Defending Liberty
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EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Alabama Death Penalty Assessment Report

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

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

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Lastly, in this publication, the Project and the Assessment Team has attempted to note as accurately as possible information relevant to the Alabama 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.

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EXECUTIVE SUMMARY

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. 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 there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. 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 sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project has conducted or is conducting state assessments in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, South Carolina, Texas, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. This assessment of Alabama is the second in this series.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using 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, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial

and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with death penalty administration, including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has 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) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about 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 of the land 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. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Alabama 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 Alabama Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions, including its belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Alabama's capital punishment system.

II. HIGHLIGHTS OF THE REPORT – STRENGTHS AND WEAKNESSES

A. Overview

To assess fairness and accuracy in Alabama's death penalty system, the Alabama Death Penalty Assessment Team 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. The Alabama Death Penalty Assessment Report summarizes the research on each issue and analyzes the level of compliance with the relevant ABA Recommendations.

B. Areas for Reform

The Alabama Death Penalty Assessment Team has identified a number of areas in which Alabama'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 with Alabama'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 sound procedures in others. With that in mind, the Alabama Death Penalty Assessment Team views the following problem areas as most in need of reform:

- Inadequate Indigent Defense Services at Trial and on Direct Appeal – While many individual indigent defense lawyers in the State of Alabama are competent and effective, the State's indigent defense system is failing. At best, it is described as a "very fragmented, mixed, and uneven system that lacks level oversight and standards . . . and does not provide uniform, quality representation to the majority of indigent defendants in the state." The State's failure to adopt a statewide public defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in a hodge-podge of systems that varies by judicial circuit in both type and quality. These problems are seriously exacerbated in the context of indigent defense in capital cases. Capital trial practice is unique and requires special skills that are not part of the standard training and experience of criminal defense attorneys. This patchwork indigent defense system, combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable. The importance of the State's requiring and ensuring that indigent defense lawyers at trial and on direct appeal be held to the performance standards set in the ABA *Guidelines for the Appointment and Performance in Death Penalty Cases* cannot be overemphasized. The Judicial Study Commission of the Alabama Supreme Court, and a committee of the Alabama State Bar have proposed legislation at various times since 2000 to create a statewide indigent defense commission which would oversee indigent defense in Alabama. Thus far, efforts at getting such legislation passed have been unsuccessful. The commission concept is modeled after that used in many other

states across the country. If established as proposed, the Commission would have the final decision on what type of indigent defense system would be used in each circuit, which would assist in eliminating the questionable control over indigent defense services which exist throughout the state. It would also assume the responsibility for approving vouchers of appointed counsel, and would establish a statewide budget for indigent defense. The bill, if passed, would assist in providing some accountability for the funds spent on indigent defense in Alabama, and would, hopefully and more importantly, improve the quality of defense representation.

- Lack of Defense Counsel for State Post-conviction Proceedings – With one exception, Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings. This failure creates a situation where this critical constitutional safeguard is seriously undermined. The importance of the State's requiring and ensuring that indigent defense lawyers in state post-conviction proceedings be held to the performance standards set in the ABA *Guidelines for the Appointment and Performance in Death Penalty Cases* cannot be overemphasized.
- Lack of a Statute Protecting People with Mental Retardation from Execution – Despite the United States Supreme Court decision in *Atkins v. Virginia* banning the execution of mentally retarded offenders, Alabama has not adopted a law setting out standards and procedures for determining which individuals have mental retardation. As a result, and despite repeated judicial requests for legislative guidance, the Alabama courts have been forced to fashion a stopgap process for dealing with claims of mental retardation. The legislature's abdication of its responsibility has resulted in a legitimate and continuing risk that the State of Alabama may execute mentally retarded offenders, despite the constitutional prohibition against it.
- Lack of a Post-conviction DNA Testing Statute – While the State enables defendants to obtain physical evidence for DNA testing during pre-trial discovery, the State has failed to pass legislation providing convicted offenders a clear method for obtaining post-conviction DNA testing. As a result, petitioners seeking post-conviction DNA testing must seek such relief under post-conviction rules that do not adequately protect against the execution of the innocent. Furthermore, individuals that file newly discovered evidence claims to obtain DNA testing may find it difficult, if not impossible, to have their claims heard.
- Inadequate Proportionality Review – In conducting its proportionality review, the Alabama Court of Criminal Appeals looks only to cases where the death penalty was imposed under similar circumstances, rather than also considering 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. Proportionality review that considers only cases where the death sentence was imposed is inherently limited and incapable of uncovering potentially serious disparities—whether those disparities are socio-economic, geographical, racial or ethnic, or attributable to any other inappropriate factor. In addition, many of the decisions that claim to do a proportionality review simply dismiss the issue with conclusory language and no reference to other comparable cases. Finally, even where courts cite comparable cases, they virtually never follow the statutory requirement that proportionality review consider both the crime and the offender.

- Lack of Effective Limitations on the "Heinous, Atrocious, or Cruel" Aggravating Circumstance – The language of this aggravating circumstance ("the capital offense was especially heinous, atrocious or cruel compared to other capital offenses") has not been interpreted in a manner that provides a basis for distinguishing between those cases in which the death penalty is properly imposed from those cases in which the death penalty is not. Because Alabama courts have not systematically reviewed cases involving this aggravating circumstance, and have thus failed to fully enforce the statutory requirement that prosecutors establish the comparative atrocity of a given capital murder as compared to other capital murders, this aggravating factor is not subject to any meaningful or rational limitation. It thus has the potential to be improperly used as a mere catch-all provision.
- Capital Juror Confusion – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Alabama capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. Over 54% of interviewed Alabama capital jurors did not understand that they could consider any evidence in mitigation, over 53% erroneously believed that the defense had to prove mitigating factors beyond a reasonable doubt, and over 55% did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. In addition, a full 40% of capital jurors interviewed did not understand that they must find that one or more statutory aggravating circumstances exist beyond a reasonable doubt, over 56% incorrectly believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 52% erroneously believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death. This research data suggests that jurors are recommending death sentences based on serious legal errors.

C. Alabama Death Penalty Assessment Team Recommendations

In addition to endorsing the recommendations found in each section of the report, the Alabama Death Penalty Assessment Team makes the following recommendations:

(1) The State of Alabama should eliminate judicial override of a jury's recommendation of life without parole in capital cases. Alabama is one of only four states that allow such overrides. Further complicating the issue, Alabama is the only state with such override that selects its judges in partisan elections. This combination can cause bias or the appearance of bias. For example, 90% of overrides in Alabama are used to impose sentences of death, but in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life. There are at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation for a life without parole sentence. Arthur Green dissents from this recommendation.

(2) The State of Alabama should sponsor a study of the administration of its death penalty to determine the existence or non-existence of unacceptable disparities, socio-economic, racial, geographic, or otherwise.

(3) The State of Alabama should establish a clearinghouse to collect data on its death penalty system. At a minimum, this clearinghouse should collect data on each judicial circuit's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Alabama Court of Criminal Appeals for use in conducting its proportionality review.

(4) The State of Alabama should require that the jury be unanimous before it may recommend a sentence of death.

(5) The State of Alabama should create a statewide indigent defense commission that would be responsible for overseeing all indigent defense activities in the State.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice system in the State of Alabama, our research establishes that at this point in time, the State cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Because of that, the members of the Alabama Death Penalty Assessment Team, except Arthur Green who dissents, join with over 450 other organizations, religious institutions, newspapers, and city/town/county councils[1] and call on the State of Alabama to impose a temporary moratorium on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular the Executive Summary.

III. SUMMARY OF THE REPORT

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

In this Chapter, we examined the demographics of Alabama's death row, the statutory evolution of Alabama's death penalty scheme, and the progression of an ordinary death penalty case through Alabama's 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 Alabama's laws, procedures, and practices concerning not only DNA testing, but also the

[1] Of these organizations, businesses, religious institutions, newspapers, and city/town/county councils that have called for a moratorium on executions in Alabama, the following city/town/county councils are included: Town of Akron; City of Bessemer; City of Birmingham; Town of Boligee; City of Brighton; County of Bullock; Town of Camp Hill; County of Clayton; City of Colony; City of Epes; Town of Emelle; City of Eutaw; City of Fairfield; Town of Five Points; Town of Forkland; Town of Gainesville; Town of Geiger; Town of Gordonville; County of Greene; Town of Hayneville; City of Hobson; City of Hurtsboro; City of La Fayette; Town of Lisman; City of Leighton; County of Lowndes; County of Macon; Town of Midway; Town of Mosses; City of North Courtland; City of Prichard; City of Ridgeville; City of Selma; County of Sumter; City of Tuskegee; City of Union Springs; City of Uniontown; Town of White Hall; County of Wilcox; and Town of Yellow Bluff. *See* Equal Justice USA, National Tally, *available at* http://www.quixote.org/ej/ (last visited May 25, 2006).

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

A summary of Alabama'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 chart below.[2]

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

The State of Alabama does not require governmental entities in possession of physical evidence from a criminal case to preserve all biological material until a defendant is executed. Furthermore, while the State enables defendants to obtain physical evidence for DNA testing during pre-trial discovery, it does not provide inmates a clear method to

[2] 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.

