18 Olive v. Maas, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. Mar. 23, 2006).

19 William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003). The interviews conducted in this study took place after Florida reformed its jury instructions. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1077-1078 (1995). Although many of these interviews took place a year after the relevant trial, most jurors claimed to remember their deliberations "very well" or "fairly well," and studies in other states have consistently replicated these types of results. *Id.* at 1086 tbl. 2.

20 We note that the Bowers and Foglia study uses the term "heinous, vile and depraved" instead of the proper term "heinous, atrocious or cruel," which is an aggravating circumstance in Florida, without accounting for this difference. *See* Bowers & Foglia, *supra* note 19.

21 *Id.* at 72.

22 State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005).

23 *Id.*

recommendations by a majority vote reduces the jury's deliberation time and thus may diminish the thoroughness of the deliberations.[24]

- ***The Practice of Judicial Override*** – (see Chapters 1, 10, 11 and 12) Between 1972 and 1999, 166 of the 857 first-time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment or life imprisonment without the possibility of parole. Although the Team is not aware of any trial judge decision since that time to override a jury's recommendation of life imprisonment without the possibility of parole, Florida law still authorizes the practice. Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission[25]—but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.[26] Additionally, in the wake of the United States Supreme Court's decision in *Ring v. Arizona*,[27] the constitutionality of judicial override remains in doubt.
- ***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 Florida's clemency decision-making process and the fact that clemency has not been granted to a death-sentenced inmate since 1983,[28] it is difficult to conclude that Florida's clemency process is adequate. For example, the factors considered by the Board of Executive Clemency (Board) are largely undefined and the Board is not required to provide its reasons for denying clemency. In fact, the Governor can deny clemency at any time, for any reason, even without holding a public hearing on the death-sentenced inmate's eligibility for clemency.
- ***Racial Disparities in Florida's Capital Sentencing*** (see Chapter 12) – The Florida Supreme Court's Racial and Ethnic Bias Commission found in 1991

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[24] William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. (forthcoming Dec. 2006).

[25] EXECUTIVE SUMMARY: REPORTS & RECOMMENDATION OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 4 (Deborah Hardin Wagner ed. 1991) [hereinafter EXECUTIVE SUMMARY].

[26] Bowers et al., *supra* note 24.

[27] 536 U.S. 584 (2002).

[28] *See* Death Penalty Information Center, Clemency, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited on Aug. 7, 2006).

that the application of the death penalty in Florida "is not colorblind," citing a study that found that a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is white than if the victim is African-American.[29] Similarly, as of December 10, 1999, of the 386 inmates on Florida's death row, "only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics."[30] Additionally, since Florida reinstated the death penalty, there have been no executions of white defendants for killing African-American victims.[31] Thus, it appears that those convicted of killing white victims are far more likely to receive a death sentence and be executed than those convicted of killing non-white victims.

- ***Geographic Disparities in Florida's Capital Sentencing*** (see Chapters 1 and 5). The death sentences of the sixty individuals who have been executed in Florida since 1972 were imposed in thirty of Florida's sixty-seven counties.[32] Similarly, of the fifteen new death sentences in 2001, three (or 20 percent)

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[29] EXECUTIVE SUMMARY, *supra* note 25. Of course, the data reported in this study could be explained by nonracial factors, but it should also be noted that the study used regression analysis to take into account factors such as the number of victims, the number of offenders, the weapon used, and the victim-offender relationship. *See* Michael L. Radelet & Glen L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 Fla. L. Rev. 1 (1991).

[30] Sydney P. Freedberg & William Yardley, *Lethal Injection Approved*, ST. PETERSBURG TIMES, Jan. 7, 2000.

