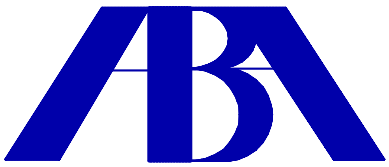

Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:
The Ohio Death Penalty Assessment Report

An Analysis of Ohio's Death Penalty Laws, Procedures, and Practices

EXECUTIVE SUMMARY

"A system that takes life must first give justice."
John J. Curtin, Jr., Former ABA President

September 2007

AMERICAN BAR ASSOCIATION

EXECUTIVE SUMMARY

INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Ohio assessment, the Project has released state assessments of Alabama, Arizona, Florida Georgia, Indiana, and Tennessee. In the future, it plans to release an additional report in Pennsylvania. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

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

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

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

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

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

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

Despite the diversity of backgrounds and perspectives among the members of the Ohio Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team believes that the body of recommendations as a whole would, if implemented, significantly improve Ohio's capital punishment system.

II. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Ohio's death penalty system, the Ohio Death Penalty Assessment Team[1] researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.[2] The Ohio Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Ohio death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Ohio complies with the ABA Recommendations.

The Ohio Death Penalty Assessment Team notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. Additionally, it appears that the cost of a capital case far exceeds the cost of a case seeking a life sentence. The Ohio Death Penalty Assessment Team is concerned that the necessary expenditure of resources on capital cases affects the system's ability to render justice in non-capital cases and recommends that a study be conducted on this issue.

The Team has concluded that the State of Ohio fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in Ohio's death penalty system. The next section highlights the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. Areas for Reform

The Ohio Death Penalty Assessment Team has identified a number of areas in which Ohio's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems within Ohio's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can undermine

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

[2] This report is not intended to cover all aspects of Ohio's capital punishment system and, as a result, it does not address a number of important issues.

sound procedures in others. With that in mind, the Ohio Death Penalty Assessment Team views the following problem areas as most in need of reform:[3]

- ***Inadequate Procedures to Protect the Innocent*** (see Chapters 2, 3, and 4) – Since 1973, the State of Ohio has exonerated five death row inmates and at least one additional person with strong claims of innocence remains on death row. Despite these exonerations, the State of Ohio has not implemented a number of requirements that would make the conviction of an innocent person much less likely, including requiring the preservation of biological evidence for as long as the defendant remains incarcerated, requiring that crime laboratories and law enforcement agencies be certified by nationally recognized certification organizations, requiring the audio or videotaping of all interrogations in potentially capital cases, and implementing lineup procedures that protect against incorrect eyewitness identifications.
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Ohio are denied these necessary resources.
- ***Inadequate Qualification Standards for Defense Counsel*** (see Chapter 6 and 8) – Although the State of Ohio provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls short of the requirements set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* for trial and appellate attorneys. In fact, while the State of Ohio requires counsel to be certified to represent indigent death row inmates in post-conviction proceedings, it does not set forth any requirements that are specific to post-conviction representation or any other related proceedings.
- ***Insufficient Compensation for Defense Counsel Representing Indigent Capital Defendants and Death-Row Inmates*** (see Chapters 6 and 8) – In at least some instances, attorneys handling capital cases and appeals are not fully compensated at a rate and for all of the necessary services commensurate with the provision of high quality legal representation. The Office of the Ohio Public Defender sets the statewide maximum hourly rate and case fee cap, but each county is authorized to and does set its own reimbursement amounts and requirements. These limits have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.
- ***Inadequate Appellate Review of Claims of Error*** (see Chapter 7) – Appellate review of claims of error are vital to a properly functioning capital system, yet the State of Ohio maintains an overly strict application of waiver standards, overuses the harmless error standard of review, and engages in summary review of issues presented to the court.
- ***Lack of Meaningful Proportionality Review of Death Sentences*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and

[3] The ordering of this list follows the progression of the report and is not a ranking in terms of importance.

offenders; however, the Ohio Supreme Court does not engage in a meaningful comparison of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.