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

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

seek post-conviction DNA testing. In addition, Alabama fails to require law enforcement agencies to establish and enforce written procedures and policies governing the preservation of biological evidence. Some of the procedural ambiguities and restrictions that are particularly problematic include:

- The State of Alabama does not have any uniform procedures for the preservation of evidence during the capital trial or any uniform requirements for how long evidence must be preserved after the conclusion of the defendant's capital trial;
- The State of Alabama does not have a separate mechanism for seeking post-conviction DNA testing and consequently, post-conviction petitioners must seek such relief under post-conviction rules that do not adequately protect against the execution of the innocent;
- A death-row petitioner who files a post-conviction petition within the permitted time limits may seek DNA testing of evidence in his/her case as an appropriate ground for relief of the constitutional violation of wrongful conviction. However, for many death-row petitioners, the time for making such a claim had run before DNA testing was widely used or within the knowledge of inmates, law enforcement, and the judiciary;
- Petitioners who fail to request post-conviction DNA testing within the legal time frame technically still may be able to bring a claim of newly discovered evidence, so long as they file the request within six months of discovering the new evidence. It appears, however, that even this outlet may not be available to all death-row petitioners. Alabama courts appear inclined to dismiss claims of newly discovered evidence as untimely by starting the six month time limit in 1991, the year that Alabama courts began recognizing DNA testing as admissible. The courts then dismiss the petitioner's allegation that s/he only recently became aware of DNA testing as not credible and failing to provide a rationale for overcoming the time bar. This interpretation fails to take into account the evolution of DNA testing since its inception and particularly the progressive development of new testing methods allowing accurate testing of increasingly smaller and more degraded samples of varied types of biological evidence; and
- Claims of newly discovered evidence and the normal post-conviction discovery procedures require the new evidence to "exist" before such a claim can be reviewed on the merits. Because the results of the testing, rather than the method of testing itself, can be construed as the newly discovered evidence, a claim of newly discovered evidence cannot be made until testing is performed and the results are discovered. This means that a petitioner likely would not have a meritorious claim for DNA testing through post-conviction discovery without first knowing the results of such testing, resulting in petitioners being unable to discover the evidence they need to prove their innocence.

To eliminate at least some of these ambiguities and restrictions, the State of Alabama should enact a separate post-conviction DNA testing law that clarifies and expands the mechanism for requesting post-conviction DNA testing and its corresponding time limitations.

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 Alabama'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 Alabama's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the chart below.

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 American Bar Associations 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 photspreads, 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 of Alabama should provide adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	

Law Enforcement Identifications and Interrogations (Con't.)					
Recommendation / *Compliance*	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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 Alabama for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Alabama are required to complete a basic training course that includes instruction on interviewing and questioning techniques;
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications; and
- Alabama courts allow a jury instruction that provides jurors with information about the shortcomings and trouble spots of the eyewitness identification process.

Despite these measures, the State of Alabama does not require law enforcement agencies to adopt procedures on identifications and interrogations nor does it appear than any Alabama law enforcement agencies videotape or audiotape the entirety of custodial interrogations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Alabama should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA's recommendations. In addition, the State should mandate that law enforcement agencies record the entirety of custodial interrogations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

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

practices comply with the ABA's policies on crime laboratories and medical examiner offices.

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

Crime Laboratories and Medical Examiner Offices					
Recommendation / Compliance	*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 preservation, validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Alabama does not require crime laboratories or medical examiner offices to be accredited, but nine of the ten crime laboratories in the Department of Forensic Sciences (Department) are accredited and are required by the accrediting body to adopt written standards and procedures on handling, preserving, and testing forensic evidence. Neither the accrediting body nor Alabama statutory law, however, require Department crime laboratories to publish these standards and procedures, nor must they be made public before becoming effective. Therefore, the contents of the Department standards and procedures, along with the other crime laboratories around the state, are unknown.

In addition, while the State of Alabama requires the Department's Chief Medical Examiner to be a pathologist certified in forensic pathology and other Department medical examiners to be forensic pathologists who graduated from accredited medical schools and completed up to five years of additional training in pathology and one year in forensic pathology, the Office of the Chief Medical Examiner does not currently employ any standard operating procedures to maintain reliability and consistency in its work among its four offices. Additionally, the Office of the Chief Medical Examiner does not provide standardized training for new and existing state medical examiners to ensure the validity and reliability of medical examiners' death investigations.

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 Alabama'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 Alabama's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the chart below.

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 Alabama does not require district attorneys' offices to establish policies on the exercise of prosecutorial discretion or on evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other

witnesses who receive a benefit. Furthermore, Alabama does not require that the prosecutors handling capital cases receive any specialized training. The State of Alabama, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Alabama has entrusted the Alabama State Bar Association with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Alabama State Bar Association has established the Alabama Rules of Professional Conduct, which address prosecutorial discretion in the context of the role and responsibilities of prosecutors;
- The State of Alabama has established the Office of Prosecution Services to assist prosecuting attorneys throughout the state in a number of different ways, including offering training courses, preparing and distributing a basic prosecutor's manual and other educational materials, and promoting and assisting with the training of prosecuting attorneys; and
- The Alabama Court of Criminal Appeals has held prosecutors responsible for disclosing not only evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf."

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

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		

Defense Services (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation			X		
Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training			X		

The State of Alabama's indigent defense system is a "very fragmented, mixed, and uneven system that lacks level oversight and standards … and does not provide uniform, quality representation to the majority of indigent defendants in the state." The State's failure to adopt a statewide public defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in the State being incapable of delivering quality counsel in all capital cases.

In addition, the indigent capital defense system falls far 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 Alabama does not guarantee counsel at every stage of the proceedings. Indigent defendants charged with a capital felony for which the death penalty is being sought have a right to appointed counsel at trial and on direct appeal. However, death-sentenced inmates are not entitled to appointed counsel in state post-conviction or clemency proceedings;
- Alabama statutory law contains only minimal qualification requirements for attorneys handling death penalty cases. Further, these qualifications are not always enforced and there is no mandated consequence or recourse in cases in which an attorney is appointed who fails to comply with these minimal qualifications;
- The State of Alabama does not guarantee two lawyers at every stage of the proceedings, nor does it guarantee the assistance of an investigator and mitigation specialist;
- The compensation caps of $2,000 for defense services in direct appeal proceedings and $1,000 in state post-conviction proceedings are far too low to ensure that lawyers have the funds necessary to present a vigorous defense or to attract the most experienced and qualified lawyers to these cases;
- The State of Alabama has failed to remove the judiciary from the attorney appointment process; and
- Alabama does not require any training for capital defense attorneys beyond the State Bar of Alabama requirement that all lawyers complete twelve hours of continuing legal education per year.

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 sentencing 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 Alabama'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 Alabama's overall compliance with the ABA's policies on the direct appeal process is illustrated in the chart below.

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 Alabama Code requires that the Alabama Court of Criminal Appeals determine whether the defendant's sentence of death is excessive or disproportionate by comparing the "penalty imposed in similar cases considering both the crime and the defendant." In practice, however, the Alabama Court of Criminal Appeals has not followed this statutory requirement in several respects. First, it has not considered cases where death was not imposed. Second, it has often issued decisions with cursory and conclusive claims of proportionality, without reference to any other cases. And finally, it has repeatedly failed to account for the defendants, focusing exclusively on general attributes of the crimes alone.

Given the scope of the cases considered by the Court of Criminal Appeals and the cursory manner in which the proportionality review is explained, the proportionality review conducted by the Alabama Court of Criminal Appeals appears to be of limited value. In order to increase the meaningfulness of its proportionality review, the Alabama

Court of Criminal Appeals should thoroughly review cases in which the death penalty 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.

Chapter Eight: State Post-Conviction Proceedings

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

State Post-Conviction Proceedings

Recommendation \ Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.				X	
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X	
Recommendation #3: Judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X	
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.		X			
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		

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 #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.			X		
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the ABA Guidelines on the Appointment and Performance of Death Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.			X		
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.		X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.				X	
Recommendation #11: 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 Alabama has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—for example, courts permit second and successive petitions under certain circumstances. But some laws and procedures have the opposite effect, such as:

- Post-conviction cases in Alabama usually are assigned to the original trial-level sentencing judge. Although the sentencing judge has knowledge of relevant facts and issues in the case, a potential for or the appearance of bias exists under this scenario, as post-conviction proceedings stem from a decision in which the same judge presided. A judge's ability to exercise independent judgment, therefore, may or may appear to be compromised, resulting in a petitioner not being afforded adequate judicial consideration of his/her claims;

- The State of Alabama provides only a short period of time to file a post-conviction petition after one's conviction and sentence become final and an even shorter amount of time for filing following the discovery of new evidence, potentially inhibiting the full development of the record upon which the *habeas* court bases its decision; and
- Alabama law only applies the "knowing, understanding, and voluntary" standard for waivers of constitutional and state law claims to claims of "sufficient constitutional magnitude," meaning that the review of potentially viable claims can be barred even without the petitioner's "knowing, understanding, and voluntary" waiver of those claims.

The effect of these issues on the adequate development and judicial consideration of claims is even more acute in a post-conviction proceeding where the petitioner may not be represented by counsel. In Alabama, death-sentenced inmates do not have a right to appointed counsel after direct appeal, leaving them in many cases to represent themselves or to obtain *pro bono* representation in order to pursue state post-conviction relief.

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 Alabama's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Alabama Board of Executive Clemency's criteria for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

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

Clemency					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.				X	

Clemency (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction.			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: Clemency determinations should be insulated from political considerations or impacts.			X		

The Alabama Constitution gives the Governor the exclusive authority to grant reprieves and commutations to people under sentence of death. The process an inmate follows in applying for clemency and the process the Governor follows in considering a clemency application is largely undefined and each Governor may conduct the process and s/he wishes. A hearing is not guaranteed and the Governor is not required to consider any

specific facts, evidence, or circumstances, or perform any specific procedures when making his/her decision regarding a clemency petition.

Not only is the process largely undefined, but parts of the clemency decision making process are confidential as well. For example, the Governor is not required to release to the public the evidence s/he considered during the clemency process. Furthermore, the Governor is not required to release his or her reasons for granting or denying an inmate's clemency petition.

Given the ambiguities and lack of structure surrounding Alabama's clemency process, the State of Alabama should adopt more explicit factors to guide the consideration of clemency petitions and should open the hearing and decision making process to ensure transparency.

Chapter Ten: Voir Dire and 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 Alabama'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 Alabama's overall compliance with the ABA's policies on capital jury instructions is illustrated in the chart below.

Capital Jury Instructions					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should work with certain specialists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary, 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.				X	

Capital Jury Instructions (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
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.			X		
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	X				

Jurors in Alabama appear to be having difficulty understanding their roles and responsibilities, as described by the judge in his/her charge to the jury. This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions. Consequently, it is no surprise that 54.7% of interviewed capital jurors in Alabama did not understand that they could consider any evidence in mitigation and that 53.8% believed that the defense had to prove mitigating factors beyond a reasonable doubt. Similarly, 55.8% of interviewed capital jurors in Alabama did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. Alabama capital jurors not only are confused about the scope of mitigation evidence that they may consider, but also about the applicable burden of proof and the unanimity of finding required for mitigating factors.