[31] Michael Radelet, *Recent Developments in the Death Penalty in Florida*, at tbl. 3, *available at* http://www.cuadp.org/florida/fldpinfo.html (last visited on Aug. 18, 2006). For data on executions after 2001, see Clark County Prosecuting Attorneys Office, Rigoberto Sanchez-Velasco, *at* http://www.clarkprosecutor.org/html/death/US/sanchez804.htm (last visited on July 24, 2006) (Hispanic man executed for killing a Hispanic victim); Clark County Prosecuting Attorneys Office, Aileen Carol Wuornos, *at* http://www.clarkprosecutor.org/html/death/US/wuornos805.htm (last visited on July 24, 2006) (white woman executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Linroy Bottoson, *at* http://www.clarkprosecutor.org/html/death/US/bottoson813.htm (last visited on July 24, 2006) (African American man executed for killing an African American victim); Clark County Prosecuting Attorneys Office, Newton Carlton Slawson, *at* http://www.clarkprosecutor.org/html/death/US/slawson854.htm (last visited on July 24, 2006) (white man executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Glen James Ocha, *at* http://www.clarkprosecutor.org/html/death/US/ocha957.htm (last visited on July 24, 2006) (white man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Paul Jennings Hill, *at* http://www.clarkprosecutor.org/html/death/US/hill873.htm (last visited on July 24, 2006) (white man executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, John Richard Blackwelder, *at* http://www.clarkprosecutor.org/html/death/US/blackwelder911.htm (last visited on July 24, 2006) (white man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Amos Lee King, *at* http://www.clarkprosecutor.org/html/death/US/king834.htm (last visited on July 24, 2006) (African American man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Johnny L. Robinson, *at* http://www.clarkprosecutor.org/html/death/US/robinson895.htm (last visited on July 24, 2006) (African American man executed for killing a white victim). *But see* Clark County Prosecuting Attorneys Office, Edward Castro, *at* http://www.clarkprosecutor.org/html/death/US/castro681.htm (last visited on July 24, 2006) (listing Edward Castro as Hispanic with a white victim).

[32] Florida Department of Corrections Bureau of Research & Data Analysis, Table 15.1 (2005) (on file with author).

came from the First, Second, and Third Judicial Circuits.[33] The cause of these geographic disparities is unclear, but one possible variable is the charging decision. Research in other states indicate that charging practices vary from prosecutor to prosecutor[34] and few of the prosecutor offices in Florida that we contacted have written polices governing the charging decision. Research also suggests that some capital charging decisions in Florida are influenced by racial factors.[35]

- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.[36]

C. Florida Death Penalty Assessment Team Recommendations

As noted above, each chapter of this report includes several ABA recommendations, which the Florida Death Penalty Assessment Team used as a springboard to analyze Florida's death penalty laws and procedures. While Team members expressed divergent views about the weight to be placed on the various ABA recommendations, the entire Florida Death Penalty Assessment Team endorses several independent, state-specific proposals, which correspond to the observations made in the previous section:

(1) The State of Florida should create two independent commissions to: (a) establish the cause of wrongful convictions in capital cases and recommend changes to prevent future wrongful convictions in these cases;

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[33] Radelet, *supra* note 31, at 4.

[34] *See, e.g.*, *Minimizing Risk: A Blueprint for Death Penalty Reform in Texas*, Texas Defender Service, *available at* http:// www.texasdefender.org/risk/risk.pdf (2006) (listing as a problem in Texas the excessive prosecutorial discretion in charging decisions resulting in racial and geographic disparity); Raymond Paternoster and Robert Brame, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, tbl. 8 (2003), *available at* http:// www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (Final Report) (documenting significant unadjusted geographic disparities in prosecutorial charging decisions in Maryland); OFFICE OF THE ARIZ. ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT 17 (2002) (recommending that all prosecutors involved in trying capital cases adopt written policies for identifying cases in which to seek the death penalty, including policies on "soliciting or accepting defense input before deciding to seek the death penalty"); OFFICE OF THE ARIZ. ATTORNEY GENERAL, CAPITAL CASE COMMISSION INTERIM REPORT, at A-3 (2001).

[35] *See, e.g.*, Bob Levenson & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992, at A1; Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 618-19 (1985) (stating that "[i]t appears that not only are prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined.")

[36] *See, e.g.*, Chris Adams, *Executing the Mentally Retarded Cruel and Unusual?*, CHAMPION, May 2001, at 10 (stating that as of 2001, "of the 3700 inmates currently on death row it is estimated 'between 200-300 inmates are mentally retarded'"); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42 (1986) (estimating that "as many as fifty percent of Florida's death-row inmates become intermittently insane").

and (b) review claims of factual innocence in capital cases that, if sustained, would then by reviewed by a panel of judges. Given the number of exonerations in Florida, the creation of the first type of commission is extremely important—even if it is discovered, as one previous investigation suggested,[37] that many of the exonerated individuals were not clearly factually innocent—because understanding the reasons for the exoneration can help improve the system. The second type of commission, which would supplement the current post-conviction process, was recently established in North Carolina and is being considered in at least twelve other states, in large part because of the perception that procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full consideration.[38]

(2) The State of Florida should take steps to ensure that all conflict trial counsel in death penalty cases are properly compensated. Specifically, the State of Florida should (a) eliminate the statutory fee cap, thus giving judges the discretion to determine on a case-by-case basis the appropriate amount of compensation, and (b) allow greater flexibility for obtaining interim payments for services.