- ***Virtually Nonexistent Discovery Provisions in State Post-conviction*** (see Chapter 8) –Despite the fact that prior to obtaining an evidentiary hearing in state post-conviction a death-sentenced inmate must allege all available grounds for relief and state the specific facts that support those grounds for relief, the State of Ohio denies petitioners access to the discovery procedures necessary to develop those claims. This is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims in spite of the fact that anyone else, including reporters, can and do obtain these documents. The impact of the lack of discovery in state post-conviction proceedings is exacerbated by the limited discovery often provided at trial.
- ***Racial Disparities in Ohio's Capital Sentencing*** (see Chapter 12) – The Ohio Commission on Racial Fairness recognized that "[a] perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers."[4] Despite these statements, the State of Ohio has not further studied the issue of racial bias in capital sentencing or implemented reforms designed to help eliminate the impact of race on capital sentencing. The racial and geographic disparity study conducted as part of this assessment confirms the existence of racial bias in the State of Ohio's capital system, finding that those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks.
- ***Geographic Disparities in Ohio's Capital Sentencing*** (see Chapter 12) – The Associated Press reported that 8% of people charged with a capital crime were sentenced to death in Cuyahoga County, but 43% of those charged in Hamilton County received a death sentence. The racial and geographic disparity study conducted as part of this assessment confirms the existence of geographic bias in the State of Ohio's capital system, finding that the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County.
- ***Death Sentences Imposed and Carried Out on People with Severe Mental Disability*** (see Chapter 13) – The State of Ohio has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.

[4] OHIO COMMISSION ON RACIAL FAIRNESS, THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS 37-38 (1999), *available at* http://www.sconet.state.oh.us/publications/fairness/fairness.pdf (last visited Sept. 13, 2007).

C. Ohio Death Penalty Assessment Team Recommendations

Although a perfect system is unfortunately not possible, the following recommendations would improve Ohio's death penalty proceedings significantly. Our recommendations seek to ensure fairness at all stages, while emphasizing the importance of resolving important issues during the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Ohio Death Penalty Assessment Team makes the following recommendations:[5]

(1) The State of Ohio should require that all biological evidence be preserved in all potentially capital cases for as long as the defendant remains incarcerated.

(2) The State of Ohio should require all law enforcement agencies to videotape the entirety of custodial interrogations in homicide cases at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of the custodial interrogation.

(3) The State of Ohio should implement mandatory lineup procedures, utilizing national best practices, to protect against incorrect eyewitness identifications.

(4) The Governor of Ohio should create a commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. This sort of commission, which would supplement the clemency process, is necessary, in large part because current procedural defaults and inadequate lawyering have prevented claims of factual innocence from receiving full judicial consideration and the clemency process currently is not equipped to handle them.

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

(6) In order to protect against arbitrariness in capital sentencing, the State of Ohio should ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio's capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality.

(7) The courts in the State of Ohio should more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information

[5] The ordering of this list follows the progression of the report and is not a ranking in terms of importance.

known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

(8) The State of Ohio should amend its statutes and rules to require the appointment of separate counsel for direct appeal and state post-conviction proceedings immediately after a judgment and sentence of death.

(9) The State of Ohio should engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of review.

(10) The State of Ohio should amend its rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to filing his/her post-conviction petition. In addition, the State of Ohio should amend its laws to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims.

(11) The State of Ohio should create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality.

(12) To ensure that death is imposed only for the very worst offenses and upon the very worst offenders, the Ohio Supreme Court should employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

(13) In light of the limited study conducted as a part of this Assessment that shows these problems exist, the State of Ohio should conduct and release a comprehensive study to determine the existence or non-existence of unacceptable disparities- racial, socio-economic, geographic, or otherwise - in its death penalty system and provide a mechanism for ongoing study of these factors.

(14) The State of Ohio should adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Ohio, our research establishes that at this point in time, the State of Ohio cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. It is therefore the conclusion of the members of the Ohio Death Penalty Assessment Team[6] that the State of Ohio should impose a temporary suspension of executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report, and in particular the Executive Summary.

[6] Judge Michael Merz and Geoffrey Mearns abstained from voting on whether a temporary suspension of executions should be imposed or not.

III. SUMMARY OF THE REPORT

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

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

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

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

A summary of Ohio's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.[7]

[7] Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the "Analysis" section of each chapter.