Capital jurors in Alabama also have had difficulty understanding the requirements associated with finding the existence of statutory aggravating factors. A full 40% of capital jurors interviewed in Alabama do not understand that they must find that one or more statutory aggravating circumstances exist beyond a reasonable doubt. In addition, capital jurors fail to understand the effect of finding that the defendant's conduct was

"heinous, vile or depraved" or that the defendant would be dangerous in the future. Although a sentence of death is not required upon a finding of one or more aggravating circumstances, 56.3% of interviewed Alabama capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt. Similarly, 52.1% of interviewed Alabama capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

Some additional problems include:

- Alabama statutes, rules, and case law not only fail to require judges to distribute written copies of the judge's oral charge to jurors, but the Alabama Rules of Criminal Procedure state that the judge generally is *not to provide* the jury with a copy of the charges against the defendant or the "given" written jury instructions, except in a "complex" case when the court has discretion to give the jury a copy of the "given" written instructions;
- Even though Alabama includes "life without parole" as the only sentencing option for capital murder besides death, Alabama capital juries remain vulnerable to underestimating the total number of years a capital murderer sentenced to life without parole serves in prison and making their sentencing decisions based on inaccurate beliefs as to the state's parole practices. In interviews with capital jurors in Alabama, the median estimate of the amount of time served in prison by capital murderers not sentenced to death was fifteen years, despite Alabama's mandatory life without parole minimum sentence; and
- Alabama does not allow the jury to recommend life imprisonment unless (1) it fails to unanimously agree on the existence of one or more aggravating circumstances or (2) the jury unanimously agrees that one more aggravating circumstances have been proven beyond a reasonable doubt, but at least seven jurors believe that the aggravating circumstances do not outweigh the mitigating circumstances. Alabama law does not allow the jury to recommend life imprisonment if the aggravating circumstances outweigh the mitigating circumstance.

<u>Chapter Eleven: Judicial Independence</u>

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, judge's 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. In this Chapter, we reviewed Alabama'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 Alabama's overall compliance with the ABA's policies on judicial independence is illustrated in the chart below.

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 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	

Alabama's partisan judicial election format, combined with the rising costs and increasing political nature of Alabama judicial campaigns, have called into question the fairness of the judicial election process in Alabama for a number of reasons:

- Judicial candidates sometimes campaign on criminal justice issues, including the death penalty. For example, in 1996, an Alabama Court of Criminal Appeals judge, who was also a candidate for the state's supreme court, accused the

Alabama Supreme Court of being "too left and too liberal" in capital cases and challenged the court to set execution dates in twenty-seven cases that were pending in the federal courts on *habeas corpus* review; and

- The prospect of soliciting contributions from special interests and being publicly pressured to take positions on issues they must later decide as judges threatens to discourage many people from seeking judicial office. Between 1994 and 1998, political parties were the largest source of campaign funds for judicial candidates, contributing $6.3 million, or 34 percent of all contributions. In addition to political parties, attorneys, law firms, and legal political action committees contributed nearly $4 million, approximately 22 percent of the total raised. Other business interests contributed approximately $5.86 million, or 32 percent. Between 1994 and 1998, approximately 63 percent of the cases heard by the Alabama Supreme Court involved campaign contributors who had given to a judge hearing the case.

Chapter Twelve: 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. In this Chapter, we examined Alabama'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 Alabama's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the chart below.

Racial and Ethnic Minorities					
Compliance / **Recommendation**	***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 potentially capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.		X			

Racial and Ethnic Minorities (con't.)					
Recommendation / Compliance	*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 #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.			X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.		X			
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.				X	
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

Whatever the cause, Alabama's death penalty system reflects serious racial disparities. Specifically, twenty-eight out of the thirty-four people—over 82%—who have been executed in Alabama since 1976 were convicted of killing white people, despite the fact that over sixty-five percent of all murders each year in Alabama involve black victims. Eighty percent of Alabama's current death row prisoners were convicted of murdering white people. Thus, it appears that those convicted of killing white victims are far more likely to receive a death sentence than those convicted of killing non-white victims.

Although the State of Alabama agreed to examine the impact of racial discrimination in its criminal justice system, specifically in sentencing, there is no indication that it has done so, nor has it taken steps to develop new strategies to eliminate the role of race in capital sentencing. Furthermore, the State of Alabama does not currently collect and maintain the data necessary to fully evaluate the impact of race in capital sentencing.

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. This discretion includes, but is not limited to, the ability to define mental retardation and the burden of proof for mental retardation claims. In this Chapter, we reviewed Alabama's laws, procedures, and practices pertaining to mental retardation and the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Alabama's overall compliance with the ABA's policies on mental retardation and the death penalty is illustrated in the chart below.

Mental Retardation and Mental Illness					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death row inmates.			X		
Recommendation #3: Jurisdictions should ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their clients' mental limitations. These attorneys should have sufficient training, funds, and resources.			X		

Mental Retardation and Mental Illness (con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.				X	
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.			X		

Despite the United States Supreme Court decision in *Atkins v. Virginia* banning the execution of mentally retarded offenders, the State of Alabama still has not passed a law banning the execution of the mentally retarded, defining mental retardation in this context, or establishing procedures for when and how these determinations will be made. Consequently, the Alabama courts have been forced to create a piecemeal process for dealing with claims of mental retardation. Some of the problems with this piecemeal process include:

- In defining mental retardation, there appears to be judicial uncertainty as to whether an IQ score in the low or mid-70s disqualifies a defendant or death row inmate from being found to have mental retardation. In deciding this issue, the Alabama Court of Criminal Appeals has inconsistently applied a somewhat broader definition of mental retardation than the Alabama Supreme Court;
- Alabama does not have any policies in place to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. Instead, capital defendants who may be mentally retarded are assigned (or not assigned) counsel under the same rules and fee structure as every other capital defendant. No training is required to assist counsel in recognizing mental retardation in their clients, in understanding

its possible impact on their client's ability to assist with their defense, on the validity of their confessions (where applicable), and on their eligibility for capital punishment.

- Given the lack of legislation regarding the procedures to be used for finding mental retardation in the capital context, there is no set procedure for when -- prior, during, or after trial -- a determination of mental retardation will be made. However, Alabama courts have encouraged "defendants to raise, and trial courts to resolve, mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial."

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. 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 there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. 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 sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project has conducted or is conducting state assessments in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, South Carolina, Texas, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. This assessment of Alabama is the second in this series.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using 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, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with death penalty administration,

including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has 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) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about 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 of the land 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. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Alabama 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 Alabama Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions, including their belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Alabama's capital punishment system.

MEMBERS OF THE ALABAMA DEATH PENALTY ASSESSMENT TEAM

Chair, Professor Daniel M. Filler
Mr. Filler is a Professor of Law at the University of Alabama where he teaches courses in criminal law and procedure. He joined the faculty in 1998. Professor Filler received an A.B. from Brown University and a J.D. from New York University School of Law. At NYU, Professor Filler won first place in the school's Orison S. Marden Moot Court Competition and was an editor of the Law Review. After graduation, he clerked for Judge J. Dickson Phillips, Jr. of the United States Court of Appeals for the Fourth Circuit. He worked as an associate at the New York firm Debevoise & Plimpton, practicing in both the corporate and litigation groups, and subsequently practiced as a staff attorney with the Defender Association of Philadelphia and the Bronx Defenders.

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Ms. Adams is an associate at the Birmingham law firm of Maynard, Cooper & Gale, P.C., where she practices in the labor and employment section. She is a member of the Alabama and Mississippi State Bars and the Birmingham and American Bar Associations. Ms. Adams received her B.A. *cum laude* from Auburn University and her J.D. from Vanderbilt University Law School, where she was the recipient of the Cortner Award for first place in the intramural moot court competition in 2001 and recognized as the Most Outstanding Moot Court Officer in 2002.

Judge John L. Carroll
Judge Carroll is Dean and Professor of Law at Samford University's Cumberland School of Law, where his teaching and scholarship focus on complex litigation, civil procedure, and federal courts. Prior to joining Cumberland School of Law, Judge Carroll was a U.S. Magistrate Judge for the United States District Court for the Middle District of Alabama. He has extensive litigation experience with major civil rights class action litigation and complex criminal defense, and has twice given oral arguments before the United States Supreme Court in *Hopper v. Evans*, 456 U.S. 605. (1982), and *Baldwin v. Alabama*, 472 U.S. 372 (1985). Judge Carroll also previously worked at the Southern Poverty Law Center in Montgomery, Alabama as Legal Director and as an attorney. He has held adjunct and faculty positions at Georgia State University School of Law, the University of Alabama School of Law, and Mercer University School of Law. Judge Carroll received his B.A. from Tufts University, his J.D. *magna cum laude* from Cumberland School of Law, and an LL.M. from Harvard Law School.

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Mr. Clark is a Partner at the Birmingham law firm of Redden, Mills & Clark, where he practices in the areas of criminal defense, civil litigation, family law, personal injury, employment discrimination and appellate litigation. Mr. Clark is also a retired Army Reserve Major General. He served as President of the Birmingham Bar Association in 1994 and as President of the Alabama State Bar from 2003 to 2004. Mr. Clark was previously an adjunct professor at the University of Alabama School of Law and was a law clerk to the Honorable Walter P. Gewin of the United States Court of Appeals for the Fifth Circuit. He is a graduate of the United States Military Academy at West Point and of the University of Alabama School of Law. He is a Fellow in the American College of Trial Lawyers.

Arthur Green, Jr.
Mr. Green is currently the District Attorney for the Tenth Circuit-Bessemer Division in Alabama. Mr. Green also serves as President of the Board of the Bessemer Cutoff Advocacy Center and as a Board Member of the Bessemer Chamber of Commerce and the Bessemer Y.M.C.A. He did his undergraduate studies at Auburn University and received his J.D. from the University of Alabama School of Law.