(3) The State of Florida should adopt qualification standards for capital collateral registry attorneys and attorney monitoring procedures that are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). In the alternative, it should reinstitute the Capital Collateral Regional Counsel Office in the Northern Region of Florida, thereby eliminating reliance on registry counsel in non-conflict cases.

(4) The State of Florida should adopt compensation standards for capital collateral registry attorneys that are consistent with the ABA Guidelines.

(5) The State of Florida should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature referenced in the previous section.

(6) The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance.

(7) The State of Florida should give the jury final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.

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[37] *See* FLA. COMM'N ON CAPITAL CASES, CASE HISTORIES: A REVIEW OF 24 INDIVIDUALS RELEASED FROM DEATH ROW 5 (2002), *available at* http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf (last visited on August 14, 2006); *see also* DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), *available at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#rn44 (last visited on August 14, 2006).

[38] Patrick Johnson, *North Carolina Creates a New Route to Exoneration*, CHRISTIAN SCIENCE MONITOR, Aug. 20, 2006.

(8) The State of Florida's Board of Executive Clemency should: (a) adopt a rule that calls for the Board of Executive Clemency (Board) to issue a brief written statement in every instance wherein a death-sentenced inmate is denied clemency, making specific reference to the various factors/claims that the Board may have considered; (b) adopt a rule delineating the factors that the Board should consider, but not be limited to, when reviewing a death-sentenced inmate's grounds for clemency; (c) adopt a rule establishing that a death-sentenced inmate will receive a public hearing before the Board prior to the clemency determination; and (d) adopt a rule that calls for the Governor to, at a minimum, assign a clemency aide to routinely attend, in person or via video-conference, the Parole Commission interviews with the death-sentenced inmate since the Governor is, in effect, the principal clemency decision-maker and could therefore be well-served by an aide's first-hand observations. We also recommend that such a rule should attempt to facilitate participation by the clemency aides of the other members of the Board, at the discretion of their respective principals.

(9) The State of Florida 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, or, at least, implement the recommendations of its 2000 Governor's Task Force on Capital Cases.[39] Among other things, the Task Force recommended that a committee of experts be appointed to undertake a state-funded review of racial disparity in the capital punishment system and the establishment of an information clearinghouse on issues relevant to race and the death penalty.[40]

(10) The State of Florida should develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision.

(11) Although the State of Florida 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, nor does it adequately protect against the accuracy-impairing impact of mental disability during the post-conviction process. Consistent with a resolution recently unanimously passed by the ABA House of Delegates,[41] the State of Florida 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

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[39] Becker, *supra* note 31.

[40] *Id.*

[41] American Bar Association, Recommendation #122A with Report, adopted Aug. 2006, *available at* http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwoa.doc (last visited Aug. 30, 2006).

> 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).

Lastly, the Florida Death Penalty Assessment Team notes that many of the problems discussed throughout this executive summary and in more detail in this report transcend the death penalty system. For instance, although capital cases comprise only 3 percent of all criminal felony filings, they occupy 50 percent of the Florida Supreme Court's docket.[42] Additionally, the cost of a capital case resulting in a death sentence far exceeds the cost of a case resulting in a life sentence.[43] Many members of the Florida Death Penalty Assessment Team are concerned that the expenditure of resources on capital cases affects the system's ability to render justice in non-capital cases.

III. SUMMARY OF THE REPORT

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

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

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

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, we examined Florida's laws, procedures, and practices concerning not only DNA testing, but also the

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[42] Frank Davies, *Death Penalty System Called Highly Flawed: Two-Thirds of U.S. Cases Overturned*, MIAMI HERALD, June 12, 2000, at 1A.