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*[8]	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*[9]	*Not Applicable*
Recommendation #1: The State should preserve all biological evidence for as long as the defendant remains incarcerated.			X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.		X			
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.		X			
Recommendation #5: The state should ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: The state should provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

The State of Ohio does not statutorily require the preservation of biological evidence, except in the limited circumstance that a post-conviction DNA test has been requested and granted. In that situation, the samples must be preserved during the death-sentenced inmate's incarceration and for at least twenty-four months after his/her execution. Despite this limited exception, biological evidence could be destroyed before a post-conviction motion requesting DNA testing has been filed and granted or after such a motion requesting testing has been denied.

While the State of Ohio does not require the preservation of all physical evidence for the entire period of incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery; and (2) seek post-conviction DNA testing. However, strict procedural requirements and various restrictions have the potential to

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

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

preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, the court may reject an application for testing if it finds that the applicant does not meet one or more of the requirements for accepting an application, including if the court finds that there is not a scientifically sufficient amount of biological material or the biological material is so degraded as to make DNA testing impracticable or the biological sample is so minute that performing DNA testing would create a risk of consuming the whole sample.

Even in cases in which DNA testing is granted, the forensic services offered by Ohio's Bureau of Criminal Identification and Investigation (BCI) are somewhat limited. For example, BCI crime laboratories do not perform the more discriminating and exacting methods of DNA testing, such as Mitochondrial DNA testing of hair without roots or Y-Chromosome STR testing, both of which are especially effective for obtaining conclusive DNA profiles from old, degraded biological samples.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi of the Executive Summary, that a law be passed requiring that all biological evidence be preserved in all potentially capital cases for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

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

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

Law Enforcement Identifications and Interrogations					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.				X	
Recommendation #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations		X			
Recommendation #5: The state should ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.		X			
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.		X			

We commend the State of Ohio for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example, law enforcement officers in Ohio are required to complete a basic training course of 558 hours, which includes instruction on interviews and interrogations, as well as on line-ups. Furthermore, courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

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

Despite these measures, the State of Ohio does not require law enforcement agencies to adopt procedures governing identifications and interrogations. Although modern technology makes recording these important events easy and inexpensive, many police agencies do not record them.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi of the Executive Summary, that all law enforcement agencies be required to videotape the entirety of custodial interrogation in homicide cases at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of the custodial interrogation. The State of Ohio should also implement mandatory lineup procedures, utilizing national best practices, to protect against incorrect eyewitness identifications.

Chapter Four: Crime Laboratories and Medical Examiner Offices

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

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

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

Ohio law does not require crime laboratories to be accredited, but the Ohio Bureau of Criminal Identification and Investigation (BCI) and some local crime laboratories voluntarily have obtained accreditation. As a prerequisite for accreditation, the accreditation program requires laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

Despite these measures, however, problems have been discovered in at least one Ohio crime laboratory. Joseph Serowik, a forensic analyst at the Cleveland Police Department, was fired from the police department after it was revealed that he testified falsely about hair analysis that he performed in a criminal case which led to a rape conviction and the thirteen-year sentence of an innocent defendant. In addition to false testimony provided by Serowik, he "was allowed to conduct hair examinations without proper education, training, supervision, or protocols," and Serowik's supervisor had no expertise in hair analysis or serology.

Serowik's flawed techniques raised questions about the validity of his testimony in over 100 cases in which he testified since 1987. As a condition of the lawsuit settlement brought by Michael Green, who was wrongfully convicted due to Serowik's testimony, the City of Cleveland agreed to review the work performed by Serowik and his colleagues from 1987 through 2004. As of September 2007, the audit of the Cleveland Police Department's practices has resulted in a request for two new murder trials for defendants whose convictions were based on faulty testimony. Furthermore, the police laboratory now sends items for DNA testing to the BCI, rather than conducting such testing in-house. The full report of the audit, which began in 2004, has not yet been released. The fact that the Cleveland Police forensic laboratory is not accredited by any nationally recognized accreditation organization underscores the need for accreditation and procedural transparency by crime laboratories in the State.

Like crime laboratories, the State of Ohio does not require county coroner's offices to receive accreditation, although the Montgomery County Coroner Office in Dayton, Ohio; the Hamilton County Coroner Office in Cincinnati, Ohio; and the Summit County

Medical Examiner's Office in Akron, Ohio all have received voluntary accreditation through the National Association of Medical Examiners (NAME) and the Office of the Cuyahoga County Coroner is accredited through the American Board of Forensic Toxicology (ABFT). In addition, all newly-elected coroners are required to receive sixteen hours of continuing education prior to commencing office and all coroners, once in office, are required to complete thirty-two hours of continuing education over the course of his/her four-year term of office.