Richard S. Jaffe
Mr. Jaffe is the owner of and senior attorney with the Birmingham law firm of Jaffe, Strickland & Drennan. He has handled over fifty capital cases, nineteen of which have been tried to conclusion. None of his clients have received a death sentence. In Alabama, five Death Row inmates have been exonerated and are now free. Mr. Jaffe was lead counsel in three of those cases: *State of Alabama v. Randal Padgett*, *State of Alabama v. James (Bo) Cochran*, and *State of Alabama v. Gary Drinkard*, and his firm successfully represented Wesley Quick, the 5th exoneree, on appeal. He is a member of the New York, Washington, D.C., Georgia, and Alabama Bars. He has been board certified as a NBTA criminal trial specialist since 1984. He is currently a board member of the National Association of Criminal Defense Lawyers. In 1996, the Alabama Bar Association awarded him the Clarence Darrow Award for contributions to indigent defense.

Senator Henry "Hank" Sanders
Senator Sanders is currently serving his sixth term representing the 23rd District in the Alabama State Senate. He is one of the founding partners of Chestnut, Sanders, Sanders, Pettaway & Campbell, LLC in Selma, Alabama. He holds membership in the Campaign for a New South, C.A.R.E. Alabama New South Coalition, the National Conference of Black Lawyers, the National Bar Association, the American Bar Association, and the Alabama Lawyers Association. Senator Sanders is a graduate of Talladega College and Harvard Law School.

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Ms. Weidner recently joined the Birmingham law firm of Waller Lansden Dortch & Davis, LLC. In 2004, Ms. Weidner graduated *summa cum laude* from the University of Alabama School
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CHAPTER ONE

AN OVERVIEW OF ALABAMA'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF ALABAMA'S DEATH ROW

A. Historical Data

In 1976, Alabama reinstituted the death penalty. Between 1976 and May 2006, Alabama executed 34 people.[5] Of those, all but one were male, 18 were white and 16 were black.[6] Twenty-eight of those who were executed were sentenced to death for murdering white victims.[7] Inmates executed in Alabama since the reinstatement of the death penalty were tried and convicted in 19 different counties.[8] Five death-row inmates have been exonerated since 1976.[9]

B. A Current Profile of Alabama's Death Row

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[5] *See* Death Penalty Information Center, State by State Information, *at* http://www.deathpenaltyinfo.org/state/ (last visited on December 12, 2005) (click on Alabama in the pull-down menu). The following Alabama governors oversaw executions of death-row inmates: George C. Wallace (1983-1987, 2 executions); Guy Hunt (1987-1993, 8 executions); Forrest "Fob" James (1995-1999, 7 executions); Don Seigelman (1999-2003, 8 executions); and Bob Riley (2003-present, 9 executions). *See* Alabama Department of Corrections, Inmates Executed in Alabama, *at* http://www.doc.state.al.us/execution.asp (last visited on May 17, 2006); *see also* Alabama Department of Archives and History, Alabama Governors, *at* http://www.archives.state.al.us/govslist.html (last visited on May 17, 2006).

[6] *See* Death Penalty Information Center, Searchable Database of Executions, *at* http://www.deathpenaltyinfo.org/executions.php (last visited on May 17, 2006) (Click on "AL" in the state pull-down menu).

[7] *Id.*

[8] *See* Alabama Department of Corrections, Inmates Executed in Alabama, *at* http://www.doc.state.al.us/execution.asp (last visited on May 17, 2006). The following Alabama counties have tried and sentenced to death individuals eventually executed: Mobile (7 executions); Jefferson (5 executions); Henry (2 executions); Lee (2 executions); Monroe (2 executions); Russell (2 executions); Talladega (2 executions); Baldwin (1 execution); Bessemer (1 execution); Blount (1 execution); Calhoun (1 execution); Etowah (1 execution); Houston (1 execution); Macon (1 execution); Madison (1 execution); Montgomery (1 execution); Morgan (1 execution); Shelby (1 execution); and Tuscaloosa (1 execution). *Id.*

[9] *See* Death Penalty Information Center, Cases of Innocence 1973 - Present, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=109 (last updated on May 17, 2006). The names of the five exonerated individuals are as follows: Walter McMillian (charges dismissed and released in 1993), Randall Padgett (acquitted at retrial and released in 1997), James Bo Cochran (acquitted at retrial and released in 1997), Gary Drinkard (acquitted at retrial and released in 2001), and Wesley Quick (acquitted at retrial and released in 2003). The definition of innocence used by the Death Penalty Information Center ("DPIC") in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id.* In 2002, former Governor Fob James also commuted Judith Ann Neelley's death sentence because the death penalty had been imposed by judicial override of the capital jury's recommended sentence of life without the possibility of parole and Neelley was seventeen years old at the time of the murder. Kristin Latty & Scott Wright, *Former Gov. Fob James Explains Decision to Commute Death Sentence of Judith Ann Neelley*, THE POST (Cherokee County, Ala.), July 19, 2002.

Currently, there are 193 inmates on Alabama's death row.[10] Of those, 97 are white, 94 are black, and 2 are Latino.[11] There are 3 women on death row; 2 of whom are black and 1 of whom is white.[12] Additionally, there are 5 juveniles on death row, all of whom are male, 2 of whom are black, and three of whom are white.[13] These 193 death-row inmates were tried and convicted in 44 counties across Alabama.[14]

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[10] *See* Alabama Department of Corrections, Alabama Inmates Currently on Death Row, *at* http://www.doc.state.al.us/deathrow.asp (last visited on May 17, 2006).

[11] *Id.*

[12] *Id.*

[13] *See* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DEATH ROW U.S.A. 34 (Winter 2006), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf (last visited on May 17, 2006)

[14] *See* Alabama Department of Corrections, Alabama Inmates Currently on Death Row, *at* http://www.doc.state.al.us/deathrow.asp (last visited on May 17, 2006). The following Alabama counties have tried and convicted individuals currently awaiting execution on death row: Jefferson (32 inmates); Montgomery (15 inmates); Houston (13 inmates); Mobile (13 inmates); Talladega (13 inmates); Baldwin (9 inmates); Madison (8 inmates); St. Clair (6 inmates); Tuscaloosa (6 inmates); Calhoun (5 inmates); Marshall (5 inmates); Morgan (5 inmates); Shelby (5 inmates); Bessemer (4 inmates); Dallas (4 inmates); Etowah (4 inmates); Walker (4 inmates); Cullman (3 inmates); Russell (3 inmates); Bibb (2 inmates) Coffee (2 inmates); Colbert (2 inmates); Conecuh (2 inmates); Dale (2 inmates); Fayette (2 inmates); Lee (2 inmates); Limestone (2 inmates); Macon (2 inmates); Tallapoosa (2 inmates); Barbour (1 inmate); Blount (1 inmate); Chilton (1 inmate); Coosa (1 inmate); Crenshaw (1 inmate); Elmore (1 inmate); Escambia (1 inmate); Geneva (1 inmate); Hale (1 inmate); Henry (1 inmate); Jackson (1 inmate); Marion (1 inmate); Monroe (1 inmate); Pike (1 inmate); and Randolph (1 inmate). *Id.*

II. THE STATUTORY EVOLUTION OF ALABAMA'S DEATH PENALTY SCHEME

*A. Alabama's Post-*Furman *Death Penalty Statute*

In the wake of the United States Supreme Court's decision finding the death penalty unconstitutional in *Furman v. Georgia*,[15] the Alabama Legislature passed a new death penalty law in 1975.[16] The new law provided a number of offenses for which death could be imposed, all of which required that the defendant actually killed the victim and excluded attempted murder and murder where an accomplice committed the murder.[17]

Capital crimes were defined as:

(1) Kidnapping or attempted kidnapping for ransom, when the victim is intentionally killed by the defendant;
(2) Robbery or attempted robbery, when the victim is intentionally killed by the defendant;
(3) Rape, carnal knowledge or attempted carnal knowledge of a girl under the age of 12, when the victim is intentionally killed by the defendant;
(4) Nighttime burglary of an occupied dwelling when any occupant is intentionally killed by the defendant;
(5) Murder of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard while on-duty or because of some official or job-related act or performance;
(6) Murder while the defendant is under a sentence of life in prison;
(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract for hire;
(8) Indecent molestation or attempted indecent molestation of a child under sixteen years old, when the child is intentionally killed by the defendant;
(9) Willful setting off or exploding dynamite or other explosive where a person is intentionally killed by the defendant because of the explosion;
(10) Murder in the first degree where two or more people are intentionally killed by the defendant in one or a series of acts;
(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts, or capacity;
(12) Murder in the first degree committed while the defendant is engaged in or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman, or to direct the route or movement of the aircraft, or otherwise exert control over the aircraft;
(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; and
(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial, or grand jury proceeding against the defendant

[15] Furman v. Georgia, 408 U.S. 238 (1972).
[16] 1975 Ala. Acts 213 §§ 1-5.
[17] ALA. CODE § 13-11-2(a)(1)-(14) (1975) (amended and renumbered at ALA. CODE § 13A-5-40).

> who kills or procures the killing of witnesses, or when perpetrated against any human being while intending to kill such witnesses.[18]

The statute explicitly excluded felony-murder as a method of providing evidence of intent.[19] Evidence of intent was a necessary prerequisite to most capital crimes.

If the jury found the defendant guilty of a capital crime and aggravation was charged in the indictment, punishment automatically was set as death.[20]

Once an automatic death sentence was handed down, the trial court would hold a hearing to determine whether or not the death sentence was appropriate.[21] After this review, it either would sentence the defendant to death or to life in prison without the possibility of parole.[22] In determining the appropriate sentence, the court considered evidence relating to statutory aggravating and mitigating circumstances. The aggravating circumstances were:

(1) The capital felony was committed by a person under sentence of imprisonment;
(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
(3) The defendant knowingly created a great risk of death to many persons;
(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, rape, robbery, burglary, or kidnapping for ransom;
(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(6) The capital felony was committed for pecuniary gain;
(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
(8) The capital felony was especially heinous, atrocious or cruel.[23]

Statutory mitigating circumstances were:

(1) The defendant has no significant history of prior criminal activity;
(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;

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18 ALA. CODE § 13-11-2(a) (1975).
19 ALA. CODE § 13-11-2(b) (1975).
20 ALA. CODE § 13-11-2(a) (1975).
21 ALA. CODE § 13-11-3 (1975).
22 *Id.*
23 ALA. CODE § 13-11-6 (1975).