[43] Glenn L. Pierce & Michael Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. J. L. & SOC. CHANGE 711, 719 (1990/91) (noting that in Florida a death sentence case costs approximately $2.5 million more than a life sentence of 40 years); *see also* Amnesty International, Death Penalty Facts: Cost, *at* http://www.amnestyusa.org (last visited on Aug. 18, 2006).

collection and preservation of all forms of biological evidence, and we assessed whether Florida complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Florida'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.[44]

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

Compliance / Recommendation	*In Compliance*	*Partially in Compliance*[45]	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*[46]	*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	

[44] 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.

[45] 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 Florida meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

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

The State of Florida requires governmental entities to preserve all physical evidence from a death penalty case until sixty days after the defendant is executed. It also allows defendants to:

(1) obtain physical evidence for DNA testing during pre-trial discovery,
(2) gain DNA testing before entering a plea of guilty or nolo contendere, and
(3) seek post-conviction DNA testing.

However, certain procedural requirements and restrictions have the potential to preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, judges are not required to hold evidentiary hearings on an inmate's motion requesting DNA testing. Rather, in order to obtain an evidentiary hearing on the merits of a motion, the motion must be sworn and the movant must sufficiently allege all of the six pleading requirements. If the movant fails to meet any of the procedural requirements, it will result in the summary dismissal of his/her motion without an evidentiary hearing. Additionally, even if the motion is legally sufficient, the judge may still deny the motion if its allegations are conclusively refuted by the record on appeal.

Even in cases in which DNA testing is granted, the forensic services offered by Florida Department of Law Enforcement (FDLE) crime laboratories are somewhat limited. For example, FDLE crime laboratories do not perform Mitochondrial or Y-STR testing, which is necessary for old, degraded evidence. Additionally, the reliability and validity of the tests performed by Florida crime laboratories have been called into question. For a discussion on the problems with Florida crime laboratories, see Chapter 4: Crime Laboratories and Medical Examiner Offices.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this chapter, we reviewed Florida's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies on law enforcement identifications and interrogations.

A summary of Florida'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 likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.		X			
Recommendation #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial		X			
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	X				
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.		X			

We commend the State of Florida for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Florida are required to complete a basic training course that includes instruction on avoiding suggestive methods of interviewing witnesses such as leading, specific, or threatening questions; and
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

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

Despite these measures, however, the basic training course does not appear to include any instruction on conducting pre-trial identification procedures. Additionally, the State of Florida does not require law enforcement agencies to adopt procedures governing identifications and interrogations nor does it have a jury instruction that specifically provides the factors to be considered by the jury in gauging lineup accuracy.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Florida 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 Florida and assessed whether Florida's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

A summary of Florida'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	

Florida law does not require crime laboratories to be accredited, but all seven of the crime laboratories of the Florida Department of Law Enforcement (FDLE) and all five of the unaffiliated, local crime laboratories have voluntarily obtained accreditation. As a prerequisite for accreditation, the accreditation programs require laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence. Further, Florida law requires the FDLE to establish policies and procedures that are similar to the requirements of the accreditation programs. For example, the FDLE is required to: (1) establish policies and procedures to be employed by the laboratories; (2) establish standards of education and experience for professional and technical personnel employed by the laboratories; and (3) adopt internal procedures for the review and evaluation of laboratory services. It appears that all five accredited unaffiliated crime laboratories have adopted similar policies and procedures.

Despite these measures, however, the validity and reliability of the tests conducted by at least two of these laboratories have been called into question. For example, in 2003, a DNA analyst at the Broward County Sheriff's Office Crime Laboratory mixed DNA from a murder case with a separate rape case. Similarly, in 2002, a DNA lab worker at the FDLE Orlando Regional Crime Laboratory admitted to falsifying DNA data in a test designed to check the quality of work.

Like crime laboratories, the State of Florida does not require district medical examiner offices to be accredited, but four of the twenty-four medical examiner district offices have voluntarily obtained accreditation. Even though the State of Florida does not require such accreditation, it has established a commission to oversee the practices of all medical examiners and has adopted certain laws and procedures that govern the practices of all medical examiners—even those in the unaccredited districts. Additionally, according to the Florida Association of Medical Examiners, as of 2003, every district medical examiner had office policies that prescribed the duties of associate medical examiners and paraprofessional staff.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion deciding whether or not to seek the death penalty.