Chapter Five: Prosecutorial Professionalism

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

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

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

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

The State of Ohio does not require prosecuting attorneys' offices to establish policies on the exercise of prosecutorial discretion. We recognize, however, the State of Ohio has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Ohio Supreme Court has adopted the Ohio Rules of Professional Conduct, which requires prosecutors to, among other things, disclose to the defense all evidence or information known to the prosecutor that tends to

negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged information known to the prosecutor;

- The Ohio Supreme Court holds prosecutors responsible for disclosing not only evidence of which he/she is aware, but also favorable evidence known to others acting on the government's behalf;
- A Prosecuting Attorneys Association exists in Ohio to serve the needs of prosecutors by promoting "the study of law, the diffusion of knowledge, and the continuing education of its members."

Based on this information, the State of Ohio should, at a minimum, adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi-vii of the Executive Summary, that the courts in the State of Ohio more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

Chapter Six: Defense Services

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

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

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

Ohio's indigent trial and appellate legal representation system consists of the Office of the Ohio Public Defender, single county public defender offices, joint county public defender offices, non-profit corporations, and court-appointed counsel. The work of these offices and attorneys is supported and/or overseen by the Ohio Public Defender Commission, county public defender commissions, and joint county public defender commissions. The indigent defense system used in each county is determined by the local Board of County Commissioners, although in all counties, judges have sole or primary authority to appoint counsel. State post-conviction counsel generally is provided by the statewide Ohio Public Defender's Office. Together, these entities provide at least one attorney for indigent defendants charged with or convicted of a capital offense at every stage of the legal proceedings, except for clemency. While the State of Ohio does not provide for counsel to be appointed in clemency proceedings, however, the federal courts have held that federal habeas counsel may represent the defendant in clemency proceedings.

Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) for a number of reasons:

- The State of Ohio does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony;
- Ohio law does not contain any specific qualification or training requirements for attorneys representing death row inmates in state post-conviction or related proceedings; and

- The State of Ohio requires only twelve hours of training, professional development, and continuing legal education every two years to be eligible for appointment as a defense attorney and no training for other members of the defense team involved in capital cases; and

Based on this information, the State of Ohio should, at a minimum, adopt the Ohio Death Penalty Assessment Team's recommendations, previously discussed on page vi-vii of the Executive Summary, to:

(1) Adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction and any related proceedings so that they are consistent with the *ABA Guidelines*.
(2) Amend its statutes and rules to require the appointment of separate counsel for direct appeal and state post-conviction proceedings immediately after a judgment and sentence of death.

Chapter Seven: Direct Appeal Process

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

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

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

The Ohio Revised Code requires the court(s) on direct appeal to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."[10] In determining whether the sentence of death is appropriate, the court(s) "shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."[11]

Given that the State of Ohio generally limits its proportionality review to cases in which the death penalty was actually imposed, the meaningfulness of the Ohio Supreme Court's review is questionable. While the Ohio Supreme Court has reviewed over 250 death-imposed cases since proportionality review was required, it has never vacated a death sentence on this ground.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vii of the Executive Summary, to:

(1) Ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio's capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality;

(2) Employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in

[10] OHIO REV. CODE § 2929.05(A) (West 2007).

[11] *Id.*

which the death penalty could have been sought or was sought and not imposed;

(3) Create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality; and

(4) Engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of review.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, discovery in criminal trials is rather limited, and some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, so that state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Ohio's laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA's policies on state post-conviction.

