

Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

ACKNOWLEDGMENTS

The American Bar Association Section of Individual Rights and Responsibilities is pleased to present this publication, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, to help jurisdictions that authorize the death penalty conduct comprehensive reviews of the laws, processes, and procedures relevant to the administration of capital punishment in their jurisdictions. These “protocols” are intended to encourage further consideration and implementation of the principles and ABA policies relating to death penalty administration that are encompassed in the ABA’s February 1997 resolution calling for a nationwide moratorium on carrying out the death penalty until severe and pervasive problems in the system are addressed.

This publication complements earlier Section reports on legal, policy, and legislative developments and related activity around the country that have been inspired by the moratorium resolution. The bibliography in the appendices lists these reports and many other resources that may be helpful to jurisdictions undertaking reviews or considering moratorium initiatives. The ABA’s 1997 resolution, with accompanying report, also is included in the appendices.¹

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¹ For Appendix A, see *infra* p. 537. Appendix B (selected resources) can be found at <http://www.abanet.org/irr/finaljune28.pdf>.

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INTRODUCTION

In February 1997, in the face of pervasive and worsening problems in the administration of the death penalty, the American Bar Association (ABA) House of Delegates passed a resolution calling for a general moratorium on executions until flaws in the system are eliminated. The resolution was supported by a report outlining serious deficiencies in five areas: the competency of State-appointed counsel in capital cases, the independence and thoroughness of post-conviction and habeas corpus review of capital cases, continuing racial discrimination in the exercise of discretion in capital cases, and imposition of the death penalty on the mentally retarded and on individuals who were under the age of eighteen at the time they committed capital offenses.

The ABA's action reflected a belief that this country's capital punishment system is so fundamentally flawed that it not only is tragically and irreparably harming defendants in many cases, but also is undermining public confidence in the fairness of the legal system as a whole. Since 1997, the timeliness of the ABA's call for a moratorium has been demonstrated in dramatic fashion.

Early last year, after the number of innocent people that the State of Illinois had released from its death row had surpassed the number of people that the State had executed, the governor of Illinois imposed a moratorium on executions in that state. But Illinois is not the only state that has experienced miscarriages of justice in the capital punishment system nationwide. Late last year, for example, the Federal Bureau of Investigation produced evidence that exonerated an individual who earlier had died on Florida's death row after languishing there for fourteen years. Nationwide, since 1972, almost 100 individuals originally sentenced to death have been exonerated.

States also have sentenced numerous individuals to death unfairly or improperly. A recent study by scholars at Columbia University School of Law reported that, in reviews of capital cases between 1973 and 1995, courts overturned more than two-thirds of death sentences because of serious state or federal constitutional violations in the processes that led to the capital sentences. In virtually all of these cases, one or more of the systemic flaws that underlie the ABA's call for a moratorium was a factor in the reversal.

As such disturbing facts have become more widely known, a number of states besides Illinois have begun to consider moratoriums or other actions to address problems in death penalty processes. In 1999, prior to the Illinois governor's moratorium declaration, the Nebraska legislature voted to impose a moratorium in that state. Although the governor vetoed the bill, the legislature authorized a comprehensive two-year study of the state's administration of the death penalty. Other states are considering proposed legislation that would impose moratoriums while similar comprehensive studies are conducted or have initiated studies without first imposing moratoriums.

In view of such developments and the growing interest of public officials and

the public generally in examining the fairness of the death penalty, the ABA Section of Individual Rights and Responsibilities has developed these protocols to assist those undertaking reviews of death penalty laws and processes in individual states, as well as those interested in monitoring such reviews.

The protocols are divided into two parts. The first part focuses on an examination of the actors in and stages of the death penalty process and ways in which those actors may contribute to flaws that can lead to arbitrary and unfair imposition of capital punishment and, in some cases, to the wrongful conviction of innocent people. The second part focuses on vulnerable populations—offenders convicted of killing white people, members of racial minorities, juveniles, the mentally retarded, and the mentally ill—and encourages examination of the treatment of these individuals by the capital punishment system.

The protocols address eight specific areas of concern: defense services, procedural restrictions, clemency, jury instruction, judicial independence, racial discrimination, and the sentencing of juveniles and mentally retarded or mentally ill defendants in capital cases. Each protocol contains a brief introductory overview of the issues involved in the subject area, a list of questions to be considered in a comprehensive review, and a list of recommendations for improving administration of the system in the particular area. Both the subjects covered and the guidance offered are based largely upon principles and policies that underlie the ABA moratorium resolution.

These protocols are not intended to be exhaustive. Rather, their purpose is to direct attention to areas that experience has shown contribute to errors in administration of the death penalty. There may be areas not identified in these protocols that may require examination in some jurisdictions; similarly, issues raised in these protocols are not equally problematic in all capital jurisdictions. Each jurisdiction that authorizes the death penalty therefore must tailor a review of its system to take into account issues that may be unique to that jurisdiction. Each capital jurisdiction is urged to use these protocols as a floor, not a ceiling, to develop a review framework that ensures that all relevant factors are taken into full consideration.

In undertaking the review contemplated by these protocols, the question is not whether, as a matter of morality, philosophy, or penologic theory, there should be a death penalty. In fact, the ABA itself has taken no position on that issue, beyond opposing imposition of the death penalty in cases involving mentally retarded individuals or individuals who were under age eighteen at the time they committed capital offenses. But each jurisdiction that imposes the death penalty has a duty to determine whether the system under which the penalty is imposed and carried out is flawed and, if so, to eliminate the flaws. These protocols are intended to help capital jurisdictions meet this fundamental obligation systematically and comprehensively.

PART ONE: THE DEATH PENALTY ADMINISTRATION PROCESS

I. DEFENSE SERVICES

A. Overview

A primary reason for the American Bar Association's 1997 call for a moratorium on executions was the urgent concern that many individuals charged with capital offenses are not provided with adequate counsel at one or more levels of the capital punishment process. By 1997, it had become apparent that the quality of counsel, more than the circumstances of the offense and the record and history of the offender, frequently determines who receives a death sentence. The failure to appoint lawyers competent to represent capital defendants and death row inmates is one of the major causes of serious errors in capital cases, as well as a major factor in the wrongful conviction and sentencing to death of innocent people.

Last year, a team of researchers from Columbia University released results of a study that underscores the ABA's concern about the role of inadequate counsel in contributing to serious flaws in administration of the death penalty.² This study found that, between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or resentencing in 68% of the cases reviewed. Prominent among the causes of such errors was incompetent defense counsel. (The actual extent of this problem is likely even greater than the Columbia University study reveals; in numerous cases, counsel had been appointed whose performance, although clearly inadequate, was not sufficiently egregious to warrant relief under the very high legal standard for establishing "ineffective assistance of counsel" violative of constitutional rights. Moreover, incompetent counsel in post-conviction proceedings is not a basis for relief.)

Other recent reports also have identified inadequate counsel as a factor in a startlingly large number of cases in which individuals convicted and sentenced to death subsequently have been found to be innocent.

It is clear that capital jurisdictions likely would reduce some of the serious errors that occur in capital cases by providing competent counsel to represent individuals facing the death penalty and by providing such counsel with sufficient compensation and resources for investigative services and experts, as well as sufficient time to prepare cases effectively. Although lawyers and the organized bar can provide valuable assistance through pro bono services, state governments have primary responsibility—indeed, a constitutional duty—to ensure adequate representation at every level in capital cases through appropriate appointment and

² JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000).

compensation measures. Determining how best to discharge that obligation requires an objective and comprehensive assessment of the current system and identification of specific inadequacies and the means to eliminate them.

B. *Guidelines for Review of Defense Services*

1. How adequate are the defense services available *pretrial and at trial* in capital cases?
 - a. Who appoints counsel?
 - b. What are the standards for appointment?
 - i. What are the minimum qualifications for appointment as lead counsel and as secondary counsel?
 - ii. Do these standards take into account the unique complexity of capital cases, which involve two related, but quite independent, phases; special jury selection methods; and knowledge of special constitutional doctrines?
 - iii. Do sufficient numbers of lawyers in the appointing jurisdiction meet the standards for appointment?
 - iv. Do the standards require consideration of the overall workload and state of health of appointed counsel to avoid appointment of lawyers who otherwise might be competent to serve, but who cannot provide effective assistance in the case at hand because of workloads or health?
 - v. Is compliance with the standards monitored and enforced? If so, how?
 - c. How adequate is the compensation for appointed lawyers in capital cases?
 - i. How is the rate established and by whom?
 - ii. How is the rate adjusted, how often, according to what criteria, and by whom?
 - iii. When in the process are counsel compensated?

- iv. Is the actual practice of compensating counsel consistent with the jurisdiction's stated policy on compensation?
 - d. What other defense services are provided for capital defendants?
 - i. Are investigators, experts, and other defense services, including those noted below, provided for by statute, rule, or practice?
 - (a) Investigators, including mitigation specialists
 - (b) Trial and consulting experts
 - (c) Mental health evaluations
 - (d) Scientific testing
 - ii. What are the procedures for obtaining such services in:
 - (a) Adversarial proceedings?
 - (b) Ex parte proceedings?
 - iii. Are limits placed on the availability of such services?
 - (a) Are some services generally not available?
 - (b) Do statutes, rules, or practices limit the amount that the jurisdiction will pay for certain services?
 - e. Are defense counsel given adequate pretrial discovery of material available to prosecutors and law enforcement officials that may bear on guilt, innocence, and punishment of the defendant?
 - f. Are proceedings in capital cases scheduled at a pace that permits adequate investigation, fact development, and decision making by defense counsel?
 - g. Where the costs of capital cases are borne by local or county governments, do state resources supplement local resources, as necessary, to ensure quality defense services in localities that lack or fail to provide the necessary funding?
2. How adequate are the defense services available on *direct appeal* of

capital cases, including review in the U.S. Supreme Court?

- a. Who appoints appellate counsel?
- b. What are the standards for appointment of appellate counsel?
 - i. What are the minimum qualifications for appointment?
 - ii. Do these standards take into account the unique complexity of appeals in capital cases?
 - iii. Do sufficient numbers of lawyers in the appointing jurisdiction meet the standards for appointment?
 - iv. Do the standards require consideration of the overall workload and state of health of counsel to avoid appointment of lawyers who otherwise might be competent to serve, but who cannot provide effective assistance in the case at hand because of workloads or health?
 - v. Is compliance with the standards monitored and enforced? If so, how?
- c. Does the jurisdiction appoint appellate counsel who are authorized to seek certiorari for a death row inmate? If not, is there some other mechanism whereby such counsel are provided?
- d. Is there an automatic stay of execution during the time permitted for seeking certiorari and during the pendency of a petition for certiorari?
- e. How adequate is the compensation for appointed attorneys handling direct appeals and/or certiorari petitions?
 - i. How is the rate established and by whom?
 - ii. How is the rate adjusted, how often, according to what criteria, and by whom?
 - iii. When in the process are counsel compensated?
 - iv. Is the actual practice of compensating counsel consistent with the jurisdiction's stated policy on compensation?