In this chapter, we examined Florida's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Florida's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

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 Florida does not require state attorneys' offices to establish policies on the exercise of prosecutorial discretion. Accordingly, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendation previously discussed on page xi of the Executive Summary.

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

- The State of Florida has entrusted The Florida Bar with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Florida Bar has promulgated the Florida Rules of Professional Conduct, which require prosecutors to, among other things, disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor;
- The Florida Supreme Court holds prosecutors responsible for disclosing not only evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf;"
- The Florida Supreme Court has established guidelines for prosecutors, defense attorneys, and trial judges on conducting plea discussions and reaching plea agreements; and
- The State of Florida, through Florida's twenty State Attorneys, has created the Florida Prosecuting Attorneys' Association to serve the needs of prosecutors by offering educational programs and technical support.

Despite these measures, the Florida Supreme Court has on a number of occasions expressed its concern over the prevalence of prosecutorial misconduct. In *Gore v. State*,[47] for example, the Court reiterated an admonishment from an earlier case stating:

> [W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases . . . . It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.[48]

Courts in Florida have not only expressed concern over prosecutorial misconduct, but also with the efficacy of The Florida Bar's disciplinary abilities. In *Johnnides v. Amoco Oil Company*,[49] the Third District Court of Appeals stated:

> [W]e have no illusions that [referring lawyers to The Florida Bar] will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer's conduct in litigation, none has resulted in the public imposition of any discipline—not even a reprimand—whatsoever. In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of

[47] 719 So. 2d 1197, 1202 (Fla. 1998).
[48] *Id.*
[49] 778 So. 2d 443 (2001).

> so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years.[50]

Along these same lines, based on reports from prosecutors offices and The Florida Bar, it appears that prosecutors have rarely been sanctioned for misconduct in capital cases.

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 Florida'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 Florida's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services

Recommendation \ Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Guideline 4.1 of the *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			

Florida's indigent legal representation system is composed of twenty public defenders' offices, two Capital Collateral Regional Counsel Offices, and twenty-one attorney registries. Together, these entities provide at least one attorney as well as investigators and experts for indigent defendants charged with or convicted of a capital offense at every stage of the legal proceedings, except possibly during clemency proceedings. The system nonetheless falls far short of complying with the *ABA Guidelines for the*

[50] *Id.* at 445 n.2.

Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) for a number of reasons:

- Florida law contains only minimal qualification requirements for capital collateral registry attorneys. Specifically, these attorneys are only required to: (1) be members in good standing of The Florida Bar with not less than three years of experience in the practice of criminal law, (2) have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any combination of at least five of such proceedings, and (3) meet the continuing legal education requirements;
- The statutory fee caps for attorneys handling capital cases at trial, on appeal, during capital collateral proceedings, and during clemency proceedings and the failure to provide for interim payments to some of these attorneys have the potential to: (1) dissuade the most experienced and qualified lawyers from taking capital cases, and (2) preclude those attorneys who do take cases from having the funds necessary to present a vigorous defense; and
- The State of Florida has not removed the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the appointment or retention of attorneys for reasons other than their qualifications.

Based on this information, the State of Florida should at a minimum adopt the Florida Death Penalty Team's recommendations previously discussed on page xiii of the Executive Summary.

Chapter Seven: Direct Appeal Process

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

A summary of Florida'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			

The Florida Supreme Court has interpreted the Florida Constitution to impose "an absolute obligation" on the Court to determine whether death is a proportionate penalty. The Court's proportionality review entails (1) performing a qualitative review of the underlying basis for each aggravator and mitigator; and (2) determining whether the crime falls within the category of *both* the "most aggravated" and the "least mitigated murders." This review must consider the totality of the circumstances in the case under review and compare it to cases in which the death penalty was imposed. The Florida Supreme Court only expands its proportionality review to cases where the death penalty was not imposed in cases involving multiple co-defendants or co-participants.