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

State Post-Conviction Proceedings					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.		X			
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.			X		
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expiditing the proceedings.				X	
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.		X			
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in a capital case.			X		
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.		X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.		X			

State Post-Conviction Proceedings (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.		X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.		X			
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.		X			
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.					X

The State of Ohio has adopted some laws and procedures that facilitate the adequate development and judicial consideration of post-conviction claims—for example, Ohio law requires an automatic stay of execution throughout any initial post-conviction proceedings and Ohio law provides a right to counsel for all indigent post-conviction petitioners. But some laws and procedures have the opposite effect. The State of Ohio:

- Makes appointments for post-conviction counsel only when an attorney requests that counsel be appointed. Because appointments are made only upon request, the petitioner sometimes will receive counsel before the filing of the petition or upon the granting of an evidentiary hearing and sometimes will not. Consequently, while counsel and petitioner often have an opportunity to work together to fully develop all available claims for relief and amend the petition to include all such claims, it does not appear that this happens as a matter of course;
- Provides death-sentenced inmates only 180 days to file a post-conviction motion after the date on which the trial transcript is filed in the Ohio Supreme Court in the direct appeal of the judgment of conviction and sentence. While the inmate may amend his/her petition as a matter of right before the prosecuting attorney answers, after the state's answer is filed, the inmate may amend the petition only with leave of the court;
- Permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its

own, which could undermine the judge's duty to exercise independent judgment in deciding cases;

- Has in place a problematic discovery process. While death-sentenced inmates are required to successfully obtain an evidentiary hearing in order to partake in post-conviction discovery, their ability to assert the well-founded post-conviction claims necessary for an evidentiary hearing is thwarted because petitioners are denied access to the discovery procedures necessary to develop those claims. This is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims and, if the petitioner does somehow obtain evidence in support of such claims through the public records process, these records cannot be offered as attachments in support of his/her post-conviction petition.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation previously discussed on pages vii of the Executive Summary, that the State of Ohio amend its rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to submission of his/her post-conviction petition. In addition, the State should amend its law to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims.

Chapter Nine: Clemency

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

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

Clemency

Recommendation \ Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.				X	
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.				X	
Recommendation #4: Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.				X	
Recommendation #5: Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.				X	
Recommendation #6: Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*.			X		
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.			X		
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.		X			
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.		X			
Recommendation #10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.			X		
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.				X	

The Ohio Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for all offenses, including capital crimes, except treason and impeachment. Additionally, the Ohio Parole Board (Board) assists the Governor by making pardon, clemency, reprieve, and remission recommendations. While the Board has a set of procedures to be followed in death penalty cases, the process the Board and the Governor follow in considering clemency for death row inmates is largely undefined; for example:

- The Board is responsible for conducting an investigation into death penalty cases in preparation for the clemency hearing, but the scope of this investigation is not delineated in the Ohio Rev. Code or the Department of Rehabilitation and Correction's Death Penalty Clemency Procedure;
- Neither the Ohio Rev. Code nor the Death Penalty Clemency Procedure require or recommend that the Board consider any specific factors when assessing a death-sentenced inmate's eligibility for clemency; and
- Nothing requires the Governor to consider the Board's clemency recommendation and accompanying report or to consider any specific factors when assessing a death-sentenced inmate's clemency petition.

Not only is the clemency process largely undefined, but parts of the clemency application process also are problematic. For example, the State of Ohio does not provide for the appointment of counsel to indigent inmates petitioning for clemency.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation previously discussed on page vi of the Executive Summary, that the Governor of Ohio create a commission, with the power to conduct investigations, hold hearings, and test evidence to review claims of factual innocence in capital cases. This sort of commission, which would supplement the clemency process, is necessary, in large part because current procedural defaults and inadequate lawyering have prevented claims of factual innocence from receiving full judicial consideration and the clemency process currently is not equipped to handle them.

Chapter Ten: Capital Jury Instructions

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

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

Capital Jury Instructions

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

The State of Ohio has suggested pattern jury instructions covering the sentencing phase of a capital trial. These instructions are informative: they include, for example, definitions of mitigating and aggravating circumstances. Despite this, there are still problems. For example:

- While a myriad of studies have found that jurors provided with written court instructions pose fewer questions during deliberations, express less confusion about the instructions, use less time trying to decipher the meaning of the instructions, and spend less time inappropriately applying the law, and while some sort of audio, electronic, written, or other recording of the jury instructions must be made, the State of Ohio is required to reduce jury instructions to writing only when requested by a party to the case;
- Ohio law does not require, nor do the *Ohio Criminal Jury Instructions* recommend, that the court provide to the jury an explanation of the terms, "life imprisonment without the possibility of parole," "life imprisonment," or "parole;"
- The State of Ohio does not require an instruction stating that the jury may impose a life sentence if the juror does not believe that the defendant should receive the death penalty, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt; and
- The Ohio Supreme Court has held that "residual" or "lingering doubt" is not a mitigating circumstance and trial courts may not instruct on it.

Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. In addition, judges' decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society's confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Ohio's laws, procedures, and practices on the judicial election/appointment and decision-making processes and assessed whether they comply with the ABA's policies on judicial independence.

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

Judicial Independence					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.			X		
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.				X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.				X	
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Ohio's partially-partisan, partially-nonpartisan judicial election format for judges, combined with the high cost and increasingly political nature of judicial campaigns, has called into question the fairness of the judicial election process in Ohio for several reasons:

- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. For example, numerous judges and judicial candidates have run advertisements touting their experience in death penalty cases, their support for the death penalty, and their being "tough on crime;" and
- The influx of money into Ohio judicial elections from parties that may come before the judicial candidate has the potential to undermine the impartiality of the judiciary. An examination of the Ohio Supreme Court by *The New York Times* found that "its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."[12]

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Ohio's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

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

Racial and Ethnic Minorities

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

[12] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006.

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

Racial and Ethnic Minorities (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.			X		
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.				X	
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

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

In 1993, the Ohio Supreme Court and the Ohio Bar Association established the Ohio Commission on Racial Fairness (Commission) to (1) study "every aspect of the state court system and the legal profession to ascertain the manner in which African-Americans, Hispanics, Native Americans, and Asian-Americans are perceived and treated as parties, victims, lawyers, judges, and employees;" (2) determine "public perception of fairness or lack of fairness in the judicial system and legal profession;" and (3) make "recommendations on needed reforms and remedial programs."[13] The Commission found that "many of Ohio's citizens, particularly its minority citizens, harbor serious reservations about the ability of Ohio's current legal system to be fair and even-handed in its treatment of all of the state's residents regardless of race"[14] and was convinced that regardless of the findings contained in any empirical data it collected, recommendations were needed to address the perceptions of Ohio's citizens.

Furthermore, the Commission recognized that "[a] perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The

[13] RACIAL FAIRNESS IMPLEMENTATION TASK FORCE, ACTION PLAN (2002), *available at* http://www.sconet.state.oh.us/publications/fairness/Action-Plan-dev.pdf (last visited Sept. 13, 2007).
[14] *Id.* at 3.

implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers."[15] "Intended or not, disparate end results suggest that, when laws are drafted in such a way that they target certain minority communities for enforcement, and combine with arrest policies focusing on those same communities, and are then joined with sentencing guidelines, practices and policies that have devastating impacts on those exact same minority groups, a legitimate grievance is identified which demands redress, if fundamental fairness is to be obtained.[16]

The Commission made a series of recommendations covering the entire justice system, including, but not limited to, the following:

(1) The Supreme Court should establish an implementation task force on racial bias in the legal profession;
(2) The implementation task force should develop an anti-racism workshop curriculum to be implemented by the Ohio Judicial College, the Ohio State Bar Association, and the Ohio Continuing Legal Education Institute as an annual workshop offered to attorneys, judges, and courthouse personnel;
(3) The Ohio Supreme Court should require racial diversity education for jurors and for lawyers;
(4) All groups and organizations involved in the criminal justice system should engage in a continuing process of study and discussion with the objective of identifying and eradicating race based attitudes and practices;
(5) Statistical data as to race should be maintained in connection with sentences in all criminal cases;
(6) Law enforcement agencies should maintain statistical data as to race in connection with all arrests;
(7) The public defenders' offices should be expanded and upgraded to ensure equity between the prosecutorial function and defense function; and
(8) A Sentencing Commission should be established, as recommended by the Governor's Committee on Prison and Jail Crowding, to research and review sentencing patterns in Ohio courts.

In 2000, the Ohio Supreme Court created the Racial Fairness Implementation Task Force (Task Force) to develop a plan to implement the recommendations of the Ohio Commission on Racial Fairness. In its 2002 final report, the Task Force noted the importance of addressing the fundamental and perceived fairness in the criminal justice system, recognizing that "[i]n order to maximize the effectiveness of the criminal justice system, it is vitally important that all participants continue to work on continuous quality improvement – to make improvements in both the fairness and the perception of fairness of the system."[17] The Task Force's plan to implement the Commission's recommendations included, but was not limited to, the following:

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15 *Id.* at 37-38 (footnotes omitted).
16 *Id.* at 43-44 (footnotes omitted).
17 *Id.*