- f. What other defense services are provided for capital defendants on direct appeal?
 - i. In cases where such services could be useful, are other defense services, including those noted below, provided for by statute, rule, or practice?
 - (a) Investigators, including mitigation specialists
 - (b) Consulting experts
 - (c) Mental health evaluations
 - (d) Scientific testing
 - ii. What are the procedures for obtaining such services in:
 - (a) Adversarial proceedings?
 - (b) Ex parte proceedings?
 - iii. Are limits placed on the availability of such services?
 - (a) Are some services generally not available?
 - (b) Do statutes, rules, or practices limit the amount that the jurisdiction will pay for certain services?
 - g. Are proceedings scheduled at a pace that permits adequate investigation, fact development, and decision making by counsel?
3. How adequate are the defense services available to death row inmates in state post-conviction and federal habeas corpus proceedings in capital cases?
- a. Is counsel provided? If so, who appoints counsel or how else is counsel secured?
 - b. What are the standards for appointment or other selection of counsel for post-conviction or habeas corpus proceedings?
 - i. What are the minimum qualifications for appointment or

- selection as counsel?
- ii. Do the standards take into account the unique complexity of collateral proceedings in capital cases?
 - iii. Do sufficient numbers of lawyers in the jurisdiction meet the standard for appointment or selection?
 - iv. Do the standards require consideration of the overall workload and state of health of counsel to avoid appointment or selection of lawyers who otherwise might be competent to serve, but who cannot provide effective assistance in the case at hand because of workload or health?
 - v. Is compliance with the standards monitored and enforced? If so, how?
- c. How adequate is the compensation for appointed lawyers in collateral proceedings?
- i. How is the rate established and by whom?
 - ii. How is the rate adjusted, how often, according to what criteria, and by whom?
 - iii. When in the process are counsel compensated?
 - iv. Is the actual practice of compensating counsel consistent with the jurisdiction's stated policy on compensation?
- d. What other services are provided to death row inmates in connection with state post-conviction and federal habeas corpus proceedings?
- i. Are investigators, experts, and other services, included those listed below, available by statute, rule, or practice?
 - (a) Investigators, including mitigation specialists
 - (b) Experts
 - (c) Mental health evaluations
 - (d) Scientific testing

- ii. What are the procedures for obtaining such services in:
 - (a) Adversarial proceedings?
 - (b) Ex parte proceedings?
 - iii. Are limits placed on the availability of such services?
 - (a) Are some services generally not available?
 - (b) Do statutes, rules, or practices limit the amount that the jurisdiction will pay for certain services?
 - e. Are post-conviction and habeas corpus proceedings in capital cases scheduled at a pace that permits adequate investigation, fact development, and decision-making by counsel for death row inmates?
 - i. If there is a time limit for the preparation of a post-conviction petition, is that time limit tolled during the time it takes to find appropriate counsel?
 - ii. How long does it take to find appropriate counsel?
 - f. Is there an automatic stay of execution during the pendency of post-conviction and habeas corpus proceedings?
4. How adequate are the services available to death row inmates in clemency proceedings?
- a. Is counsel provided? If so, who appoints counsel or how else is counsel secured?
 - b. What are the standards for appointment or other selection of counsel for clemency proceedings?
 - i. What are the minimum qualifications for selection as counsel?
 - ii. Is compliance with the standards monitored and enforced? If so, how?
 - c. How adequate is the compensation for lawyers appointed in clemency proceedings?

- i. How is the rate established and by whom?
 - ii. How is the rate adjusted, how often, according to what criteria, and by whom?
 - iii. When in the process are counsel compensated?
 - iv. Is the actual practice of compensating counsel consistent with the jurisdiction's stated policy on compensation?
 - d. What other services are provided to death row inmates in connection with clemency proceedings?
 - i. What are the procedures for obtaining such services?
 - ii. Are limits placed on the availability of such services?
 - (a) Are some services generally not available?
 - (b) Do statutes, rules, or practices place limits on the amount that the jurisdiction will pay for certain services?
 - e. Are clemency proceedings in capital cases scheduled at a pace that permits adequate investigation, fact development, and decision-making by counsel for death row inmates?
5. How does the level and quality of services provided for individuals facing the death penalty compare to the services available to the prosecutors in capital cases?
 - a. What are the minimum standards for prosecutors assigned to capital cases?
 - b. What resources are actually available to prosecutors in capital cases?
6. What has been the actual quality of counsel in pretrial (including plea-bargaining), trial, direct appeal, certiorari, state post-conviction, federal habeas corpus, and clemency proceedings in cases in which the death penalty has been imposed in the jurisdiction?
7. Is there a specifically funded, independent, statewide system for providing adequate legal services to individuals facing capital

punishment in the jurisdiction?

- a. If not, what level of resources is required to establish such a system?
- b. What are the near- or long-term prospects for establishing such a system?

C. Recommendations for Establishing Adequate Defense Services

1. An individual facing the death penalty in any capital jurisdiction should have qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including plea-bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus proceedings, and clemency—who are appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following:
 - a. At least two lawyers at every stage of proceedings;
 - b. Lawyers who are trained properly in death penalty law and procedure, as well as in general criminal law and procedure; at least one of these lawyers should have a minimum number of years of practice in felony trial work (this minimum requirement is not intended to preclude the participation of others on the counsel team who do not have this level of expertise in capital representation, but who can provide other types of expertise for the defense team); and
 - c. Lawyers with expertise in jury selection, plea bargaining, and investigation and preparation for guilt/innocence and penalty phases of capital trials.
2. The selection and evaluation process should include:
 - a. A statewide appointing authority, not comprised of judges, consistent with the types of statewide appointing authority proposed by the ABA³ such as:
 - i. A statewide defender organization;
 - ii. A capital litigation resource center; or

³ See AMERICAN BAR ASSOCIATION POLICY RECOMMENDATIONS ON DEATH PENALTY HABEAS CORPUS, ¶ 2–3, app. B thereto, proposed § 2254(h)(1), (2)(I), *reprinted in* 40 AM. U. L. REV. 1, 9, 12, 254 (1990).

- iii. A special committee selected by the state court of last resort, in consultation with staff lawyers of a defender organization, members of the private bar, or both; committee members should, *inter alia*, have practiced criminal defense for at least five years, have demonstrated knowledge of capital case practice, and be familiar with the state's criminal practitioners;
 - b. Development and maintenance, by the statewide appointing authority, of a roster of eligible lawyers for each phase of representation;
 - c. A process that ensures that lawyers are eligible, qualified, and trained to represent death penalty clients in each phase of representation; and
 - d. Monitoring of capital counsel performance and workload to ensure quality representation in accordance with performance and workload standards, with the recognition that proper compensation alone does not guarantee effective performance.
3. Compensation for lawyers appointed in capital cases should be paid from a state or local fund according to a reasonable rate of hourly compensation commensurate with the provision of effective assistance in complex cases.
 - a. Compensation must include full reimbursement for reasonable incidental expenses.
 - b. The system must allow for periodic billing and payment during the course of representation.
 - c. Compensation should be evaluated according to the following criteria:
 - i. A recognized group that has assessed defense services funding in numerous states should be retained to evaluate the funding of counsel and support for counsel at all stages of proceedings; and
 - ii. Any evaluation should include a survey of lawyers who actually have handled capital cases—including public defenders, appointed counsel, pro bono lawyers, and retained counsel—to determine how many hours, and what resources, have been

required to handle these cases properly at each phase of the proceedings.

4. At all phases of death penalty proceedings, qualified, properly compensated support, including investigators, experts, mitigation specialists, and other specialists as needed, must be provided, through ex parte proceedings, to counsel appointed to represent the individual facing the death penalty.
 - a. Courts should appoint mental health and other experts who report confidentially to counsel for the individual facing the death penalty. Such experts should be selected on the basis of their independence, qualifications, professionalism, and suitability for the services requested, not on the basis of cost of services, prior work for the prosecution, or professional status with the state.
 - b. Courts should eliminate procedural requirements for obtaining these services that have the effect of discouraging counsel for the individual facing the death penalty from seeking services that are theoretically available, including, e.g., requirements for defense counsel's advance payments for experts without knowing whether or how much of the money will be reimbursed; onerous or impractical documentation of facts to support requests for funds; and lack of a genuine ex parte procedure for requesting defense funds.
5. For post-conviction proceedings, federal habeas corpus, and clemency proceedings in capital cases, all of which involve specialized expertise that ordinarily is not available in small communities or is available unevenly throughout a state, the state should:
 - a. Appoint counsel to handle these proceedings expeditiously, particularly ensuring that post-conviction counsel are appointed during the time that certiorari from direct appeal may be sought and that any state statutes of limitations are tolled during the time it takes to secure such qualified counsel;
 - b. In the absence of federal funding, provide and fund a state center to provide lawyers to handle such proceedings and to locate, train, and mentor lawyers to handle proceedings that the state center cannot itself handle; and
 - c. Urge the U.S. Congress to reinstate federal funding for post-conviction defender organizations.

6. Proceedings in each phase of capital cases should be scheduled at a pace that permits counsel for the individual facing the death penalty adequate time for investigation, fact development, and decision making.
7. States should provide for an automatic stay of execution during the completion of one complete round of litigation, including direct appeal, certiorari, state post-conviction and appeal and certiorari there from, federal habeas corpus and appeal and certiorari there from, and clemency.

II. PROCEDURAL RESTRICTIONS AND LIMITS ON HABEAS CORPUS

A. Overview

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Numerous capital convictions and death sentences have been set aside in such proceedings as a result of, among others, successful claims of ineffective assistance of counsel, claims made possible by the discovery of crucial new evidence, claims based upon prosecutorial misconduct, and new constitutional holdings of the federal courts.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because so many capital defendants receive inadequate counsel at trial and on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish claims of innocence, pursue claims based upon newly developed facts, or prove constitutional errors that infected the earlier proceedings.

But if counsel for death row inmates (whether appointed, retained, or pro bono) fail to develop and present meritorious claims in post-conviction proceedings, those claims generally are forfeited forever because no federal remedy exists for ineffective or even grossly incompetent post-conviction counsel. For example, in a situation involving two co-defendants, one of whom obtains relief in federal court as a result of claims properly raised in accordance with state post-conviction procedural rules, the other can be barred from raising the identical claim in the same federal court because of his counsel's failure to raise the claim properly in state court.