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The defendant's age at the time of the crime.[24]

After weighing the aggravating and mitigating factors, the court could accept the jury's sentence of death or could sentence the defendant to life in prison without parole.[25]

B. Amendments to the Alabama Death Penalty Statute

1. *Beck v. Alabama* and 1981 Statute

In the 1980 case of *Beck v. Alabama*, the United States Supreme Court reviewed the Alabama death penalty statute and found portions of the 1975 law unconstitutional.[26] According to the Supreme Court, the statute's main problem was that it precluded juries from considering lesser-included, non-capital offenses. In response, the Alabama Supreme Court formulated a new death penalty scheme.[27]

In its decision, the Alabama Supreme Court held that capital cases must be bifurcated, with separate proceedings for the guilt/innocence and sentencing phases of a capital trial.[28] During the sentencing phase, the defendant automatically would be sentenced to life in prison without parole if a capital jury could not agree on a death sentence.[29] If the jury agrees that a death sentence is appropriate, the court must then hold a hearing to make its own determination as to its appropriateness.[30]

On direct appeal from a death sentence, the Court of Criminal Appeals and the Alabama Supreme Court:

> should examine all death sentences in light of the standards and procedure approved in *Gregg*. Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant.[31]

In response to the U.S. and Alabama Supreme Court decisions in *Beck v. Alabama*, the Alabama legislature repealed the 1975 law and replaced it with a different, but similar scheme.[32] Under this new statute, the following crimes were deemed to be capital offenses:

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[24] ALA. CODE § 13-11-7 (1975).
[25] ALA. CODE § 13-11-4 (1975).
[26] Beck v. Alabama, 447 U.S. 625 (1980).
[27] Beck v. Alabama, 396 So. 2d 645 (1980).
[28] *Id.* at 662.
[29] *Id.* at 663.
[30] *Id.*
[31] *Id.* at 664.
[32] 1981 Ala. Acts 178 §§ 1-23.

(1) Murder during a first degree kidnapping or an attempt;
(2) Murder during a robbery in the first degree or an attempt;
(3) Murder during a rape in the first or second degree or an attempt, or murder during sodomy in the first or second degree or an attempt;
(4) Murder during a burglary in the first or second degree or an attempt;
(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard while on-duty or because of some official or job-related act or performance;
(6) Murder while the defendant is under a sentence of life in prison;
(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract for hire;
(8) Murder during sexual abuse in the first or second degree or an attempt;
(9) Murder during arson in the first or second degree or murder by means of explosives or explosions;
(10) Murder where two or more people are killed by the defendant in one or pursuant to one scheme of course of conduct;
(11) Murder where the victim is a state or federal public official or former public official and the murder stems from or is caused by or related to his official position, act, or capacity;
(12) Murder during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of the aircraft or any passenger or crewman, or to direct the route or movement of the aircraft, or otherwise exert control over the aircraft;
(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; and
(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim has testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding, or civil trial or civil proceeding in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.[33]

If the jury found the defendant guilty of a capital crime, the court would then conduct a hearing to determine between a sentence of life in prison without parole or death.[34] The hearing would be conducted in front of a jury unless both parties waived that right. If the hearing was in front of a jury, the jury would provide an advisory verdict, but would not render the official sentence.[35] This sentencing scheme differs from the original 1975 statute in that no automatic death sentence is given.

During the sentencing hearing, the judge and/or jury considered evidence relating to aggravating and mitigating circumstances. Aggravating factors were:

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[33] 1981 Ala. Acts 178 § 2(a).
[34] 1981 Ala. Acts 178 § 8(a).
[35] *Id.*

(1) The capital offense was committed by a person under sentence of imprisonment;
(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
(3) The defendant knowingly created a great risk of death to many persons;
(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, rape, robbery, burglary, or kidnapping;
(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(6) The capital offense was committed for pecuniary gain;
(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or
(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.[36]

Mitigating circumstances were:

(1) The defendant has no significant history of prior criminal activity;
(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to it;
(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
(7) The defendant's age at the time of the crime.[37]

Additionally, mitigating circumstances could include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant chose to offer as a reason for leniency and were not limited to those that were statutorily defined.[38]

If the hearing was held in front of a jury and it found that (1) no aggravating factors existed; or (2) they did exist, but did not outweigh the mitigating circumstances, the jury was required to return an advisory verdict recommending life in prison without parole.[39] If the jury found that one or more aggravating factors existed and they outweighed the mitigating circumstances, the jury was required to return an advisory verdict recommending death.[40] Seven or more jurors had to agree before the jury could advise a sentence of life in prison without parole and ten or more jurors had to agree before the

[36] 1981 Ala. Acts 178 § 11(a)-(h).
[37] 1981 Ala. Acts 178 § 13(a)-(g).
[38] 1981 Ala. Acts 178 § 14.
[39] 1981 Ala. Acts 178 § 8(e)(1)-(2).
[40] 1981 Ala. Acts 178 § 8(e)(3).

jury could submit an advisory verdict in support of a death sentence.[41] Once the jury provided its advisory verdict, the court proceeded to make its ultimate determination on sentence.[42] In making this decision, the court considered the jury's advisory verdict and whether the aggravating circumstances outweighed the mitigating circumstances.[43]

If the parties waived their right to a jury trial, the judge would hear all of the evidence regarding aggravating and mitigating circumstances and determine the appropriate sentence without guidance from an advisory verdict.[44]

The Alabama Court of Criminal Appeals automatically reviewed every case where a death sentence was imposed for errors involving the conviction and the propriety of the death sentence. The Alabama Supreme Court could choose to review the Court of Criminal Appeals decision, but was not required to do so.[45]

2. 1982 Amendments

In 1982, the legislature adopted and incorporated into the Code of Alabama 1975 the 1981amendments and several non-substantive, technical changes.[46]

3. 1987 Amendments

In 1987, the legislature amended the list of death-eligible crimes to include the "murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard while on-duty, *regardless of whether the defendant knew or should have known the victim was an officer or guard on duty*, or because of some official or job-related act or performance."[47]

4. 1992 Amendments

The legislature added four additional death-eligible offenses in 1992.[48] The added capital offenses are: (1) murder when the victim is less than fourteen years of age;[49] (2) murder in which the victim is killed while in a dwelling by a deadly weapon fired from outside the dwelling;[50] (3) murder in which the victim is killed while in a motor vehicle by a deadly weapon fired from outside that motor vehicle;[51] and (4) murder in which the victim is killed by a deadly weapon fired from a motor vehicle.[52]

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41 1981 Ala. Acts 178 § 8(f).
42 1981 Ala. Acts 178 § 9(a).
43 1981 Ala. Acts 178 § 9(e).
44 1981 Ala. Acts 178 § 6(c), 9(a).
45 1981 Ala. Acts 178 § 15(a)-(b).
46 1982 Ala. Acts 567 § 1.
47 1987 Ala. Acts 709 § 3 (italics added to highlight new language).
48 1992 Ala. Acts 601 § 1.
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*

5. 1994 Amendments

In 1994, the legislature revised three of the four capital offenses added in 1992.[53] The new capital crimes were: (1) murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling;[54] (2) murder committed by or through the use of a deadly weapon while the victim is in a vehicle;[55] and (3) murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.[56]

6. 1999 Amendments

In 1999, the legislature changed the fourth aggravating circumstance to read, "the capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, *or flight after committing, or attempt to commit* rape, robbery, burglary, or kidnapping."[57]

In addition, the legislature added two new aggravators: (1) the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct;[58] and (2) the capital offense was one of a series of intentional killings committed by the defendant.[59]

7. 2004 Amendments

In 2004, the legislature passed a statute clarifying that the inclusion of aggravating circumstances in the list of death-eligible crimes does not preclude the finding and consideration of that relevant aggravating circumstance in determining the sentence.[60] In other words, the legislature expressly allowed the use of an element of the underlying crime to be used as an aggravating circumstance.

8. Conclusion

The Alabama death penalty statute has not changed significantly since 1975 and even less since the 1981 statute. Since 1981, six new aggravators have been added and two others have been expanded.

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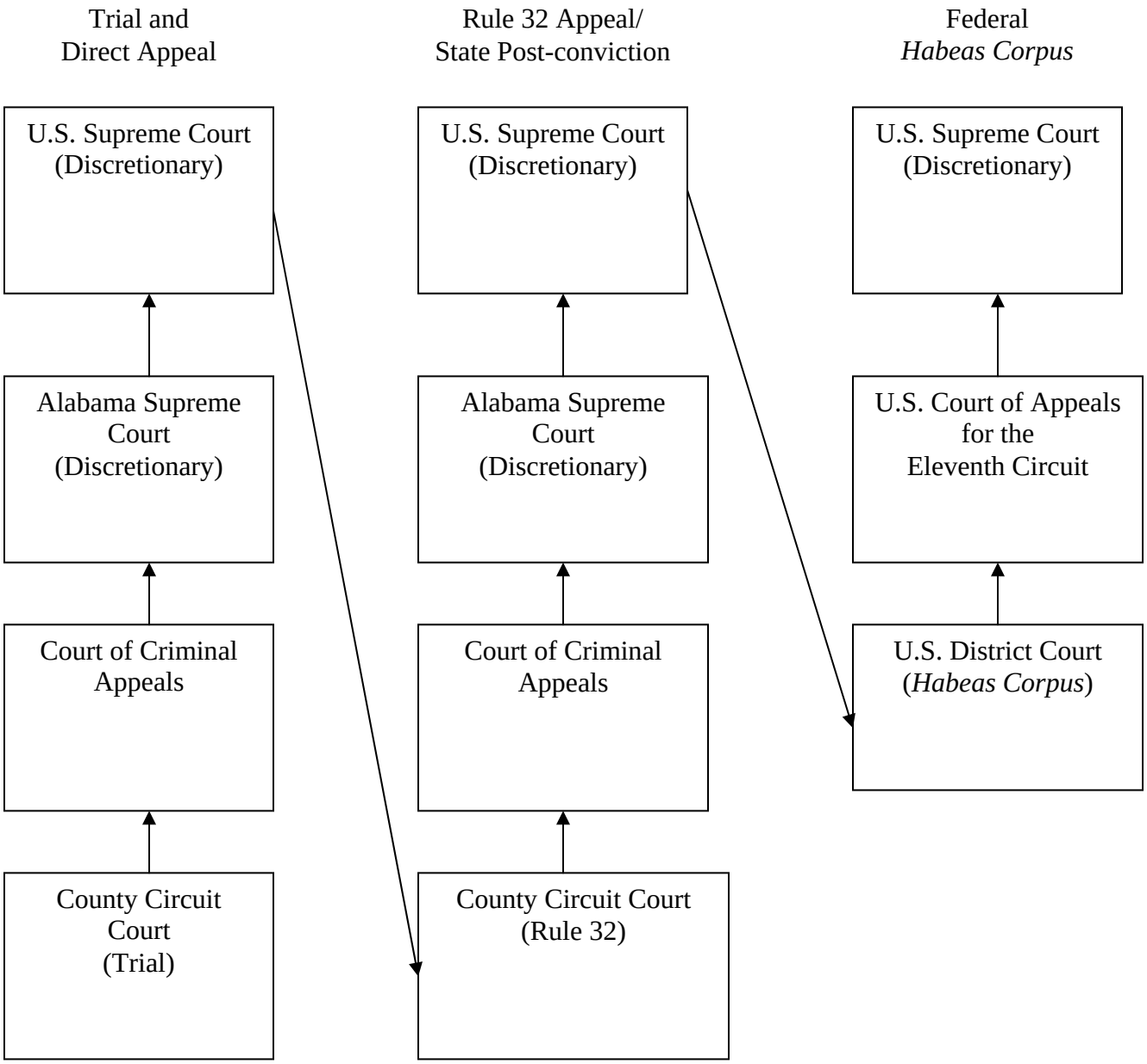
53 1994 Ala. Acts 679 § 1.
54 *Id.*
55 *Id.*
56 *Id.*
57 1999 Ala. Acts 403 § 1 (italics added to highlight new language).
58 *Id.*
59 *Id.*
60 ALA.CODE § 13A-5-50 (2004).