(1) Two hours of anti-racism/diversity training be added to the continuing legal education requirement for judges and attorneys for each reporting cycle;
(2) The Supreme Court facilitate research to determine whether and to what extent there is minority under-representation in Ohio state courts;
(3) The Supreme Court of Ohio offer continuing legal education courses for lawyers and judges with the aim of eradicating race-based attitudes and practices through the justice system;
(4) The Supreme Court of Ohio ensure that statistical data regarding race is maintained in connection with sentences in all criminal cases;
(5) Law enforcement agencies should be encouraged to continue or begin to implement the collection of statistical data about race in connection with all arrests and stops; and
(6) The Supreme Court of Ohio should engage a person/entity with the necessary skill and experience to design methodologies for collecting data on race at all relevant stages of the criminal justice system, and to monitor its compilation.

To date, these recommendations have not been implemented.

Neither of the State's efforts have studied the administration of the death penalty or resulted in the implementation of any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in death penalty proceedings.

Because the State of Ohio has not conducted a study designed to determine whether racial bias exists in Ohio's capital punishment system, the full extent of the issue cannot be known, nor can steps to develop new strategies to eliminate the role of race in capital sentencing be fully implemented.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vii of the Executive Summary, to conduct and release a comprehensive study to determine the existence or non-existence of unacceptable disparities--racial, socio-economic, geographic, or otherwise--in its death penalty system, and provide a mechanism for ongoing study of these factors.

Chapter Thirteen: Mental Retardation and Mental Illness

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

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

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

Mental Retardation (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.		X			

The State of Ohio does not have a statute banning the execution of mentally retarded offenders, but following the United States Supreme Court decision in *Atkins v. Virginia*, the Ohio Supreme Court confirmed, in *State v. Lott*, that Ohio courts should use the clinical definitions of mental retardation cited with approval in *Atkins* to assess whether a capital defendant was mentally retarded at the time of the offense.

Ohio comports with many of the ABA recommendations in this area, including that:

- Ohio courts adhere to the American Association on Intellectual and Developmental Disabilities (AAIDD) definition of mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18;"[18]
- Ohio law allows for a determination of mental retardation as a bar to execution in the pretrial stages; and
- While the burden of proof is on the defense to prove mental retardation, he/she is only required to prove mental retardation at trial by a preponderance of the evidence and in post-conviction by clear and convincing evidence.

We also reviewed Ohio's laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA's policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a

[18] State v. Lott, 779 N.E.2d 1011, 1013-14 (Ohio 2002).

defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

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

Mental Illness					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.		X			
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.		X			
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.			X		

Mental Illness (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.		X			
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.				X	
Recommendation #6: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
Recommendation #7: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		

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

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

The State of Ohio has taken some minimal steps to protect the rights of individuals with mental disorders or disabilities by requiring or providing the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, law enforcement officers receive—as part of their basic training course—sixteen hours of training on the "special needs population," including information on the causes and symptoms of several mental illnesses, as well as how to respond to a person who the officer believes to be mentally ill. Despite this, the State of Ohio does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Ohio does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner's input;
- The State of Ohio does not provide a mechanism for "next friend" petitioners to act on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision. This is particularly concerning given that nearly a quarter of the individuals executed since Ohio resumed executions in 1999--seven of the twenty-six inmates executed in Ohio--waived either part or all of their post-conviction appeals and effectively "volunteered" to be executed;
- While the State of Ohio permits a court to hold a competency hearing to determine whether an inmate is competent to waive or withdraw his/her post-conviction review, there is no constitutional or statutory entitlement to competency to proceed with post-conviction relief and the petitioner need not be competent to participate. Consequently, the State of Ohio does not stay post-conviction proceedings where a death-row inmate's mental disease or defect impairs the inmate's ability or capacity to understand, communicate, or otherwise assist counsel in connection with post-conviction proceedings;
- The State of Ohio provides no statutory right to appointment of a mental health expert in post-conviction proceedings, nor does it appear that post-conviction courts use their discretion to appoint experts; and
- The State of Ohio does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing, nor does it have a pattern jury instruction on the administration of medication to the defendant for a mental disorder or disability.

Based on this information, the State of Ohio should adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi-vii of the Executive Summary, to adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.