Despite the critical importance of competent, experienced, and properly compensated counsel in state post-conviction proceedings, however, the availability and appointment of such counsel for capital representation is the exception, not the rule.

Compounding the problem of inadequate counsel is the fact that securing relief on meritorious federal constitutional claims in state post-conviction

proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Under changes in state laws, for example, a death row inmate whose trial, appellate, or state post-conviction counsel mistakenly fails to raise claims in accordance with state procedures now can be precluded from raising fundamental issues that, if heard, would have entitled him to substantial relief, including release from custody, a new trial, or a new sentencing hearing, in either state or federal court.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (the AEDPA) have greatly limited the ability of a death row inmate to return to federal court a second time. For example, under AEDPA a death row inmate generally cannot raise a claim in a second habeas corpus proceeding, regardless of whether the claim is meritorious and the petitioner could not have presented it earlier, unless there is extremely strong proof of the inmate's factual innocence, even if the meritorious claim relates only to the death sentence and not the underlying conviction.

Supreme Court decisions also have made it impossible in most circumstances for death row inmates who consistently have raised meritorious constitutional claims at every opportunity to obtain relief if the Court itself has not resolved the issue before the inmate's direct appeal ends.

Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Other developments that contribute to unfair results include a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts believe that the rulings are erroneous.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death row inmates from having valid claims heard or reviewed at all.

State courts and legislators could alleviate some of the unfairness these developments have created if there were greater awareness of the changes and their unfair consequences. It generally is assumed that judicial review is an important means of ensuring the fairness of the death penalty, but that assumption increasingly is wrong. Numerous rounds of judicial review may not result in

consideration of the merits of the inmate's claim or even consideration of compelling new evidence that comes to light shortly before an execution. Under current procedures, a "full and fair judicial review" often does not include reviewing the merits of the inmate's claims.

B. *Guidelines for Review of Procedural Restrictions and Limits on Habeas Corpus*

1. Does the jurisdiction conduct post-conviction proceedings in a manner that permits adequate development and judicial consideration of the petitioner's claims?
 - a. In the face of execution dates, do courts stay executions to permit full development and consideration of the claims?
 - b. When stays are granted, do courts press to complete the proceedings in order to limit the duration of the stay?
 - c. When no execution date has been set, are proceedings conducted in a deliberate fashion or are they affected by concerns about delays?
 - d. Do courts exercise independent judgment in deciding claims rather than relying on findings and conclusion prepared by the State?
2. Does the State provide meaningful discovery in post-conviction proceedings?
3. When deciding post-conviction claims on appeal, do appellate courts explicitly address the issues of law and fact?
4. What standard do state appellate courts use in deciding whether to consider claims of constitutional error that were not raised properly at trial or on appeal?
5. What standard do state appellate courts use in deciding whether to review errors of state law that were not raised properly at trial or on appeal?
6. On the initial state post-conviction application, what standard do state post-conviction courts use in reviewing the merits of claims of constitutional error not preserved properly at trial or on appeal?
7. Has the state established and sufficiently funded a post-conviction defense organization similar in nature to the capital resources centers de-

funded by Congress in 1996? If so, does this organization deal with state post-conviction, federal habeas corpus, and clemency proceedings in capital cases?

8. What standards exist for counsel appointed for state post-conviction proceedings in capital cases? If so, are these standards consistent with the recommendations above in Part I(C)?
9. Do counsel handling state post-conviction proceedings in capital cases receive adequate compensation and sufficient funding for support services, including investigators and experts?
10. What retroactivity rules are applicable in state capital proceedings, including second and successive post-conviction proceedings?
11. To what extent do state courts, in adjudicating capital cases, consider holdings of federal appeals and district courts, as well as U.S. Supreme Court decisions?
12. Do the jurisdiction's procedures in capital cases provide a mechanism in successive post-conviction proceedings to consider meritorious claims not properly raised previously, because of either counsel incompetence or prosecutorial misconduct or because of claims that have become newly available because of intervening court decisions?
13. What harmless error rule do state courts use in post-conviction proceedings?

C. Recommendations for Addressing Procedural Restrictions and Limits on Habeas Corpus

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.
 - a. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims.
 - b. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions only after fully and carefully considering the evidence and the applicable law.

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.
3. Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.
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 orders that fully explain the bases for dispositions of claims.
5. 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 apply a plain error rule applied liberally with respect to errors of state law in capital cases.
6. 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.
7. The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.
8. For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in Part I(C), above. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.
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.
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.
11. In post-conviction proceedings, state courts should apply the harmless

error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

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.

III. CLEMENCY PROCEEDINGS

A. Overview

Clemency is the act of a governor or state executive body either to commute a death sentence to life imprisonment or to grant a pardon for a criminal offense. The clemency process traditionally was intended to function as a final safeguard to evaluate thoroughly and fairly whether a person should be put to death. The process cannot fulfill that critical function, however, when exercise of the clemency power is influenced more by political considerations than by the fundamental principles of justice, fairness, and mercy that underlie the power.

It is essential that governors and clemency boards recognize that the clemency power requires an inquiry into the fairness of carrying out an execution in each case in which clemency is sought. In recent years, however, clemency has been granted in substantially fewer cases than it was prior to the U. S. Supreme Court's 1972 decision declaring the death penalty unconstitutional.⁴ Among the factors accounting for this decline may be a changing political climate that encourages "tougher" criminal penalties and the erroneous belief that clemency is unnecessary today because death row inmates receive "super due process" in the courts.

In fact, the need for a meaningful clemency power is more important than ever. Because of restrictions on judicial review of meritorious claims, including those involving actual innocence,⁵ clemency often is the State's last and only opportunity to prevent miscarriages of justice. A clemency decision maker may be the only person or body that has the opportunity to 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. Yet, as the capital punishment process currently functions, meaningful review frequently is not obtained, although procedural rules are served.

The State's clemency authority exists precisely to ensure that justice is done when all else fails. Full and proper use of the clemency process is essential to guaranteeing fairness in death penalty administration.

⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵ See *supra* Part II(A).

B. Guidelines for Review of Clemency Proceedings

1. What limitations exist concerning the scope, operation, or application of clemency decisions? What is the articulated justification for such limitations?
2. Is consideration given, during the clemency process, to:
 - a. Constitutional claims (a) that were held barred in court proceedings due to procedural default, non-retroactivity, abuse of the writ, statutes of limitations, or similar doctrines, or (b) whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court rulings;
 - b. Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
 - c. Lingering doubts of guilt;
 - d. Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims; and
 - e. Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction?
3. Are death row inmates provided counsel and access to investigative and expert services prior to and during clemency proceedings?
 - a. How are counsel compensated?
 - b. Are counsel provided sufficient time to investigate and otherwise prepare for clemency proceedings?
4. Are clemency proceedings formally conducted in public? If so, by whom?
5. If the clemency authority is exercised by an official who previously participated in the administration of the death penalty as a prosecutor or state attorney general, what safeguards are in place to ensure that the authority is insulated, to the extent possible, from conflicts of interests?

6. How are clemency decision makers educated about their responsibilities and their powers concerning clemency decisions?
7. How are clemency decisions insulated from political considerations?

C. Recommendations for Improving Clemency Proceedings

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.
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.
3. Clemency decision makers should consider as factors in their deliberations any patterns 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.
4. In a jurisdiction that does not bar the execution of mentally retarded offenders, those with serious mental illness, those who were juveniles at the time of their offenses, or those whose cases pose a lingering doubt about guilt, clemency proceedings should include consideration of such factors.
5. Clemency decision makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.
6. In clemency proceedings, the death row inmates should be represented by counsel whose qualifications are consistent with the recommendations in Part I(C), above.
7. Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

8. Clemency proceedings should be formally conducted in public and presided over by the governor or other officials involved in making the clemency determination.
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 clemency petitioners.
10. Clemency decision makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.
11. To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

IV. JURY INSTRUCTIONS

A. *Overview*

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.⁶ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision making. Often, however, sentencing instructions are poorly written and conveyed. As a result, instructions often serve only to confuse, not to communicate; jurors do not understand basic principles governing the imposition of capital punishment.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine what the sentence should be. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors make their decisions based upon accurate facts. For example, if jurors do not believe that a sentence of “life without parole” really means that the offender will remain in prison for the rest of his life, or if they substantially underestimate the amount of time that a life-sentenced offender must serve before becoming eligible for parole, they

⁶ *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985).

misguidedly may impose a death sentence to ensure the person never will be free without realizing that they could have accomplished the same result by sentencing the offender to life in prison. Nowhere is a miscarriage of justice more likely than in a capital case in which jurors mistakenly believe that a defendant who is not sentenced to death may be released within a few years.

B. Guidelines for Review of Jury Instructions

1. Do trial courts in the jurisdiction expressly instruct jurors concerning the “awesome power” to decide between life and death and, in jurisdictions where the jury recommendation is advisory, the full significance of their recommendation?
2. Do court instructions effectively convey the applicable law to jurors?
 - a. Are the instructions clearly organized and presented?
 - b. Are the instructions void of complex sentences, clauses embedded within clauses, double negatives, nouns created from verbs, or other unclear language?
 - c. Are the instructions objectively written to avoid presumptions in favor of a death sentence?
 - d. Do the instructions cover all aspects of applicable law and jurors’ responsibilities for applying it?
3. Do court instructions aid understanding and recall of instructions?
 - a. Do trial courts provide jurors with copies of the instructions to read along while the courts are instructing them?
 - b. Do the trial courts provide jurors with copies of instructions to review during deliberations?
4. Do jury instructions fully and accurately address mitigating circumstances?
 - a. Do the instructions clearly explain the meaning of the terms, “mitigation” and “mitigating circumstances”?
 - b. Do the instructions clearly state that any juror can act on his/her belief that a mitigating circumstance exists, regardless of whether

other jurors agree?

- c. Do the instructions clearly and accurately state the defendant's burden of proof with regard to mitigating circumstances?
 - d. Do the instructions fully and accurately explain the difference between the burden of proof that applies to a juror's finding of a mitigating circumstance and the burden of proof that applies to a jury's finding of guilt or an aggravating circumstance?
 - e. Do the instructions clearly indicate that jurors can and must consider "any aspect of a defendant's character or record and any of the circumstances of the offense" that could be "the basis for a sentence less than death?"⁷
 - f. Do the instructions clearly indicate that jurors can find mitigating circumstances other than those set forth in the statute?
 - g. Do the instructions clearly indicate that jurors can consider residual doubt to be mitigating?
 - h. If the jurisdiction's statutory description of mitigating circumstances contains words of degree (e.g., "extreme," as in "the defendant acted under extreme duress"), do the instructions make clear that jurors can find mitigating circumstances in those instances even if the circumstances are not "substantial" or "extreme"?
 - i. If applicable in the jurisdiction, do the instructions clearly indicate that a juror can vote for a life sentence, even where an aggravating circumstance has been proven beyond a reasonable doubt and even in the absence of any mitigating circumstance, if the juror's reasoned moral judgment is that a life sentence is more appropriate for the defendant than the death sentence?
 - j. If applicable in the jurisdiction, do the instructions make it clear that in weighing aggravating and mitigating factors, the relative numbers of aggravating versus mitigating factors is not determinative of the outcome?
5. Do jury instructions fully and accurately address aggravating circumstances?

