

**Defending Liberty
Pursuing Justice**

**THE STATE OF THE DEATH PENALTY:
EVALUATING FAIRNESS AND ACCURACY IN STATE
DEATH PENALTY SYSTEMS**

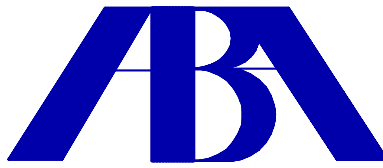
Key Findings, Compliance Levels, and Executive Summaries

“A system that takes life must first give justice.”

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The American Bar Association Death Penalty Moratorium Implementation Project (the Project) is pleased to present this publication, *The State of the Death Penalty: Evaluating Fairness and Accuracy in State Death Penalty Systems*.

The Project expresses its great appreciation to all those who helped to develop, draft, and produce each of the eight state death penalty assessment reports. The efforts of the Project and the death penalty assessment teams were aided by many lawyers, academics, judges, and others who presented ideas, shared information, and assisted in the examination of each state capital punishment system. We would like to offer particular thanks to each of the state team leaders: Daniel M. Filler, Sigmund “Zig” Popko, Christopher Slobogin, Anne S. Emanuel, Joel Schumm, Phyllis Crocker, Anne Bowen Poulin, and Dwight L. Aarons. Additional thanks goes to the team members on each of the state death penalty assessment teams, as well as to the law student researchers in each of the eight states.

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STATE DEATH PENALTY ASSESSMENTS KEY FINDINGS

As a society, we must do all we can to ensure a fair and accurate system for every person who faces the death penalty. When a life is at stake, there is no room for error or injustice. The American Bar Association, working with in-state teams, assessed the fairness and accuracy of eight state death penalty systems. To do this, the state-based teams researched twelve issues: (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) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. While the requisite data often was not collected, maintained, or made available in a way that made analysis possible, general themes emerged in each of the topic areas. Ultimately, serious problems were found in every state death penalty system.

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 states' laws and on state law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. We examined each state's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence. After examining eight states, the themes that emerged include:

- States generally are failing to require the preservation of physical and/or biological evidence through the entire legal process and after release from prison or execution, thereby increasing the possibility that crucial evidence that could prove innocence will be destroyed; and
- DNA testing statutes often are drafted too narrowly, with strict filing deadlines and onerous procedural hurdles, making it difficult for a wrongfully convicted person to successfully file for and obtain DNA testing.

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. After examining eight states, the themes that emerged include:

- States are not requiring law enforcement agencies to adopt procedures that comport with identified national best practices on identifications and interrogations; and
- Most states are not requiring law enforcement agencies to videotape or audiotape the entirety of custodial interrogations in murder cases. While some

law enforcement agencies are in fact taping interrogations, this practice is limited and sporadic in the eight states studied.

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. After examining eight states, the themes that emerged include:

- States are not requiring that crime laboratories and medical examiner offices be accredited;
- Most states have had at least one serious incident of crime lab mistake or fraud;
- Many states are failing to require that state crime laboratories make their standards and procedures public;
- Most state crime laboratories are not utilizing the newest and/or most sophisticated methods of DNA testing; and
- Many crime labs are seriously underfunded.

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. After examining eight states, the themes that emerged include:

- States are not establishing policies, nor are they requiring prosecutors' offices to establish policies, on the exercise of prosecutorial discretion, or on evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit;
- Many states are failing to require that prosecutors who handle capital cases receive any specialized training; and
- Most states have cases in which courts have found serious misconduct by prosecutors in capital cases, yet the prosecutors are not disciplined by the state disciplinary organization or by the prosecutor's office.

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. After examining eight states, the themes that emerged include:

- Many states are failing to provide a statewide indigent capital defense system, providing services instead on a county-by-county basis;
- The judiciary remains primarily responsible for appointing defense counsel;
- Some states are failing to provide for the appointment of counsel in post-conviction proceedings and all states are failing to provide for the appointment of counsel in clemency proceedings;
- Capital indigent defense systems, whether statewide or county-by-county, generally are significantly underfunded;
- Many states are failing to provide for the appointment of two lawyers at all stages of a capital case, nor are they guaranteeing access to investigators and mitigation specialists;
- Many states are requiring only minimal training and experience for attorneys handling death penalty cases; and
- The compensation paid to appointed capital defense attorneys is often woefully inadequate, dipping to well under \$50 per hour in some cases.

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 sentencing phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or result in improper racial or geographic disparities. 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. After examining eight states, the themes that emerged include:

- Some states are not required to conduct a proportionality review and, in those that are, the review tends to be cursory and include only cases where death was imposed, leaving out potentially important cases where death was sought but not imposed and where death could have been, but was not sought; and
- Few, if any, states maintain the sort of capital case database that would include case information on actual and potential capital cases to make meaningful proportionality review easier to achieve.

State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be

conducted in a manner designed to permit adequate development and judicial consideration of all claims. After examining eight states, the themes that emerged include:

- Many states provide unreasonably short time periods in which to file post-conviction petitions;
- Most states allow the post-conviction judge to adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own, potentially undermining the judge's duty to exercise independent judgment;
- Some states assign post-conviction cases to the original trial judge, creating the potential for and/or the appearance of bias;
- Many states make it difficult, if not impossible, to obtain discovery materials in post-conviction;
- Many states make it difficult to obtain an evidentiary hearing and afford the post-conviction judge many opportunities to summarily deny a post-conviction petition; and
- Some states make it difficult to raise claims of error, including wrongful conviction errors, in post-conviction proceedings.

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. After examining eight states, the themes that emerged include:

- Most states fail to require any specific type or breadth of review in considering clemency petitions;
- Most states do not require the clemency decision-maker to explain the reasons why clemency was or was not granted; and
- Very few states require that the clemency decision-maker meet with the petitioning inmate and/or the inmate's counsel.

Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must, through jury instructions, present clearly and accurately 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. After examining eight states, the themes that emerged include:

- Jurors in many states appear to have difficulty understanding their roles and responsibilities as described by the judge in his/her jury instructions;
- Many states fail to provide, as a matter of course, written jury instructions;

- Many states fail to define important terms of art, such as “life imprisonment without the possibility of parole” when instructing the jury; and
- Most states fail to require that the jury be instructed that it may impose a life sentence if a juror does not believe that the defendant should receive the death penalty, even in the absence of any mitigating factors, and even where an aggravating factor is established beyond a reasonable doubt.

Judicial Independence

With increasing frequency, judicial elections, appointments, and confirmations are being 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, undermining society’s confidence that individuals in court are guaranteed a fair hearing. After examining eight states, the themes that emerged include:

- Judicial elections are used in most states for at least some judicial positions, and some of these judicial elections are partisan;
- The cost of judicial elections have risen quickly and significantly in many states; and
- Judicial candidates in many states have discussed and advertised their views of the death penalty.

Racial and Ethnic Minorities

To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. After examining eight states, the themes that emerged include:

- Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim;
- Even in states with acknowledged racial disparities, little, if anything, has been done to rectify the problem; and
- Generally, states are not keeping the data necessary to conduct the sort of analysis necessary to quantify any problem with bias and identify its causes, making the process of conducting analysis difficult, if not impossible.

Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 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 was mentally retarded at the time of the offense.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant. After examining eight states, the themes that emerged include:

- States do not have policies in place to ensure that people with mental retardation or mental illness are represented by attorneys who fully appreciate the significance of their client's mental disability;
- States do not formally commute a death sentence upon a finding that the inmate is incompetent to proceed on factual matters requiring the inmate's input; and
- Most states fail to require that jurors be 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.