Given that the State of Florida generally limits its proportionality review to cases in which the death penalty was actually imposed, the meaningfulness of the Court's review is questionable. For example, a recent study of 272 death sentences reviewed for proportionality by the Florida Supreme Court between January 1, 1989 and December 31, 2003 raised a number of questions pertaining to the meaningfulness of the Court's review and demonstrated that the Court's proportionality review has been much less successful in identifying disproportional death sentences since 1999.[51] Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent during 1989-1999 to 4 percent during 2000-2003.[52] It also found that the Court has affirmed death sentences in cases with low levels of aggravation and high levels of mitigation—cases with the lowest level of criminal culpability—at a much higher rate in 2000-2003 than it did in 1989-1999.[53] In order to increase the meaningfulness of its proportionality review, the Florida Supreme Court should review

[51] *See* Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L REV. 299, 314 (2004).

[52] *Id.* at 319-320.

[53] *Id.* at 349. The study attributed this drop-off in vacations of death sentences on proportionality grounds to the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court. *Id.*

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.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Florida'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 Florida's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the following chart.

State Post-Conviction Proceedings

Recommendation / Compliance	*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 executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.			X		
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.		X			

State Post-Conviction Proceedings (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.		X			
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	X				
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.				X	
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.		X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the *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 Florida has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—for example, when deciding post-conviction claims on appeal, the Florida Supreme Court issues opinions addressing the issues of fact and law and explaining the basis for the disposition of the asserted claims. But some laws and procedures have the opposite effect:

- The State of Florida allows the post-conviction judge to adopt or copy either party's proposed findings of fact and conclusions of law in the post-conviction court's final order, which undermines the judge's duty to exercise independent judgment in deciding cases;
- The State of Florida provides death-sentenced inmates only one year to file a post-conviction motion after their conviction and sentence become final, but provides inmates seeking post-conviction relief in non-death penalty cases two years from the date their conviction and sentence become final to file a post-conviction motion. The one-year time limitation in capital cases has the potential to inhibit the full development of viable claims;[54] and
- Although the State of Florida permits successive motions in certain instances, it will only allow intervening changes in the law to overcome the general bar against successive motions in limited circumstances and a movant may never claim that his/her earlier post-conviction counsel failed to raise a claim in the earlier post-conviction motion as a means of overcoming the bar against successive motions, because the movant does not have a state or federal

[54] We note that even if the State of Florida changed the filing deadline from one year to two years, the movant would still have to file his/her federal habeas corpus petition with the applicable federal district court within one year from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence. *See* 28 U.S.C. § 2244(d)(1) (2006). This one-year filing deadline may be tolled if the movant is pursuing a properly filed application for state post-conviction relief or other collateral review. *See* 28 U.S.C. § 2244(d)(2) (2006).

constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.

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 movant may not be represented by qualified counsel, which underscores the importance of establishing qualification standards consistent with the ABA Guidelines recommended by the Florida Death Penalty Assessment Team on page x of the Executive Summary.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision-making. In this chapter, we reviewed Florida's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Florida Board of Executive Clemency's criteria for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

A summary of Florida'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	

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

The Florida Constitution authorizes the Governor to grant clemency with the approval of two other members of the Board of Executive Clemency (Board), which is composed of the Governor and the members of the Cabinet. However, the Governor acting alone may deny clemency at any time, for any reason. The process the Governor and the other Board members follow in considering a clemency application is largely undefined; for example:

- The Florida Parole Commission (Commission), which serves as the investigative arm of the Board, is responsible for conducting a "thorough and detailed investigation into all factors relevant to the issue of clemency" and for submitting

a report of its findings to the Board, but the scope of a "thorough and detailed investigation" is not delineated in either the Florida Statutes or the Florida Rules of Executive Clemency (Rules);

- Neither the Florida Statutes nor the Rules recommend that the Board consider the findings of the Commission's investigation or any specific factors when assessing a death-sentenced inmate's eligibility for clemency;
- While the Commission's "thorough and detailed investigation" should include an interview with the inmate, the Commission's findings from the interview need not be considered by the Board nor is the inmate guaranteed a hearing before the Board; and
- Nothing recommends that the Board give reasons for its decisions.

Not only is the clemency process largely undefined, but parts of the clemency decision-making process are confidential. All records and documents generated and gathered in the clemency process are confidential and unavailable for inspection by any person except members of the Board and their staff, and only the Governor has the discretion to allow such documents to be inspected or copied.

In light of the ambiguities and confidentiality surrounding Florida's clemency process, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendations previously discussed on page xi of the Executive Summary to ensure a transparent clemency process.

Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Florida'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 Florida's overall compliance with the ABA's policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions

Recommendation \ Compliance	*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 the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.		X			
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	X				
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.			X		
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.		X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.			X		

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

Florida's standard jury instructions do not define the term "mitigation," but they do help to define the overall concept of mitigation by listing seven possible mitigating circumstances and by requiring the judge to explain to the jury that it may consider any other evidence regarding the defendant's background and character in mitigation. The standard jury instructions also clearly state that unlike aggravating circumstances, mitigating circumstance need not be proven beyond a reasonable doubt, and if the jury is reasonably convinced of the existence of a mitigating circumstance, it may consider it established. Despite this information, a recent study found that:

- Approximately 15 percent of interviewed capital jurors in Florida thought that only a specific list of mitigating circumstances could be considered and 35 percent did not know that any evidence could be considered in mitigation; and
- Approximately 50 percent of interviewed Florida capital jurors believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.

Accordingly, Florida capital jurors are confused not only about the scope of mitigation evidence that they may consider but also about the applicable burden of proof. Further, contrary to the ABA's recommendations, jurors are not told that residual doubt about guilt can be a mitigating factor and are not told that they may recommend a life sentence even if they find no mitigating circumstances exist.

Similarly, capital jurors in Florida have difficulty understanding the requirements associated with finding the existence of certain statutory and non-statutory aggravating circumstances. Specifically, capital jurors fail to understand the effect of finding that the defendant's conduct was "heinous, vile or depraved" or that the defendant would be dangerous in the future. For example, the same study found that:

- Although a sentence of death is not required upon a finding of one or more aggravating circumstances, 36 percent of interviewed Florida capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt; and
- Twenty-five percent of interviewed Florida capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

In an effort to prevent these common juror misconceptions, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendations previously discussed on page x of the Executive Summary.

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 Florida's laws, procedures, and practices on the judicial election/appointment and decision-making processes and assessed whether they comply with the ABA's policies on judicial independence.

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

Judicial Independence

Recommendation / Compliance	*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		
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.				X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.		X			

Judicial Independence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Florida's judicial election format for trial judges, combined with the rising costs and increasing political nature of judicial campaigns, have called into question the fairness of the judicial election process in Florida for two specific reasons:

- The influx of money into Florida judicial elections from parties that may come before the judicial candidate has the potential to undermine the impartiality of the judiciary. Since 2000, "the average amount of money [that] campaigns of circuit judges and circuit judicial candidates have raised has increased more than 10 percent," while the average amount from "sources other than the candidate, such as lawyers and businesses, has increased more than 36 percent;" and
- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. One study identified three Florida judges who may have been less than neutral about the death penalty because of the political pressure of reelection. Data also suggests that concerns about being reelected have influenced trial judges' decisions to override a jury recommendation of life imprisonment for death.

Based on this information, the State of Florida should at a minimum adopt the Florida Death Penalty Assessment Team's recommendation on page x of the Executive Summary to give the jury the final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.

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 Florida'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 Florida'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		
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		

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 #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	
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 Florida—through the Florida Supreme Court and the Governor's Task Force on Capital Cases—has explored at varying levels of degree the impact of race on Florida's criminal justice system. Between 1990 and 1991, the Florida Supreme Court's Racial and Ethnic Bias Study Commission reviewed Florida's criminal justice system and released two reports addressing: (1) the dearth of minorities in Florida's courthouses; (2) the treatment accorded minorities by law enforcement organizations; (3) the processing of delinquency cases of minority juvenile offenders; (4) the disproportionate number of minorities in the criminal justice system; and (5) the lack of minority presence within the legal profession. Not only were minorities found to be significantly underrepresented in the judiciary, but they were found to be treated differently by law enforcement

organizations. Similarly, on the issue of the death penalty, the Commission stated in the following words:

> (1) The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is white than if the victim is an African-American;
> (2) Since 1972, 18 percent of all capital cases have involved a judicial override of a jury recommendation of life imprisonment. The discretionary authority of the judge to override a jury's recommendation of life opens up an additional window of opportunity for bias to enter into the capital sentencing decision. This discretion is too often influenced by public pressure for punishment and retribution; and
> (3) Society must intensify its efforts to address the underlying economic and social issues and conditions which contribute to the tragically high rate of incarceration of minorities on death row.[55]

To address these issues and others like them, the Commission made over eighty recommendations for reform, including the elimination of judicial override. The effect of these recommendations on Florida's criminal justice system was explored in 2000, when then-Chief Justice Charles Wells of the Florida Supreme Court directed an Advisory Committee to review the implementation status of the Commission's recommendations. Although the Advisory Committee found that some of the recommendations had been implemented either in whole or in part, it found that additional progress needed to be made in a number of areas, including, but not limited to, "reducing the disparate impact of sentencing policies and practices on racial and ethnic minorities."