⁷ Lockett v. Ohio, 438 U.S. 586, 604 (1978).

- a. Do the instructions clearly explain that jurors must be unanimous in finding an aggravating circumstance?
 - b. Do the instructions explain the difference between the legal meaning of “aggravation” and its meaning in everyday usage?
6. How are clarifying instructions provided?
- a. When jurors ask for clarification of instructions, what is the practice followed by the trial courts?
 - b. When jurors ask for clarification of instructions, does the law of the jurisdiction require a trial court to explain the instruction rather than merely repeat the instruction?
7. How are instructions on sentencing alternatives provided?
- a. Is the trial court required to instruct the jury on the nature of all sentencing options available to the jurors?
 - b. If the jurisdiction provides for life without parole as an alternative to a death sentence, are trial courts required to explain the meaning of “life without parole”?
 - c. If the jurisdiction provides that a jury has the option of sentencing a defendant to a prison term that is less than life without parole, are trial courts required to instruct the jury on (a) the minimum length of time that a capital defendant must serve before he would be eligible for parole, given his record of convictions and (b) the actual parole practices in the jurisdiction?
 - d. Does the jurisdiction permit or require a parole official to testify, at the defense’s request, about parole practices in the state to clarify jurors’ understanding of alternative sentences during the sentencing phase of the trial?
8. Does the jurisdiction bar jurors from imposing a death sentence where, “although the evidence suffices to sustain a verdict, it does not foreclose all doubt respecting the defendant’s guilt?”⁸

⁸ See MODEL PENAL CODE § 210.6(1)(f).

C. Recommendations for Improving Jury Instructions

1. Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.
2. Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.
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.
4. Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.
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.
6. Jurisdictions should consider having trial courts instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should consider implementing the provision of Model Penal Code Section 210.6(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.
7. In states where it is applicable, trial courts should make clear in juror 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.

V. AN INDEPENDENT, VIGILANT JUDICIARY

A. Overview

Judicial independence assumes that judges will decide cases to the best of their abilities without political or other bias and, where necessary to protect the constitution and laws, in the face of official and public opposition. In fact, however, elections, appointments, and confirmations of judges increasingly are being influenced by consideration of judicial nominees' or candidates' purported views on the death penalty or of judges' decisions in capital cases.

During election campaigns, judicial candidates increasingly seem to be expected to assure the public that they will be "tough on crime," that they will impose the death penalty whenever possible and that, if appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular even though they are based upon a reasonable application of law. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases.

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 alleged conduct of capital defendants. As a result, some judges may decide cases not on the basis of their best understanding of the law, but rather on the basis of the effects of their decisions on their careers. Others will act independently—some at expense to their careers. Either way, judicial independence is sacrificed. The Model Code of Judicial Conduct prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."⁹ Several years ago, U.S. Supreme Court Justice John Paul Stevens observed that "[I]t was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes." With increasing frequency, however, such considerations predominate during elections and in connection with judicial appointment and confirmation proceedings.

Judges also are expected to be vigilant against conduct that undermines justice, particularly prosecutorial misconduct and incompetent representation by defense counsel. In capital cases, prosecutorial misconduct can take many forms, including failure to disclose exculpatory evidence, subordination of perjury by informants and jailhouse snitches, or requests that jurors sentence the defendant to death based upon passion, prejudice, religious arguments, or other factors inappropriate and unfair for imposition of death sentences. Where judges witness such conduct, they have an obligation to take effective measures both to remedy

⁹ Canon 5A(d)(i) (1990).

the harm and to prevent such conduct in the future.

Judges also should ensure that defendants receive a full and effective defense. Judges who appoint incompetent counsel or ignore evidence of incompetence in their courts contribute to the miscarriage of justice. Judges serve as the nation's front line against injustice and unfairness; that function is never more important than in a capital case.

B. Guidelines for Review of Judicial Independence and Vigilance

1. Have candidates for election, re-election, appointment, or re-appointment to judicial positions in the jurisdiction made promises concerning future decisions affecting capital cases?
 - a. If so, are ethics proceedings ever initiated against those who engage in such conduct?
 - b. Are the existing ethical rules adequate to prevent or sanction such conduct?
2. Are judges who seek re-appointment or appointment to new or higher positions asked the percentage of capital cases in which they have upheld the death penalty? If so, how have they answered such questions?
3. Have political factors affected, or given the appearance of affecting, judges' decisions in capital cases in the jurisdiction?
 - a. If so, are ethics proceedings ever instituted against any such judges?
 - b. Are existing ethical standards adequate to guard against such improper influence?
4. Is there a perception or appearance in the jurisdiction that political factors have affected the selection of judges to preside over or review capital cases?
 - a. Are judges who are perceived to be insufficiently supportive of the death penalty prevented from presiding over such cases at the trial level?
 - b. Are such judges prevented from sitting on appeals of such cases?
5. Have judges been criticized for rulings in support of constitutional rights of capital defendants or death row inmates? If so, have bar associations

- and other community leaders in the jurisdiction spoken out in defense of their actions as an exercise of judicial independence?
6. Have bar associations and other community leaders in the jurisdiction publicly opposed questioning of potential candidates for judicial appointment or re-appointment concerning the percentage of capital cases in which they have upheld the death penalty?
 7. What efforts have been undertaken to educate the public about the respective roles and responsibilities of judges and attorneys in capital cases and the importance of upholding constitutional guarantees for all defendants, including capital defendants? Who has conducted such efforts?
 8. How do judges in the jurisdiction respond to evidence that counsel for capital defendants or death row inmates are performing ineffectively?
 - a. Do judges act to protect the rights of defendants or inmates in such situations?
 - b. Do courts or bar associations take action against lawyers who provide inadequate representation?
 9. How do judges in the jurisdiction respond to evidence that counsel for the State are or may be engaging in misconduct in capital cases?
 - a. Do judges act firmly to remedy the misconduct and take effective steps to prevent such misconduct in the future?
 - b. Do courts or bar associations take action against prosecutors who engage in misconduct?
 10. Do judges implement adequate measures to correct situations in which prosecutors fail to provide appropriate discovery to the defense in capital cases?
 11. Are judges authorized to bar the death penalty on remand in cases where convictions or death sentences are vacated because the State withheld exculpatory evidence?
 12. To what extent and under what circumstances has the State successfully invoked the harmless error doctrine as a defense against a claim of prosecutorial misconduct?

C. Recommendations for Ensuring Judicial Independence and Vigilance

1. States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.
2. A judge who has made any promise—public or private—regarding his 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.
3. Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.
 - a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.
 - b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.
 - c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.
4. A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.
5. A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

6. The State should ensure that full discovery is available to defendants in all capital cases.
7. Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.
8. During the course of a moratorium, a “blue ribbon” task force with subpoena powers should undertake a full examination of capital cases in which prosecutorial misconduct was either established or seriously alleged and should develop recommendations on ways to prevent such misconduct and its impact on capital cases in the future.

PART TWO: VULNERABLE POPULATIONS IN DEATH PENALTY ADMINISTRATION

I. RACIAL AND ETHNIC MINORITIES

A. Overview

In the past 25 years, numerous studies have found that, when significant non-racial factors affecting the death penalty are held constant, race is a major factor influencing decisions to seek and impose the death penalty. After reviewing these studies, the U.S. General Accounting Office, an independent federal agency, found this conclusion to be valid. Most of the studies have found that the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African American defendants than in cases involving defendants of other races.¹⁰

In 1987, the U.S. Supreme Court ruled in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that such evidence of systemic racial disparity in capital cases does not establish a federal constitutional violation. At the same time, the Court invited legislative bodies to consider adopting legislation that would permit courts to grant relief to defendants based upon the type of evidence of systematic racial disparity presented in *McCleskey*.

The pattern of racial discrimination persists today, in part because courts often tolerate bias by prosecutors, defense lawyers, trial judges, and juries that can infect the entire trial process. Specific problem areas include discrimination by prosecutors in choosing which cases to prosecute as capital murder cases; ineffective assistance of counsel in not objecting to systemic discrimination and

¹⁰ See Resources Appendix for selected studies, available at www.abanet.org/irt/finalJune28.pdf.

pursuing discrimination claims; discriminatory use of peremptory challenges to obtain all-white or largely all-white juries; racial insensitivity or outright racism of jurors, judges, prosecutors, law enforcement officials, and defense lawyers; and the lack of a reliable mechanism for defendants to raise claims of racial discrimination.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. But states have yet to address discrimination in the justice system generally, and the capital punishment system specifically, in a comprehensive way. To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices.

B. Guidelines for Review of Treatment of Racial and Ethnic Minorities in Death Penalty Administration

1. Have any studies been undertaken to determine the impact of racial discrimination on administration of the death penalty in the jurisdiction? If so, what are the results?
2. Where patterns of racial discrimination have been shown to exist in the jurisdiction's capital punishment system, what steps, if any, have been taken to address the problem?
3. What data does the jurisdiction collect to monitor the continuing impact of race on administration of the death penalty?
4. Is the jurisdiction collecting data about the racial composition of the state's death row inmates, the race of defendants, and the race of victims in all actual and potentially capital cases (i.e., cases in which, regardless of whether prosecuted as first degree murder cases, the alleged facts, if proven, would have made the defendant eligible for the death penalty) that have been prosecuted in the state during the same years in which the state's death row inmates were prosecuted, as well as the aggravating and mitigating factors present, charged, and found in all such cases?
5. Does the jurisdiction permit a defendant or convicted offender to establish a prima facie case of discrimination by showing that his/her case fits into an established racially discriminatory pattern? If so, does the prosecution have the burden of rebutting such a showing or does a minimal denial of a motive to discriminate suffice?
6. What educational efforts has the government undertaken to train prosecutors and defense counsel concerning the impropriety of using

racial factors in jury selection, in decisions to seek the death penalty, or in other aspects of capital cases?