III. Progression of an Alabama Death Penalty Case



A. Pretrial Process

A defendant charged by complaint with the commission of a felony may request a preliminary hearing within thirty days of the arrest.[61] If requested, the court will hold a preliminary hearing within twenty-one days of that request unless the complaint has been dismissed, the hearing later is waived, the hearing is postponed upon the justified request of either party or the judge, or a grand jury indictment is returned before the preliminary hearing has begun.[62]

If the court finds (1) that an offense has been committed and that there is probable cause to believe that the defendant committed it or (2) a preliminary hearing is waived or not requested and the complaint is not dismissed, the district attorney will present the complaint to the grand jury.[63]

In order to prosecute an individual accused of a capital felony, a grand jury[64] must determine that the evidence justifies an indictment[65] for capital murder.[66] An indictment identifies the statutes, rules, regulations, or other provisions of law that the defendant has violated and notifies the defendant of the crime or crimes for which he or she will stand trial. [67] The state must let the defendant know if it intends to seek the death penalty[68] and, if so, the aggravating factors that make the murder a capital crime.[69] Alabama meets this notice requirement by charging the defendant with capital murder. Charging a defendant with capital murder does not mean that the district attorney *will* seek death, however; instead, charging a defendant with capital murder means only that the prosecutor *may* seek death.[70]

Under the Alabama Code, a person commits murder when (1) he or she intentionally causes the death of a person; (2) under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or (3) he or

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[61] ALA. R. CRIM. P. 5.1(a).

[62] *Id.*

[63] ALA. R. CRIM. P. 5.4(b).

[64] A grand jury is composed of at least twelve individuals. *See* ALA. CODE § 12-16-204 (2006); ALA. R. CRIM. P. 12.8(a). A grand jury may consider only legal evidence given by witnesses before it or legal documentary evidence presented to it. *See* ALA. CODE § 12-16-200 (2006); ALA. R. CRIM. P. 12.8(f)(1).

[65] An indictment is a written statement charging the defendant or defendants named therein with the commission of an indictable offense, presented to the court by the grand jury, endorsed "A True Bill," and signed by the foreman. *See* ALA. R. CRIM. P. 13.1(a).

[66] ALA. CODE § 12-16-202(b) (2006).

[67] ALA. R. CRIM. P. 13.3(a).

[68] Lankford v. Idaho, 500 U.S. 110, 127 (1991).

[69] Arthur v. State, 472 So. 2d 650, 657 (Ala. Crim. App. 1984), *rev'd on other grounds*, 472 So. 2d 665 (Ala. 1985).

[70] ALA. CODE § 13A-5-45 (2006). The statute states that the court *shall* conduct a sentencing hearing to impose life without parole or death upon conviction for capital murder, but to the best of our knowledge, District Attorneys generally are granted discretion to charge a defendant with capital murder, but not seek a death sentence. In a situation where a prosecutor agrees to a sentence of life without parole, the judge will generally accept this determination, although s/he potentially could schedule a sentencing hearing and consider, and even actually impose, a sentence of death.

she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.[71]

A capital murder is a murder as defined above that falls within one or more of the following categories:

(1) Murder during a first degree kidnapping or an attempt;
(2) Murder during a robbery in the first degree or an attempt;
(3) Murder during a rape in the first or second degree or an attempt, or murder during sodomy in the first or second degree or an attempt;
(4) Murder during a burglary in the first or second degree or an attempt;
(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard while on-duty or because of some official or job-related act or performance;
(6) Murder while the defendant is under a sentence of life in prison;
(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract for hire;
(8) Murder during sexual abuse in the first or second degree or an attempt;
(9) Murder during arson in the first or second degree or murder by means of explosives or explosions;
(10) Murder where two or more people are killed by the defendant in one or pursuant to one scheme of course of conduct;
(11) Murder where the victim is a state or federal public official or former public official and the murder stems from or is caused by or related to his official position, act, or capacity;
(12) Murder during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of the aircraft or any passenger or crewman, or to direct the route or movement of the aircraft, or otherwise exert control over the aircraft;
(13) Murder by a defendant who has been convicted of any other murder in the twenty years preceding the crime; and
(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim has testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding, or civil trial or civil proceeding in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness
(15) Murder when the victim is less than fourteen years of age;
(16) Murder in which the victim is killed while in a dwelling by a deadly weapon fired from outside the dwelling;

[71] ALA. CODE § 13A-6-2 (2006).

(17) Murder in which the victim is killed while in a motor vehicle by a deadly weapon fired from outside that motor vehicle; and
(18) Murder in which the victim is killed by a deadly weapon fired from a motor vehicle.[72]

B. Arraignment and Plea

Following the indictment, the defendant will be ordered to appear for an arraignment, at which time the court will orally inform the defendant of the charges against him/her and ask him/her to plead to the charges.[73] The defendant may plead (1) guilty; (2) not guilty; (3) not guilty by reason of mental disease or defect; or (4) not guilty and not guilty by reason of mental disease or defect.[74]

At arraignment, the court is required to (1) determine whether the defendant is represented by counsel and, if not, appoint counsel to represent him/her; (2) determine that the defendant or defendant's attorney has received a copy of the charges against the defendant; (3) determine the age of the defendant and whether the defendant is entitled to the benefits of the Youthful Offender Act and, if not, ascertain and accept the defendant's plea; and (4) advise the parties in attendance of any dates set for further proceedings.[75]

If the defendant pleads guilty to a capital offense but does not enter into a plea bargain as to sentence, the state still must prove the defendant's guilt beyond a reasonable doubt to a jury.[76] In this situation, the jury may consider the guilty plea in determining whether the state has met its burden of proof.[77] If the defendant pleaded guilty to a capital offense and entered into a plea bargain as to sentence, the defendant will begin serving the agreed upon sentence.

C. The Capital Trial

Capital trials are heard in circuit court and are conducted in two phases: the guilt/innocence phase and, if the defendant is found guilty, the penalty phase.[78]

1. Guilt/Innocence Phase

All individuals charged with a capital felony possess the right to a trial by jury.[79] The capital jury is comprised of twelve individuals,[80] and two alternate jurors.[81] A court may appropriately dismiss potential jurors from the jury pool if they would "refuse to impose

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72 ALA. CODE § 13A-5-40(a) (2006).
73 ALA. R. CRIM. P. 14.1; *see also* Howard v. State, 50 So. 954 (1909).
74 ALA. R. CRIM. P. 14.2(c).
75 ALA. R. CRIM. P. 14.2(a).
76 ALA. CODE § 13A-5-42 (2006).
77 *Id.*
78 ALA. R. CRIM. P. 2.2(a).
79 ALA. CODE § 13A-5-44(c) (2006).
80 ALA. CODE § 12-16-100(a) (2006).
81 *Id.*; ALA. CODE § 13A-5-44(a) (2006).

the death penalty regardless of the evidence produced"[82] or if they would automatically impose a death sentence regardless of the evidence provided.[83]

During the guilt/innocence phase of the trial, the jury must decide whether the prosecution has proved that the defendant is guilty of capital murder or some lesser included offense or offenses beyond a reasonable doubt.[84] Both the state and defense will present opening and closing arguments, as well as witnesses and other types of evidence. After both sides have presented their closing arguments, the court will instruct the jury as to the law of the case.[85]

If the defendant is found not guilty of the capital offense and any other charge, he/she will be discharged.[86] If the defendant is found not guilty of the capital crime, but is found guilty of a lesser-included offense, he/she will proceed to a non-capital sentencing proceeding.[87] If the defendant is found guilty of the capital offense, the defendant proceeds to the sentencing phase of a capital trial.[88]

2. Sentencing Phase

At this phase of a capital trial, the judge and/or jury will determine whether the appropriate sentence for the defendant convicted of capital homicide is life in prison without parole or death.[89] The judge generally will conduct the hearing before the trial jury.[90] The jury's punishment decision will serve as an advisory sentence to the judge. The judge makes the ultimate sentencing decision.[91] A capital defendant possesses the right to waive a jury trial, but only with the consent of the state and the approval of the court.[92]

During the sentencing phase, evidence may be presented as to any matter that is relevant to sentencing.[93] This includes any evidence relating to the presence or absence of aggravating and mitigating factors.[94] Any factors proven beyond a reasonable doubt at trial are considered proven and are available for use in the sentencing proceeding.[95]

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[82] ALA. CODE § 12-16-152 (2006); *see also* Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[83] Morgan v. Illinois, 504 U.S. 719 (1992); *see also* Taylor v. State, 666 So. 2d 36 (Ala. Crim. App. 1994).