In 2000, the Governor's Task Force on Capital Cases—which was directed to study evidence of discrimination, if any, in the sentencing of defendants in capital cases—largely discounted previous studies concluding that racial bias exists in Florida's death penalty system, but still recommended that further study be conducted on this issue by a committee of experts in death penalty litigation. The Task Force also recommended, among other things, that the Florida Legislature establish an information clearinghouse on race and the death penalty at Florida A&M University.

To date, however, it does not appear that a committee of experts has been appointed, or that the information clearinghouse has been established. Therefore, the State of Florida is neither collecting the data necessary to fully evaluate the impact of race in capital sentencing nor taking steps to develop new strategies to eliminate the role of race in capital sentencing. Based on this information, the State of Florida should, at a minimum, adopt the Florida Death Penalty Assessment Team's recommendation, found on page xi of the Executive Summary, to sponsor a study to determine the existence or non-existence of unacceptable disparities, racial, socio-economic, geographic, or otherwise in

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[55] *See supra* note 25.

its death penalty system, or at the least, implement the recommendations of its 2000 Governor's Task Force on Capital Cases.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. In this chapter, we reviewed Florida'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 Florida's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation

Compliance / Recommendation	*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 American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.		X			

Mental Retardation (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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		
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 Florida statutorily prohibited the execution of the mentally retarded in 2001, but the statute applied only to mentally retarded defendants sentenced after the statute's effective date of June 12, 2001. On October 1, 2004, after the United States Supreme Court's decision in *Atkins v. Virginia*, the Florida Supreme Court promulgated a rule that

(1) prohibits the execution of all mentally retarded defendants; (2) provides for the filing of a motion and a determination of mental retardation as a bar to execution before trial; and (3) grants inmates sentenced to death before June 12, 2001 an opportunity to present a claim of mental retardation as a bar to execution. 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:

- Defendants who fail to raise their claim of mental retardation as a bar to execution within the time periods specified by Florida Rule of Criminal Procedure 3.203 waive the claim. Defendants who were sentenced to death before the promulgation of rule 3.203 on October 1, 2004, were given sixty days from October 1, 2004 to file a motion claiming mental retardation as a bar to execution, and defendants who are sentenced to death after the promulgation of the rule must file such motion no later than ninety days before trial;
- The State of Florida places the burden of proving mental retardation on the defendant, rather than requiring the prosecution to disprove the defendant's substantial showing of mental retardation; and
- The State of Florida requires defendants to prove their mental retardation by clear and convincing evidence, which is a standard of proof greater than preponderance of the evidence.

We also reviewed Florida'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 Florida'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			

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

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

Mental Illness (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 Florida has taken steps to protect the rights of individuals with mental disorders or disabilities by requiring the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, all law enforcement officers receive—as part of their basic training course—twelve hours of training on mental illness, including training on identifying symptoms and behaviors of common mental disorders and methods for responding to individuals with mental disorders. Additionally, the State of Florida has also adopted some mechanisms—including provision for the filing of "next friend" petitions—to protect

individuals with mental disorder or disabilities from waivers that are a product of their mental disorder or disability. Despite these steps, the State of Florida does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- Although the State of Florida has adopted a standard jury instruction on the administration of psychotropic medication, the instruction does not allude to the medication's possibly tranquilizing effects or to the fact that the possible effects of the medication on the defendant's demeanor should not be considered in aggravation;
- The State of Florida 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; and
- The State of Florida prohibits the execution of individuals found to be "insane" to be executed, yet the standard used to assess an individual's insanity is insufficient to protect against the execution of the insane. Specifically, although the State of Florida allows for inquiry into an inmate's rational appreciation of the reason why s/he is to be executed, it does not require that such rational appreciation exist in order for a death-row inmate to be found sane for execution.

Based on this information, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendations previously discussed on pages xi through xii of the Executive Summary.