- a. Does the jurisdiction assist prosecutors in developing racially neutral factors to consider in deciding when to seek the death penalty in a given case?
 - b. Does the State assist defense counsel at every phase of the process in identifying and developing claims of racial discrimination in capital cases?
7. Do judges instruct jurors on the impropriety of considering racial factors in decision making?
- a. Does the jurisdiction require judges to offer defense counsel the opportunity to question prospective jurors about racial bias?
 - b. Do judges permit defense counsel to question prospective jurors outside the presence of other jurors?
 - c. Are jurors instructed to report conduct that they perceive to be racist or discriminatory?
8. How effective are procedures for requiring judges to recuse themselves because of reasonable concerns that their performance in a given case could be affected by racially discriminatory factors?
9. Are defendants permitted to raise directly meritorious claims of racial discrimination at any stage of capital proceedings?

C. Recommendations for Addressing Racial and Ethnic Discrimination in Death Penalty Administration

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.
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 potentially 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.

3. Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on their 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.
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.
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 such a 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 such a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.
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.
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.
8. Jurisdictions should require jury instructions 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.
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.

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.

II. JUVENILE OFFENDERS

A. Overview

The American Bar Association unconditionally opposes the execution of individuals for crimes they committed when under the age of eighteen ("juvenile offenders"). Juvenile offenders are not mature enough to understand, in a real sense, the consequences of their actions; many suffer from the effects of terrible childhoods; and juveniles are more prone than adults to make false confessions or engage in other immature conduct that unfairly results in a death sentence.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the U.S. Supreme Court held that the execution of offenders younger than sixteen years old at the time of their crimes is "cruel and unusual" punishment under the Eighth Amendment. In *Stanford v. Kentucky*, 192 U.S. 361 (1989), however, the Court concluded that the Eighth Amendment does not prohibit execution of juveniles who were at least sixteen years old at the time they committed capital offenses. From January 1973 through June 2000 in this country, twenty-two states imposed a total of 196 death sentences upon juvenile offenders. Appellate courts have reversed a majority of these sentences but, between September 1985 and June 2000, states executed seventeen people for crimes committed as juveniles. As of June 2000, seventy-four inmates were on death row for crimes they committed as juveniles.

States have the power to change the administration of the death penalty in juvenile offender cases. For example, the execution of sixteen and seventeen-year-old juveniles might violate provisions of a state's constitution. Of course, states also are free to set the minimum age for capital punishment higher than sixteen years old; indeed, fifteen of the thirty-eight states that authorize capital punishment, along with the federal government, have set the minimum age at eighteen.

Since 1990, other countries that have executed juvenile offenders include Iran, Pakistan, Saudi Arabia, and Yemen. Those countries together have executed a total of eight juvenile offenders. In the same period, there have been fourteen such executions in the United States. The United States has signed, but not ratified, the United Nations Convention on the Rights of the Child, which bars capital punishment for juveniles; in doing so, the United States has deferred to the individual states concerning application of the death penalty to juvenile offenders.

B. Guidelines for Reviewing the Application of the Death Penalty to Juvenile Offenders

1. Does the jurisdiction permit the execution of offenders who were under age eighteen when they committed capital offenses?
2. Are there any juvenile offenders on the jurisdiction's death row?

C. Recommendations Concerning the Application of the Death Penalty to Juvenile Offenders

1. All jurisdictions that have not done so should abolish the death penalty for all individuals who were under age eighteen when they committed capital offenses.
2. All jurisdictions should commute the death sentences of all individuals currently on death row who were under age eighteen when they committed capital offenses.
3. The United States should ratify the United Nations Convention on the Rights of the Child, without a reservation concerning the ban on capital punishment for offenses committed by juveniles who were under age eighteen when they committed capital offenses.

III. MENTALLY RETARDED AND MENTALLY ILL DEFENDANTS AND OFFENDERS

A. Overview

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. It is beyond the ability of the criminal justice system adequately to ensure the fairness of such death sentences. Yet twenty-four of the thirty-eight states with capital punishment continue to permit the execution of mentally retarded offenders (although four more states are considering bans this year), and death rows across the country are populated by mentally retarded inmates, some of whom likely never have been identified as such. Although the U.S. Supreme Court held in 1989 that it was not unconstitutional to execute a

mentally retarded offender, it will reconsider that question in a case next term.¹¹

The American Association on Mental Retardation defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5% of the population, if two or more of the person's adaptive skills are significantly limited, and if these two conditions were present before the person reached the age of eighteen. Mental retardation limits a person's ability to learn, reason, plan, understand, judge, discriminate, or exercise restraint.

A person's mental retardation can be significant at every stage of a capital case, including initial police questioning, determination of competency to stand trial, the guilt/innocence phase of the trial, the sentencing phase, and all subsequent proceedings, including consideration of clemency. However, because a mentally retarded person often becomes adept at masking the disability in an effort to avoid stigmatization, a lawyer representing a client who has mental retardation may not realize the existence or scope of retardation or may not appreciate the client's extremely limited capacity to assist in the proceedings. A prosecutor, in turn, may seek the death penalty for, and a jury or judge may impose it upon, a mentally retarded individual without understanding the defendant's disability and consequently without giving the disability substantial weight as a mitigating factor in the sentencing decision.

In addition, mentally retarded individuals sometimes are charged as principals in crimes in which their participation is the result of their retardation. For example, a mentally retarded person may join in the criminal activity of others in order to appear "normal" to them and gain their friendship without being fully aware that the activity is criminal. Conversely, behavior associated with the disability, if perceived as unusual or different, may trigger police attention more readily because similar behavior exhibited by a person without mental retardation would be considered suspicious.

Mentally retarded individuals also may be more susceptible to unfair criminal punishment because they frequently do not fully appreciate the concepts of blameworthiness that underlie criminal responsibility. As a result, they inappropriately may blame themselves or assume responsibility for the criminal conduct of others. In addition, persons with mental retardation are less likely than other non-juveniles to appreciate the permanent consequences of their actions.

Mentally retarded individuals also are prone to false confessions because of susceptibility to suggestion. Such a person is predisposed to tell an authority figure what he thinks that person wants to hear and is reluctant to remain silent in the face of questioning, even when he does not understand the question or does not know the answer. *Miranda* warnings are virtually meaningless to many mentally retarded individuals because the warning is written at the seventh-grade level, beyond the comprehension of a person who has mental retardation.

¹¹ [See *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999), cert. granted sub. nom. *Atkins v. Virginia*, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-8452), cert. grant amended 70 U.S.L.W. 3233.]

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under “extreme mental or emotional disturbance” at the time of the offense; (2) whether “the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication”; and (3) whether “the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct.”

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors’ consideration of the factor, “extreme mental or emotional disturbance” in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining “future dangerousness,” often a criterion for imposing the death penalty. One study showed that a judge’s instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

Like mental retardation, mental illness affects 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.

B. Guidelines for Reviewing the Treatment of Mental Retardation and Mental Illness in Death Penalty Administration

Mental Retardation

1. Does the jurisdiction bar the execution of all mentally retarded individuals?

2. Are the jurisdiction's standards for determining mental retardation based upon the definition of mental retardation promulgated by the American Association on Mental Retardation?
3. To what extent does the jurisdiction specifically consider mental retardation in assessing a person's mental culpability?
4. Does the jurisdiction have policies not to seek the death penalty against mentally retarded defendants, to offer pleas to such defendants that would avoid the death penalty, or not to seek the death penalty against such defendants when they are not the actual killers?
5. If the jurisdiction does not bar the execution of all mentally retarded individuals, does the jurisdiction take a person's mental retardation into consideration as a factor in mitigation of the death penalty?
6. Does the jurisdiction have policies in place that ensure that mentally retarded persons are represented by attorneys who fully appreciate the significance of their client's mental limitations?
7. What policies does the jurisdiction have in place to protect a mentally retarded defendant from "waiving" his constitutional rights under circumstances in which his mental retardation could affect his ability to make a judgment about a waiver?
8. How does the jurisdiction ensure that the "confession" of a mentally retarded defendant is not false or obtained through manipulation?
9. If the jurisdiction bars the execution of individuals found to have mental retardation, does the determination of a defendant's mental retardation occur prior to the guilt/innocence stage of the trial? If not, does it occur prior to the penalty phase of the trial?
10. If the jurisdiction does not bar execution of all individuals with mental retardation, to what extent does the jurisdiction specifically treat mental retardation as a mitigating circumstance in determining whether the defendant should be sentenced to death? How clearly is that fact communicated to the jury?
11. If the jurisdiction is one in which "future dangerousness" is a legislative or common law standard for determining whether to impose the death penalty, is the jury instructed explicitly that a person's mental retardation

should not be used as a factor in finding that a defendant would be dangerous in the future? Are prosecutors prohibited from arguing that a person's mental retardation is a factor that the jury or judge should consider in favor of imposing a death sentence?

12. Does the governor or other clemency authority consider an offender's mental retardation as an important factor in favor of clemency?
13. Does the jurisdiction have policies in place to prevent discrimination against mentally retarded defendants by police, prosecutors, defense counsel, judges, jurors, or others in the criminal justice system?
14. Does the jurisdiction provide for training or other assistance from organizations or individuals with expertise on mental retardation to help the criminal justice system respond effectively to the needs of mentally retarded defendants or offenders in the system?
15. Is sufficient training available to defense counsel 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), on their eligibility for capital punishment, and on mitigation?
16. Are sufficient funds and resources provided to defense counsel for determining accurately the mental capacities and developmental disabilities of a defendant who counsel believes may have mental retardation?
17. How adequate are services of mental health experts provided by the jurisdiction in capital cases?
 - a. Do prosecutors and trial judges rely upon a group of mental health experts whose practices primarily or substantially consist of testifying on behalf of the State?
 - b. Are the mental health experts well trained and well qualified for the forensic examinations they conduct?
 - i. Are the mental health officials employed by the State and those appointed by the courts otherwise engaged in the treatment of patients?
 - ii. Do they have appropriate professional experience to conduct the

examinations required in each case in which they appear?

- c. Do the mental health experts spend adequate time with the subjects of their examinations, consistent with what is required for an adequate diagnosis under the standards that govern their profession?
- d. Do courts appoint well trained and well qualified independent mental health experts to assist defense counsel on a confidential basis?

Mental Illness

1. What practices and policies does the jurisdiction have in place to eliminate discrimination by police, judges, jurors, prosecutors, defense counsel, or others in the criminal justice system against seriously mentally ill capital defendants?
2. What policies does the jurisdiction have in place to protect a mentally ill defendant from "waiving" his constitutional rights under circumstances in which his mental illness could affect his ability to make a judgment about a waiver?
3. How does the jurisdiction ensure that mentally ill defendants are not charged with capital offenses based upon the perception that mental illness is an aggravating factor rather than a mitigating factor?
4. Do jury instructions adequately communicate to jurors the significance of mental illness as a mitigating factor, not as an aggravating factor, in capital cases? Are statutorily identified mitigating factors adequately and appropriately explained to jurors?
5. If the jurisdiction uses "future dangerousness" as a criterion for imposing the death penalty, are jurors instructed adequately not to consider mental illness a factor supporting such a finding?
6. Does the jurisdiction provide adequate resources to defense counsel to identify and develop mental illness claims, as well as to assist any defendant who is determined to be incompetent as a result of mental illness?