[84] ALA. CODE § 13A-5-43(a) (2006).

[85] ALA. CODE § 12-16-11 (2006).

[86] ALA. CODE § 13A-5-43(b) (2006).

[87] ALA. CODE § 13A-4-43(c) (2006).

[88] ALA. CODE § 13A-4-43(d) (2006).

[89] ALA. CODE § 13A-5-45(a) (2006).

[90] ALA. CODE § 13A-5-45(c) (2006).

[91] ALA. CODE § 13A-5-46(a) (2006).

[92] ALA. CODE § 13A-5-44(c) (2006).

[93] ALA. CODE § 13A-5-45(c) (2006).

[94] *Id.*

[95] ALA. CODE § 13A-5-45(e) (2006).

The state must prove beyond a reasonable doubt the existence of at least one aggravating factor for a defendant to receive a death sentence.[96]

Under current law, aggravating circumstances are defined as the following:

(1) The capital offense was committed by a person under sentence of imprisonment;
(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;
(3) The defendant knowingly created a great risk of death to many persons;
(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, rape, robbery, burglary, or kidnapping;
(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(6) The capital offense was committed for pecuniary gain;
(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses; or
(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or
(10) The capital offense was one of a series of intentional killings committed by the defendant.[97]

If the jury finds that the state has not proven any of the statutory aggravating factors beyond a reasonable doubt, the jury will recommend that the defendant receive a sentence of life without parole.[98] If the jury finds that the state has proven one or more of the aggravating circumstances beyond a reasonable doubt and the jury believes that such aggravating circumstance(s) justifies the death penalty, then the jury must assess whether mitigating circumstances exist to equal or to outweigh the proven aggravating circumstance(s).[99] If the factual existence of an offered mitigating circumstance is in dispute, the defendant has the burden of raising the issue; the state then has the burden of disproving the existence of the mitigating circumstance by a preponderance of the evidence.[100]

Under current law, statutory mitigating circumstances are defined as the following:

(1) The defendant has no significant history of prior criminal activity;
(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to it;

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[96] Whisenhant v. State, 482 So. 2d 1225, 1235 (Ala. Crim. App.1982).
[97] ALA. CODE § 13A-5-49 (2006).
[98] ALA. CODE § 13A-5-45(f) (2006).
[99] ALA. CODE § 13A-5-46(e)(2-3); *see also Whisenhant*, 482 So. 2d 1234-35; *Ex parte* Wood, 715 So. 2d 819 (Ala. 1998).
[100] ALA. CODE § 13A-5-45(f), (g) (2006).

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
(7) The age of the defendant at the time of the crime.[101]

In addition, mitigating circumstances include any other relevant circumstance, including any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life in prison without parole instead of death.[102]

After hearing the evidence, the jury provides an advisory verdict to the judge. In this advisory verdict, the jury details the sentence it believes the defendant should receive. If there is no jury, the judge determines the appropriate sentence without an advisory opinion.[103]

If after weighing the aggravating and mitigating circumstances a majority of jurors find that one or more aggravating circumstances exist, but do not outweigh the mitigating circumstances, the jury's advisory verdict should recommend life imprisonment without parole.[104] If at least ten of the twelve jurors[105] determine that one or more aggravating circumstances exist and outweigh the mitigating circumstances, the advisory verdict should recommend death.[106] If more than five, but fewer than ten jurors vote for death, the jury is unable to reach an advisory verdict.

If the jury is unable to reach an advisory verdict, the judge may declare a mistrial of the sentence hearing. The sentence hearing then would be re-conducted before a different jury. After one or more mistrials, the parties may waive the right to have an advisory verdict from a jury. In this situation, the judge will determine the sentence without guidance from an advisory verdict.[107]

Once the jury has provided its advisory verdict, the trial court will order and receive a pre-sentence investigation report. This report contains (1) a statement of the offense and the circumstances surrounding it; (2) a statement of the defendant's prior and criminal and juvenile record, if any; (3) a statement of the defendant's educational background; (4) a statement of the defendant's employment background, financial condition, and military record, if any; (5) a statement of the defendant's social history, including family relationships, marital status, interests, and activities, residence history, and religious affiliations; (6) a statement of the defendant's medical and psychological history, if

[101] ALA. CODE § 13A-5-51 (2006).
[102] ALA. CODE § 13A-5-52 (2006).
[103] ALA. CODE § 13A-5-46(a) (2006).
[104] ALA. CODE § 13A-5-46(e)(2) (2006).
[105] ALA. CODE § 13A-5-46(f) (2006).
[106] ALA. CODE § 13A-5-46(e)(3) (2006).
[107] ALA. CODE § 13A-5-46(g) (2006).

available; (7) victim impact statements; and (8) any other information required by the court.[108] The parties have an opportunity to respond to the report and present evidence about any part of the report that is the subject of factual dispute[109], along with arguments regarding the existence of aggravating and mitigating factors and the appropriate sentence.[110] The trial judge is required to enter specific written findings concerning the existence or nonexistence of each aggravating and mitigating factor, along with any additional mitigating factors. In addition, the court will enter written findings of facts that summarize the crime and the defendant's participation in that crime.[111]

The judge also must independently weigh the aggravating and mitigating circumstances. When making this determination, the court will consider the jury's advisory verdict, but it is not binding.[112] In weighing the aggravating and mitigation circumstances, the court should not simply tally the number of aggravators to compare with the number of mitigators. Instead, the aggravators and mitigators should be considered in an organized fashion in order to determine the proper sentence in light of all of the relevant circumstances.[113]

Additionally, at the end of the trial, the judge automatically enters an appeal on behalf of the defendant, with or without the defendant's direction. Once the appeal has been ordered, the court automatically grants a stay of execution.[114]

D. Direct Appeal

There are three courts in which an individual convicted of capital murder may have his or her conviction reviewed: the Alabama Court of Criminal Appeals, the Alabama Supreme Court, and the United States Supreme Court. The Alabama Court of Criminal Appeals must review any case where the defendant is convicted of capital murder. The Alabama Supreme Court and the United States Supreme Court may review a decision pursuant to a writ of *certiorari*, but neither is required to do so.[115] Until 1999, death sentenced individuals had an automatic right to *certiorari* review by the Alabama Supreme Court, but the rule was changed in 2000 by the Alabama Supreme Court to provide it discretion in deciding which death penalty cases to review.[116]

A person who is convicted of capital murder and sentenced to death receives an automatic appeal to the Alabama Court of Criminal Appeals.[117] In this appeal, the court reviews the case for any errors regarding the conviction and the propriety of the death sentence.[118] The Court has at its disposal the record of the trial, including all papers filed with the trial court, the evidence presented at trial, and the written record of all testimony

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[108] ALA. R. CRIM. P. 26.3(b).
[109] ALA. CODE § 13A-5-47(b) (2006).
[110] ALA. CODE § 13A-5-47(c) (2006).
[111] ALA. CODE § 13A-5-47(d) (2006).
[112] ALA. CODE § 13A-5-47(e) (2006).
[113] ALA. CODE § 13A-5-48 (2006).
[114] ALA. CODE § 12-22-150 (2006).
[115] ALA. CODE § 13A-5-53, 13A-5-55 (2006).
[116] ALA. R. APP. P. 39 cmt.
[117] ALA. CODE § 12-22-150 (2006).
[118] ALA. CODE § 13A-5-53(a) (2006).

and arguments. In addition, both parties may submit briefs: the appellant's attorney may submit a brief arguing that errors were made during the trial and advocating for the conviction and/or death sentence to be overturned and the Capital Litigation Division of the Office of the Attorney General may file a brief responding to the appellant's arguments. The Court generally holds oral arguments on the issues raised in the party briefs.[119]

In its review, the court determines whether (1) reversible error invalidates the adjudication of guilt; (2) the death sentence was imposed arbitrarily; (3) the trial court weighed the aggravating and mitigating circumstances appropriately; and (4) the death sentence is excessive or disproportionate to the penalty imposed in similar crimes.[120] Once the Alabama Court of Criminal Appeals conducts the required review, the court can reverse or affirm the adjudication of guilt, affirm the death sentence, set the death sentence aside and send the case back to the trial court so that any errors may be corrected, or set the death sentence aside and send the case back to the trial court with orders to sentence the defendant to life in prison without parole.[121]

Upon announcing its decision, the court generally will issue an opinion that addresses the allegations of error and explains its ruling,[122] although it is not required to do so.[123] If the Court of Criminal Appeals affirms the trial court's judgment, it must schedule a date for execution and direct that the sentence be carried out.[124]

If the Court of Criminal Appeals upholds the appellant's (defendant's) conviction and sentence, the appellant must apply for a rehearing in the Court of Criminal Appeals.[125] If the Court of Criminal Appeals denies the rehearing request, the appellant has 14 days to file a petition for a writ of *certiorari* with the Alabama Supreme Court, seeking review of the Court of Criminal Appeals decision.[126] *Certiorari* review is not automatic, however, and the Alabama Supreme Court may exercise its discretion in determining which cases to accept.[127] In death penalty cases, petitions for *certiorari* will be considered from the following types of decisions:

(1) Decisions initially holding valid a city ordinance, a state statute, or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the U.S. Constitution;
(2) Decisions that affect a class of constitutional, state, or county officers;
(3) Decisions where a material question requiring decision is one of first impression for the Supreme Court of Alabama;

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[119] ALA. R. APP. P. 34(a).
[120] ALA. CODE § 13A-5-53(b) (2006).
[121] ALA. CODE § 13A-5-53(d) (2006).
[122] STATE OF ALABAMA OFFICE OF THE ATTORNEY GENERAL, A GUIDEBOOK TO ALABAMA'S DEATH PENALTY APPEALS PROCESS 7 (2001).
[123] ALA. R. APP. P. 54(a).
[124] ALA. CODE § 12-22-243 (2006).
[125] ALA. R. APP. P. 39(c)(1).
[126] ALA. R. APP. P. 39(c)(2).
[127] ALA. R. APP. P. 39(a)(2).