C. Recommendations for Addressing Mental Retardation and Mental Illness Issues in Death Penalty Administration

1. Jurisdictions that have not done so should bar the imposition of the death penalty upon individuals who have mental retardation, as that term is 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. Testing used in arriving at this judgment need not have been performed prior to the crime.
2. All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation or mental illness in capital defendants and death row inmates.
3. During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded or mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.
4. The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded or mentally ill persons are protected against "waivers" that are the product of their limited mental ability.
5. 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.
6. Jurisdictions should provide sufficient resources to permit defense counsel to assess accurately the mental capacities and developmental disabilities of any capital defendant who counsel believes may have mental retardation.
7. Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience. The paramount concern should be an expert's ability to contribute to the appropriate resolution of the mental health issues in the case, rather than the expert's prior status as a witness for the State.

8. 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.
9. 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.
10. Jury instructions should communicate clearly that mental illness is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of mental illness to conclude that the defendant or offender represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental illness as a mitigating factor.
11. Jurisdictions should develop and disseminate—to police, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally retarded and 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 retarded and mentally ill citizens.

APPENDIX A

*American Bar Association Death Penalty Moratorium Resolution**

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended 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:

1. Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);
2. Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted August 1982, February 1990);
3. Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and
4. Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of eighteen at the time of their offenses (adopted August 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of eighteen at the time of the commission of the offenses, the Association takes no position on the death penalty.

*Approved by the American Bar Association House of Delegates, February 3, 1997.

REPORT TO THE ABA HOUSE OF DELEGATES IN SUPPORT OF THE
RESOLUTION

I. INTRODUCTION

The American Bar Association has adopted numerous policies bearing on the manner in which the death penalty should be applied in jurisdictions where it exists. These policies were adopted in view of the ABA's extensive experience with the administration of the death penalty and in light of several ABA-sponsored studies. The policies concern: (1) competent counsel in capital cases; (2) proper processes for adjudicating claims in capital cases (including the availability of federal habeas corpus); (3) racial discrimination in the administration of capital punishment; and (4) the execution of juveniles and mentally retarded persons.

The time has now come for the ABA to take additional decisive action with regard to capital punishment. Not only have the ABA's existing policies generally not been implemented, but also, and more critically, the federal and state governments have been moving in a direction contrary to these policies. The most recent and most dramatic moves, both strongly opposed by the ABA, have come in the form of laws enacted by Congress in 1996. Federal courts already are construing one law to significantly curtail the availability of federal habeas corpus to death row inmates, even when they have been convicted or sentenced to death as a result of serious, prejudicial constitutional violations. Another law completely withdraws federal funding from the Post-Conviction Defender Organizations that have handled many post-conviction cases and that have mentored many other lawyers who have represented death row inmates in such proceedings.

These two recently enacted laws, together with other federal and state actions taken since the ABA adopted its policies on capital punishment, have resulted in a situation in which fundamental due process is now systematically lacking in capital cases. Accordingly, in order to effectuate its existing policies, the ABA should now call upon jurisdictions with capital punishment not to carry out the death penalty until these policies are implemented. Of course, individual lawyers differ in their views on the death penalty in principle and on its constitutionality. However, it should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.

II. BACKGROUND

The backdrop for this Recommendation is the two decades of jurisprudence and legislation since the United States Supreme Court upheld new death penalty

statutes in *Gregg v. Georgia*,¹² after having invalidated earlier death penalty statutes in 1972 in *Furman v. Georgia*.¹³ In *Furman*, the Court believed that then-existing state statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases. Four years later, in *Gregg*, the Court concluded that new state statutes' special procedural requirements for capital prosecutions provided a means by which the states would achieve that balance.

However, two decades after *Gregg*, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed.¹⁴ Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. To a substantial extent, this situation has developed because death penalty jurisdictions generally have failed to implement the types of policies called for by existing ABA policies. The pervasive unfairness of the capital punishment system that has evolved since *Gregg* has led two of the Supreme Court justices who were part of the majority in *Gregg* to regret having upheld the death penalty's constitutionality. Retired Justice Lewis Powell, in a 1991 interview, expressed his doubt whether the death penalty could be administered in a way that was truly fair and stated that, in retrospect, his greatest regret was that he had voted to uphold the constitutionality of capital punishment in *McCleskey v. Kemp*¹⁵ and other cases.¹⁶ Justice Harry Blackmun expressed similar concerns in his 1994 dissent in *McFarland v. Scott*:

When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. . . . My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.¹⁷

The already deplorable state of affairs noted by Justices Powell and Blackmun is exacerbated by three other, very recent developments. First, although certain states have begun to implement some ABA policies, more states are moving in the opposite direction—undermining or eliminating important

¹² 428 U.S. 153 (1976).

¹³ 408 U.S. 238 (1972).

¹⁴ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357 (1995) (reporting that “[v]irtually no one thinks that the constitutional regulation of capital punishment has been a success”); see also James S. Liebman & Jonathan M. Moses, *Fatal Distortion: The Chronic Making and Unmaking of Death Penalty Law* (publication forthcoming).

¹⁵ 481 U.S. 279 (1987).

¹⁶ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994) (quoting Justice Powell).

¹⁷ 512 U.S. 1256, 1264 (1994).

procedural safeguards that the ABA has found to be essential.

Second, Congress recently enacted legislation that makes it significantly more difficult for the federal courts to adjudicate meritorious federal constitutional claims in capital cases. Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 establishes deadlines for filing federal habeas petitions, places limits on federal evidentiary hearings into the facts underlying federal constitutional claims, sets timetables for federal court action, limits the availability of appellate review, establishes even more demanding restrictions on second or successive applications for federal relief, and, in some instances, apparently bars the federal courts from awarding relief on the basis of federal constitutional violations where state courts have erred in concluding that no such violation occurred.

While the ABA has consistently supported meaningful habeas corpus reforms, this new federal legislation instead dramatically undermines the federal courts' capacity to adjudicate federal constitutional claims in a fair and efficient manner. Indeed, that may itself be unconstitutional, as the ABA already has asserted in an amicus brief. Congress' adoption of the 1996 Act only underscores the extent of this country's failure to fashion a workable and just system for administering capital punishment.

Third, and also contrary to longstanding ABA policies, Congress has ended funding for Post-Conviction Defender Organizations (PCDOs), which have handled many capital post-conviction cases and have recruited and supported volunteer lawyers in these cases for many indigent death row prisoners. The ABA had a major role in supporting the creation of the PCDOs.

Together, these three developments have brought the adjudication of capital cases to the point of crisis. Unless existing ABA policies are now implemented, many more prisoners will be executed under circumstances that are inconsistent with the Supreme Court's mandate, articulated in *Furman* and *Gregg*, that the death penalty be fairly and justly administered.

The ABA has worked hard to foster the fair and just administration of capital punishment. The ABA's Post-Conviction Death Penalty Representation Project has provided expert advice and counsel to jurisdictions attempting to improve the delivery of legal services to death row prisoners. In addition, it has recruited more than 400 volunteer attorneys to represent indigent death row inmates. The Project also has assisted in the creation of PCDOs and strongly opposed the successful effort to cut off their federal funding. The ABA has testified in support of the Racial Justice Act and actively opposed the kind of habeas corpus restrictions enacted in 1996. And the ABA has conducted and supported a variety of training programs for lawyers and judges in capital cases and has advocated detailed standards for capital defense counsel. Also, various ABA groups have sponsored numerous education programs examining the fairness of capital punishment as implemented.

The ABA's efforts have had some impact. But recent developments have

made the impact of incompetent counsel and the instances of uncorrected due process violations substantially greater, and matters are likely to become worse in the future. It is essential that the ABA now forcefully urge that executions not occur unless each person being executed has had competent counsel and the due process protections that the ABA has long advocated.

III. COMPETENT COUNSEL

The ABA is especially well positioned to identify the professional legal services that should be available to capital defendants and death row inmates. The Association has shouldered that responsibility by conducting studies and adopting policies dating back nearly twenty years. Seven years ago, the ABA recommended that “competent and adequately compensated” counsel should be provided “at all stages of capital . . . litigation,” including trial, direct review, collateral proceedings in both state and federal court, and certiorari proceedings in the U.S. Supreme Court.¹⁸ To implement that basic recommendation, the ABA said that death penalty jurisdictions should establish organizations to “recruit, select, train, monitor, support, and assist” attorneys representing capital clients.

Eight years ago, the ABA published the “Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases” and urged all jurisdictions that employ the death penalty to adopt them.¹⁹ Those guidelines call for the appointment of two experienced attorneys at each stage of a capital case.²⁰ Appointments are to be made by a special appointing authority or committee, charged to identify and recruit lawyers with specified professional credentials, experience, and skills.²¹ The guidelines make it clear that ordinary professional qualifications are inadequate to measure what is needed from counsel in “the specialized practice of capital representation.” To ensure that the lawyers assigned to capital cases are able to do the work required, the guidelines state that attorneys should receive a “reasonable rate of hourly compensation which . . . reflects the extraordinary responsibilities inherent in death penalty litigation.” Concomitantly,

¹⁸ Resolution of the House of Delegates, Feb. 12–13, 1990, 115 (No. 1) REP. OF THE A.B.A., 38–39.

¹⁹ Resolution of the House of Delegates, Feb. 6–7, 1989, 114 (No. 1) REP. OF THE A.B.A., at 59.

²⁰ The ABA previously had urged the federal government to adopt similar procedures and standards for counsel appointed to represent death row prisoners in federal habeas corpus proceedings. Resolution of the House of Delegates, Feb. 8–9, 1988, 113 (No. 1) REP. OF THE A.B.A., at 12. Before that, the ABA had urged the U.S. Supreme Court and the Congress to provide for competent counsel to handle certiorari proceedings and petitions for clemency before the Court. Resolution of the House of Delegates, Feb. 12–13, 1979, 104 REP. OF THE A.B.A., at 245.

²¹ In addition, the guidelines set forth the way in which counsel in a capital case should perform various defense functions, from plea negotiations, through jury selection, the trial and sentencing phases, and post-conviction proceedings.

counsel should be provided with the time and funding necessary for proper investigations, expert witnesses, and other support services.²²

No state has fully embraced the system the ABA has prescribed for capital trials. To the contrary, grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives.²³

Jurisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require. Many death penalty states have no working public defender programs, relying instead upon scattershot methods for selecting and supporting defense counsel in capital cases.²⁴ For example, some states simply assign lawyers at random from a general list—a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions employ “contract” systems, which typically channel indigent defense business to attorneys who offer the lowest bids.²⁵ Other states use public defender schemes that appear on the surface to be more promising, but prove in practice to be just as ineffective.²⁶

²² In August 1996, the ABA adopted a policy regarding the appropriate representation of military defendants facing execution. To date, the military has failed to implement this policy.

²³ Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30 (reporting the conclusions of an extensive six-state survey: capital trials are “more like the random flip of a coin than a delicate balancing of the scales of justice” because defense counsel are “ill-trained, unprepared . . . [and] grossly underpaid”).

²⁴ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835, 1841–55 (1994).

²⁵ Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 679–81 (1986).

²⁶ See Bright, *supra* note 24, at 1849–52, summarizing the current situation as follows:

The structure of indigent defense not only varies among states, it varies within many states from county to county. Some localities employ a combination of these programs. All of these approaches have several things in common. They evince the gross underfunding that pervades indigent defense. They are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads. Just when lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads. Generally, no standards are employed for assignment of cases to counsel or for the performance of counsel. And virtually no resources are provided for investigative and expert assistance or defense counsel training.

The situation has further deteriorated in the last few years. This is largely due to the increased complexity of cases and the increase in the number of cases resulting from

It is scarcely surprising that the results of poor lawyering are often literally fatal for capital defendants. Systematic studies reveal the depth of the problems nationwide and thus supply the hard data to support reasoned policy-making.²⁷ Case after case all too frequently reveals the inexperience of lawyers appointed to represent capital clients. In *Tyler v. Kemp*²⁸ and *Paradis v. Arave*,²⁹ state trial courts assigned capital cases to young lawyers who had passed the bar only a few months earlier; in *Bell v. Watkins*,³⁰ a state trial court appointed a lawyer who had never finished a criminal trial of any kind; and in *Leatherwood v. State*,³¹ yet another trial court allowed a third-year law student to handle most of a capital trial.

Other cases demonstrate that defense counsel in capital cases often are incapable of handling such cases properly. In *Smith v. State*,³² defense counsel asked for extra time between the guilt and sentencing phases of a capital case in order to read the state death penalty statute for the first time. In *Frey v. Fulcomer*,³³ defense counsel, in purported compliance with a state statute, limited his presentation of mitigating evidence. Unbeknownst to defense counsel, that statute had been held unconstitutional three years earlier precisely because it restricted counsel's ability to develop mitigating evidence. In *Ross v. Kemp*,³⁴ one defense attorney advanced a weak alibi theory, while his co-counsel mounted an inconsistent mental incompetency defense that necessarily conceded that the defendant had participated in the offense.³⁵ In *Romero v. Lynaugh*,³⁶ defense

expanded resources for police and prosecution and the lack of a similar increase, and perhaps even a decline, in funding for defense programs.

Id. at 1851. (citations omitted). Moreover, at an ABA Annual Meeting program in 1995, Scharlette Holdman described case after case of incompetent representation by counsel appointed by judges in California and other Western states, in which compensation is typically greater than that in most other states with capital punishment. See Scarlette Holdman in *Capital Punishment: Is There Any Habeas Left in this Corpus?*, 27 LOY. U. CHI. L.J. 524, 581 (1996). Thus, as the ABA has recognized, the problem is not merely underfunding. It is also the appointment by judges of attorneys who lack either the expertise or the experience necessary to represent a capital defendant effectively.

²⁷ Over the years, both the ABA and local bar and legislative groups have commissioned such studies. In one instance, illustrative of other states' practices as well, researchers found that Texas typically does not use central appointing authorities to choose counsel in death penalty cases, does not monitor the performance of assigned counsel in capital cases, and does not adequately compensate appointed counsel or reimburse them sufficiently for support services. THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS (1993).

²⁸ 755 F.2d 741 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985).

²⁹ 954 F.2d 1483 (9th Cir. 1992).

³⁰ 692 F.2d 999 (5th Cir. 1982).

³¹ 548 So. 2d 389 (Miss. 1989).

³² 581 So. 2d 497 (Ala. Crim. App. 1990).

³³ 974 F.2d 348 (3d Cir. 1992).

³⁴ 393 S.E.2d 244 (Ga. 1990).

³⁵ See Bright, *supra* note 24 (listing these illustrative cases and dozens more).

counsel declined to offer any evidence at all during the penalty phase of a capital case, and then made the following brief and ineffective closing argument: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."³⁷ The jury, in its turn, sentenced the defendant to death.

In *Messer v. Kemp*,³⁸ defense counsel presented very little of the mitigating evidence available, made no objections at all, then essentially told the jury that the death penalty was appropriate. That defendant, too, was sentenced to die. In *Young v. Kemp*,³⁹ the defense counsel was himself so dependent on drugs during trial that, as even he later admitted, he mounted only the semblance of a defense. His client received the death penalty, but then chanced to see the defense lawyer thereafter in a prison yard. The attorney had, in the interim, been convicted and sentenced on state and federal drug charges.

Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert witnesses.⁴⁰ In some rural counties in Texas, an appointed attorney receives as little as \$800 to represent a capital defendant.⁴¹ Similar limits are in place in other states. In Virginia, the hourly rate for capital defense services works out to about \$13.⁴² In an Alabama case, the lawyer appointed to represent a capital defendant in a widely publicized case was allowed a total of \$500 to finance his work, including any investigations and expert services needed. With that budget, it is hardly surprising that the attorney conducted no investigation at all.⁴³

Poorly prepared and supported trial lawyers typically do a poor job. When they do recognize points to be explored and argued, they often fail to follow through in a professional manner. And when they do not recognize what needs to be done, they do nothing at all or they take actions that are inimical to the needs of

³⁶ 884 F.2d 871 (5th Cir. 1989).

³⁷ Bright, *supra* note 24, at 1858 (quoting *Romero v. Lynaugh*, 884 F.2d 871, 875 (5th Cir. 1989)).

³⁸ 831 F.2d 946 (11th Cir. 1987).

³⁹ No. 85-98-2-MAC (M.D. Ga. 1985); see Bright, *supra* note 24, at 1859.

⁴⁰ Spangenberg Group, *supra* note 27, at 159; see also Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991) (providing a national survey).

⁴¹ Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34. In one celebrated Texas case, the Fifth Circuit Court of Appeals noted that an appointed attorney had received only \$11.84 per hour in a capital case and, at that price, had rendered particularly dreadful service to his indigent client. That, said the court, explained much of the problem. "[T]he justice system got only what it paid for." *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992).

⁴² Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993).

⁴³ Bright, *supra* note 24, at 1847-48; Deposition of Richard Bell at 24-25, 56-59, *Grayson v. State* (Cir. Ct. Shelby County, Ala. Oct. 10, 1991). The state payment limit is now \$1,000.

their clients. The result of such inadequacies in representation is that counsel often fail to present crucial facts. They also may fail to raise crucial legal issues, causing their clients to forfeit their opportunity to explore those issues later, in any court. In one recent case, appointed defense counsel scarcely did anything to represent his client at trial and, along the way, neglected to raise three significant constitutional claims. The federal court that reviewed the case could not consider any of these omitted claims because, under state law, counsel's numerous defaults barred their later consideration.⁴⁴

The same pattern is repeated with respect to the legal services available for the appellate and post-conviction stages of capital cases. State appellate court standards for adequate representation under state law are extraordinarily low. These courts sometimes dispose of capital appeals on the basis of inadequate briefs containing only a few pages of argument—and, in so doing, often rely on defense counsel's "default" at trial to avoid considering constitutional claims on the merits.⁴⁵ As for post-conviction, an ABA Task Force developed an enormous body of evidence in 1990 demonstrating that prisoners sentenced to death typically receive even less effective representation in post-conviction than at the trial stage.⁴⁶ The Supreme Court has held that there is no constitutional right to counsel in post-conviction proceedings, even in capital cases.⁴⁷ Although many states and the federal government once funded Post-Conviction Defender Organizations, which recruited lawyers for death row inmates at the post-conviction stage and represented others themselves, today many of those centers have been forced to close because Congress has eliminated their federal funding.⁴⁸

The federal courts generally have not rectified this situation. The standard for effective assistance of counsel under the Sixth Amendment is so egregiously low that the potential for relief in federal habeas corpus on such grounds is almost always more theoretical than real. The federal courts found the "services" rendered in the *Romero*, *Messer*, and *Young* cases, cited above, to be "effective"

⁴⁴ *Weeks v. Jones*, 26 F.3d 1030 (11th Cir. 1994).

⁴⁵ See Bright, *supra* note 24, at 1843 & n.55.

⁴⁶ Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 71–75 (1990).

⁴⁷ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

⁴⁸ See The Special Committee on Capital Representation & The Committee on Civil Rights, *The Crisis in Capital Representation*, in 51 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 169, 187–191 (Mar. 4, 1996) [hereafter cited as *Crisis*]. The PCDOs were extremely effective. In 1989, Chief Judge Tjoflat of the United States Court of Appeals for the Eleventh Circuit told the ABA Task Force that the resource centers were "indispensable." Robbins, *supra* note 46, at 73. In 1994, Judge Arthur L. Alarcon of the Court of Appeals for the Ninth Circuit wrote that the PCDO's were "critical" to the efficient processing of capital cases. *Crisis*, *supra* at 188–89 (citing the Appendix of the Alarcon Memorandum to Judge Cox and Cedarbaum (Dec. 7, 1994)). Nevertheless, they were defunded.

for constitutional purposes—and, accordingly, all three prisoners were executed.⁴⁹

Compounding the effect of incompetent representation of capital defendants and death row inmates is improper representation of the state by prosecutors inadequately trained in avoiding constitutional violations. In describing this combined impact, former Pennsylvania Attorney General Ernest Preate said at an ABA Annual Meeting program:

[I]n too many capital cases, there is ineffective assistance of counsel on both sides [T]he defense counsel's ineffective assistance of counsel is not necessarily a mistake that the defense counsel originally made, but a mistake by the prosecutor. The prosecutor did something he or she shouldn't have done and the defense counsel failed to object or failed to take advantage of it.⁵⁰

Unfortunately, relief rarely is granted under any of the circumstances described above.

IV. PROPER PROCESSES

The ABA consistently has sought to ensure that adequate procedures are in place to determine whether a capital sentence has been entered in violation of federal law. No other organization has monitored the federal habeas system more closely, developed greater expertise regarding that system's strengths and weaknesses, or offered more detailed prescriptions for reform.

Fourteen years ago, the ABA publicly opposed three bills then pending in Congress that would have dramatically restricted the federal courts' ability to adjudicate state prisoners' habeas claims. At the same time, the ABA proposed alternatives that would have streamlined habeas litigation without undermining the federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims.⁵¹

Since that time, the ABA has been deeply involved in the national debate over federal habeas—particularly in capital cases. The ABA Task Force that studied the situation in depth created a solid scholarly foundation for its work, then received written and oral testimony from knowledgeable individuals and organizations at hearings in several cities.⁵² In 1990, the ABA House of Delegates adopted a set of recommendations for improving current law that were based upon the Task Force's work.⁵³ The recommendations included the following

⁴⁹ See *supra* notes 36–39 and accompanying text.

⁵⁰ Hon. Ernest D. Preate, Jr., Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1120–21 (1994) [hereinafter *The Death of Fairness?*].

⁵¹ Resolution of the House of Delegates, Feb. 1982.

⁵² Robbins, *supra* note 46, at 58.

⁵³ *Id.*; Midyear Meeting of the House of Delegates, 115 (No. 1) REP. OF A.B.A. 38–41 (1990) (Resolution of the House of Delegates, Feb. 1990).

principles: a death row prisoner should be entitled to a stay of execution in order to complete one round of post-conviction litigation in state and federal court,⁵⁴ that the federal courts should consider claims that were not properly raised in state court if the reason for the prisoner's default was counsel's ignorance or neglect,⁵⁵ and that a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence.⁵⁶

Regrettably, none of these recommendations has been generally adopted. In fact, the Supreme Court has denied death row prisoners the very opportunities for raising constitutional claims that the ABA has insisted are essential. Prisoners have not been entitled even to a single stay of execution to maintain the status quo long enough to complete post-conviction litigation.⁵⁷ The federal courts typically have refused to consider claims that were not properly raised in state court, even if the failure to raise them was due to the ignorance or neglect of defense counsel.⁵⁸ And prisoners have often not been allowed to litigate more than one petition, even if they have offered strong evidence of egregious constitutional violations that they could not have presented earlier.⁵⁹

The consequence of these legal tangles has been that meritorious constitutional claims often have gone without remedy. Contrary to popular belief, most habeas petitions in death penalty cases do not rest on frivolous technicalities. As Professor James S. Liebman has reported, in 40% of all capital cases, even in the face of all the procedural barriers, death row inmates still have been able to secure relief due to violations of their basic constitutional rights.⁶⁰ The percentage securing relief would be substantially higher if the federal courts had considered all death row inmates' claims on their merits.

Yet, in 1996, Congress enacted legislation that will make it even more difficult for the federal courts to adjudicate federal claims in capital cases.⁶¹ This new law, which the ABA vigorously opposed, establishes deadlines for filing federal habeas petitions, limits on federal evidentiary hearings into the facts underlying federal claims, timetables for federal court action, limits on the availability of appellate review, and even more demanding restrictions on second or successive applications from a single petitioner. The new law also contains a provision that, according to the en banc Seventh Circuit (and contrary to the ABA's position as *amicus curiae*), prevents a federal court from awarding relief

⁵⁴ *Id.* at 40.

⁵⁵ *Id.* at 39.

⁵⁶ *Id.* at 40.

⁵⁷ See *McFarland v. Scott*, 512 U.S. 849, 858–59 (1994).

⁵⁸ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 752–54 (1991).

⁵⁹ See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991). Moreover, the Supreme Court has developed numerous other door-closing doctrines that restrict death row prisoners' access to the federal courts for habeas corpus adjudication. See *The Death of Fairness?*, *supra* note 50.

⁶⁰ Memorandum of James S. Liebman, Panel Discussion, Nov. 22, 1995.

⁶¹ Pub. L. No. 104–32, 110 Stat. 1214 (1996).

on the basis of a claim that the federal court finds to be meritorious if it concludes that the state court that rejected the claim was not "unreasonably" wrong in doing so.⁶²

V. RACE DISCRIMINATION

In 1988, the ABA adopted a policy of striving to eliminate "discrimination in capital sentencing on the basis of the race of either the victim or the defendant."⁶³ Nevertheless, longstanding patterns of racial discrimination remain in courts across the country.

Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black.⁶⁴ Other studies have shown that in some jurisdictions African Americans tend to receive the death penalty more often than do white defendants.⁶⁵ And in countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.⁶⁶

⁶² *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996). For a summary and analysis of the various new habeas corpus provisions, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

⁶³ Annual Meeting of the House of Delegates, 113 (No. 2) REP. OF A.B.A. 14 (1988) (Resolution of the House of Delegates, Aug. 1988). In addition, the ABA has urged Congress to "prevent or minimize any disproportionate effects of general federal death penalty legislation on Native Americans subject to federal jurisdiction." Annual Meeting of the House of Delegates, 116 (No. 2) REPORTS OF A.B.A. 51 (1991) (Resolution of the House of Delegates, Aug. 1991).

⁶⁴ See Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 780-83 (1990-91) (summarizing various studies) (this law review article is an adaptation of the ABA's testimony in support of the proposed Racial Justice Act before the Subcommittee on Civil and Constitutional Rights of the House Judiciary); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARITIES (1990), reprinted in 136 CONG. REC. S6889-90 (daily ed., May 24, 1990); Laurie Ekstrand and Harriet C. Ganson, Panel Discussion, *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 320-23, 341, 345, 347, 348 (1995); see also SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989). In Kentucky, approximately 1,000 African Americans have been murdered over the past twenty years. Yet none of the prisoners on that state's death row is there for having killed a black victim. Letter from the Death Penalty Information Center, Apr. 2, 1996.

⁶⁵ See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 399 (1990).

⁶⁶ Sadly, defense attorneys who shrink from rocking the boat locally still may fail, even in this day and age, to object to jury selection procedures that exclude African Americans from service. See Bright, *supra* note 24, at 1857 (citing *Gates v. Zant*, 863 F.2d 1492, 1497-1500 (11th Cir.), cert. denied, 493 U.S. 945 (1989) (denying relief in such an instance)). Cases in which defense attorneys use racial slurs in reference to their clients are also all too common. See Bright, *supra* note 24, at 1865 (citing Transcript of Opening and Closing Arguments at 39, State

Justice Blackmun lamented the Court's failure to fashion an effective means of preventing the "biases and prejudices that infect society generally" from influencing "the determination of who is sentenced to death."⁶⁷ After years of watching race play so large a role in the administration of capital punishment, he concluded, in part for that reason, that he no longer could find any execution consistent with the Constitution. The ABA need not go so far in order to resolve, as a matter of ABA policy, that executions should cease until effective mechanisms are developed for eliminating the corrosive effects of racial prejudice in capital cases.

The Supreme Court, in rejecting a constitutional challenge to the systemic pattern of racial discrimination in capital sentencing, invited legislative action to deal with this situation.⁶⁸ Thereafter, the ABA, in conformance with a resolution adopted by the House of Delegates in August 1988, supported enactment of the Racial Justice Act, a measure designed to create a remedy for such racial discrimination.⁶⁹ Although the House of Representatives twice has approved the Racial Justice Act, the full Congress has not enacted it. Accordingly, these patterns of racial discrimination remain unrectified. Ironically, Justice Powell, the author of the Supreme Court's 5-4 decision rejecting the constitutional challenge discussed above, has now indicated that he regrets his participation in that decision (as well as in other decisions upholding the death penalty) more than anything else during his tenure on the court.⁷⁰

VI. EXECUTION OF MENTALLY RETARDED INDIVIDUALS AND JUVENILES

The ABA has established policies against the execution of both persons with "mental retardation," as defined by the American Association of Mental Retardation,⁷¹ and persons who were under the age of eighteen at the time of their offenses.⁷² Nevertheless, the Supreme Court has upheld the constitutionality of executions in both of those instances.⁷³ While many states now bar executions of

v. Dungee, Record Excerpts at 102, (11th Cir.) (No. 85-8202), *decided sub nom.* Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986)), showing the following opening argument: "You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer. . . . He is ignorant. I will venture to say he has an IQ of not over eighty." *Id.* Unsurprisingly, the jury that heard that statement from defense counsel later sentenced the defendant to death.

⁶⁷ Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

⁶⁸ See McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

⁶⁹ See Tabak, *supra* note 64, at 777.

⁷⁰ See JEFFRIES, *supra* note 16, at 451-52.

⁷¹ Midyear Meeting of the House of Delegates, 114 (No. 1) REP. OF A.B.A. 48 (1989) (Resolution of the House of Delegates, Feb. 1989).

⁷² Annual Meeting of the House of Delegates, 108 REPORTS OF A.B.A. 814 (1983).

⁷³ Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (refusing to hold that the execution of a mentally retarded prisoner violated the Eighth Amendment); Stanford v. Kentucky, 492 U.S.

the retarded, other states continue to execute both retarded individuals and, on occasion, offenders who were under eighteen at the time they committed the offenses for which they were executed.⁷⁴

VII. CONCLUSION

As former American Bar Association President John J. Curtin, Jr. told a congressional committee in 1991, "Whatever you think about the death penalty, a system that will take life must first give justice."⁷⁵ This recommendation would not commit the ABA to a policy regarding the morality or the advisability of capital punishment per se. Rather, this recommendation would reinforce longstanding Association policies that seek to bring greater fairness to the administration of the death penalty. Those policies rest firmly on the special competence and experience that only members of the legal profession can bring to bear.

For many years, the ABA has conducted studies, held educational programs, and produced studies and law review articles⁷⁶ about the administration of the death penalty. As a result of that work, the Association has identified numerous, critical flaws in current practices. Those flaws have not been redressed; indeed, they have become more severe in recent years, and the new federal habeas law and the defunding of the PCDOs have compounded these problems. This situation requires the specific conclusion of the ABA that executions cease, unless and until greater fairness and due process prevail in death penalty implementation.

361, 380 (1989) (refusing to hold that the execution of prisoners who were sixteen and seventeen years of age at the time of their offenses violated the Eighth Amendment).

⁷⁴ EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 39 (1993) (reporting that mentally retarded prisoners account for 12% to 20% of the population on death row); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 95 (1991) (reporting that near the end of 1990 there were thirty-two death row prisoners who had been under eighteen years of age at the time of their offenses); Victor Streib, Report (Sept. 19, 1995) (reporting forty-two such prisoners only five years later). Since 1973, 140 death sentences have been imposed on juvenile offenders. Letter from the Death Penalty Information Center, Apr. 2, 1996.

⁷⁵ *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 447 (1992), microformed on CIS No. H521-33 (Cong. Info. Serv.).

⁷⁶ See, e.g., Panel Discussion, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 524 (1996); *The Death of Fairness?*, supra note 49; Panel Discussion, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239 (1994).