(4) Decisions in conflict with prior decisions of the U.S. Supreme Court, the Alabama Supreme Court, the Alabama Court of Criminal Appeals, or the Alabama Court of Civil Appeals;

(5) Decisions where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals;[128] and

(6) Decisions failing to recognize as prejudicial any plain error or defect in the proceeding under review whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals.[129]

If the Alabama Supreme Court agrees to review the decision, both sides file briefs outlining their arguments.[130] The court may or may not hold oral arguments. At a later time, the Alabama Supreme Court will issue an opinion.

If the Alabama Supreme Court overturns the conviction and/or the sentence, the Court likely will remand the case to the trial court for a new trial and/or sentencing hearing. If the Alabama Supreme Court affirms the conviction and sentence, the appellant may file a writ of *certiorari* within ninety days with the United States Supreme Court. The United States Supreme Court is under no obligation to hear particular cases and the review is discretionary.[131]

Alternatively, if the Alabama Supreme Court denies the petition for the writ of *certiorari*, the petitioner may file a petition for a writ of *certiorari* within ninety days with the U.S. Supreme Court, asking it to review the case. Again, any review by the U.S. Supreme Court is discretionary and the Court has no obligation to hear a particular case.

If the United States Supreme Court does not accept petitioner's case for review, or accepts the case but does not overturn either petitioner's conviction or sentence, both petitioner's conviction and sentence are final. In the alternative, if the defendant does not file a petition for a writ of *certiorari* with the United States Supreme Court, the conviction and sentence becomes final once the time to file a writ of *certiorari* has expired—ninety days after the Alabama Supreme Court decision became final. If the defendant wishes to continue challenging the conviction and/or sentence, s/he may file a collateral attack on his/er conviction and/or sentence.

Cases can move up and down the direct review stage repeatedly when problems are found in the conviction and/or sentence.

E. State Post-conviction: The Collateral Attack

Under Rule 32 of the Alabama Rules of Criminal Procedure, an inmate under sentence of death is entitled to file a collateral attack on his/her conviction and/or sentence. The petitioner (formerly the defendant/appellant) may allege state and federal constitutional

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[128] ALA. R. APP. P. 39(a)(1)(A)-(E).
[129] ALA. R. APP. P. 39(a)(2)(A).
[130] ALA. R. APP. P. 39(h).
[131] ALA. CODE § 13A-5-53(b) (2006).

violations, such as whether the trial level or direct appeal defense attorneys were constitutionally effective.[132]

To initiate a collateral attack, an individual convicted of capital murder and sentenced to death must file a petition for relief in the county circuit court where the petitioner was convicted.[133] The petition may raise all cognizable claims associated with the following issues:

(1) The U.S. and/or Alabama Constitutions require a new trial, a new sentencing proceeding, or other relief.[134] Reasons for this may, if not precluded under Alabama Rule of Criminal Procedure 32.2(a), include that the guilty plea was unlawfully induced or was not made voluntarily, the conviction was obtained by a coerced confession, evidence was gained pursuant to an unconstitutional search and seizure, evidence was gained pursuant to an unlawful arrest, the conviction was gained because the prosecution failed to turn over exculpatory evidence, and/or the denial of effective assistance of counsel;[135]

(2) The court did not have jurisdiction to render a judgment or to impose a sentence;

(3) The sentence imposed exceeds the maximum authorized by law or is otherwise illegal;

(4) The petitioner is being held in custody after the petitioner's sentence has expired;

(5) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court;[136] or

(6) The petitioner failed to appeal within the prescribed time and that failure was without fault on the petitioner's part.[137]

Some of the more common litigation issues in state post-conviction proceedings are: (1) ineffective assistance of trial counsel; (2) the State's failure to turn over exculpatory or impeachment evidence; (3) juror misconduct; (4) innocence; (5) jurisdiction; and (6) competency of the appellant.[138]

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[132] ALA. R. CRIM. P. 32.1.

[133] ALA. R. CRIM. P. 32.5.

[134] ALA. R. CRIM. P. 32.1(a)-(e).

[135] ALA. R. CRIM. P. 32 app.

[136] A petition based on the claim that newly discovered facts or evidence require the conviction or sentence to be vacated can be asserted by alleging that: (1) the facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence; (2) the facts are not merely cumulative to other facts that were known; (3) the facts do not merely amount to impeachment evidence; (4) if the facts had been known at the time of trial or of sentencing, the result probably would have been different; and (5) the facts establish that the petitioner is innocent of the crime from which the petitioner was convicted or should not have received the sentence that the petitioner received. *See* ALA. R. CRIM. P. 32.1(e).

[137] ALA. R. CRIM. P. 32.1(a)-(e).

[138] EQUAL JUSTICE INITIATIVE OF ALABAMA, ALABAMA CAPITAL POST-CONVICTION MANUAL 21 (4th ed. 2004).

A Rule 32 petition must be filed within one year of the Court of Criminal Appeals issuing a certificate of judgment.[139] The State must file its response to the petitioner's Rule 32 petition within thirty days.[140] Following the state's response, the court reviews the petition for relief and either dismisses it or grants leave to file an amended petition if the petition is not sufficiently specific, is precluded, fails to state a claim, or fails to raise any material issues of fact or law. If issues for consideration remain, the court either grants the petition because it is valid as a matter of law or holds an evidentiary hearing[141] where it hears arguments on disputed issues of material fact.[142] The petitioner has the burden of proving by a preponderance of the evidence the facts necessary to entitle him to relief.[143]

Once the court hears oral arguments and reviews the case, it makes specific findings of fact and issues a ruling either granting or denying petitioner's motion.[144] The rules governing Rule 32 petitions are strict and the court will not grant relief on any ground(s) which:

(1) May still be raised on direct appeal or by post-trial motion;
(2) Were raised or addressed at trial;
(3) Which could have been, but were not raised at trial, unless the court was without jurisdiction;
(4) Were raised or addressed on appeal or in any previous collateral proceeding not dismissed as a petition that challenges multiple judgments; or
(5) Could have been but were not raised on appeal, unless the court was without jurisdiction.[145]

Once a petitioner has filed an initial Rule 32 petition, the court will not consider any successive Rule 32 petitions raising the same issues, although petitioners are freely allowed to amend the petition until the court renders a decision.[146] Appeals raising different issues also will be denied unless (1) the court in the earlier petition did not have jurisdiction; or (2) good cause exists why the new ground(s) were not known or could not have been ascertained through reasonable diligence when the first petition was heard *and* that failure to entertain the petition will result in a miscarriage of justice.[147] Ineffective assistance of counsel claims are never allowed in successive Rule 32 petitions.[148]

If the petition is granted, the court can order a new trial or a new sentencing hearing.[149] If the judgment of the lower court is upheld, the Court of Criminal Appeals will direct that the sentence be carried out and schedule a date for the execution.[150]

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[139] ALA. R. CRIM. P. 32.2(c).
[140] ALA. R. CRIM. P. 32.7(a).
[141] ALA. R. CRIM. P. 32.7(d), 32.9(a).
[142] ALA. R. CRIM. P. 32.7(a).
[143] ALA. R. CRIM. P. 32.3.
[144] ALA. R. CRIM. P. 32.7(c).
[145] ALA. R. CRIM. P. 32.2(a).
[146] ALA. R. CRIM. P. 32.7(b); *see also Ex parte* Jenkins, 2005 WL 796809 (Ala. Apr. 8, 2005).
[147] ALA. R. CRIM. P. 32.2(b).
[148] ALA. R. CRIM. P. 32.2(d).
[149] ALA. R. CRIM. P. 32.9(c).
[150] ALA. CODE § 12-22-243 (2006).

Regardless of the court's determination, the decision may be appealed to the Alabama Court of Criminal Appeals.[151] If the Court of Criminal Appeals declines to grant relief, the petitioner may petition the Alabama Supreme Court for *certiorari* review. If the Alabama Court of Criminal Appeals affirms the conviction and sentence, the petitioner must apply for a rehearing before seeking review by the Alabama Supreme Court.[152] The Alabama Supreme Court is not required to grant the writ of *certiorari*. If the petitioner is unsuccessful before the Alabama Supreme Court, s/he may file a request for *certiorari* with the United States Supreme Court. If the U.S. Supreme Court declines certiorari review or affirms the lower court decision, the collateral review is complete.

F. Federal Habeas Corpus

After the state collateral attack is finished, an inmate wishing to challenge his/her conviction and/or sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* within one of Alabama's three federal districts – northern, middle, or southern. This petitioner may be entitled to appointed counsel to prepare his/her petition if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."[153] By filing the petition, the warrant of execution for the petitioner will be stayed.

Prior to filing a petition for a writ of *habeas corpus*, the petitioner must have raised all relevant federal claims in state court, as failure to exhaust all state remedies available on appeal and collateral review is a ground to deny the petition.[154] If the petitioner fails to exhaust all state remedies and makes no showing that "there is an absence of available State corrective process; or [that] circumstances exist that render such process ineffective to protect the rights of the applicant," the court may, in its discretion, consider the merits of the petition and deny relief on the merits.[155] Absent a showing of an excused failure to exhaust, the court must deny the petition for that reason.[156]

In a petition for a writ of *habeas corpus*, the petitioner must identify and raise all possible grounds of relief and summarize the facts supporting each ground.[157] If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.[158] Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court's decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.[159] In addition to the petition, the petitioner may, but is not required to, attach

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[151] ALA. R. CRIM. P. 32.10(a).
[152] ALA. R. APP. P. 39.
[153] 18 U.S.C. § 3599(a)(2) (2006); McFarland v. Scott, 512 U.S. 849, 856-57 (1994) (citing 21 U.S.C. § 848(q)(4)(B), which has since been repealed).
[154] 28 U.S.C. § 2254(b)(1) (2004).
[155] 28 U.S.C. §§ 2254(b)(1); 2254(b)(2) (2004).
[156] 28 U.S.C. § 2254(b)(1) (2004).
[157] RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[158] 28 U.S.C. § 2253(e)(1) (2004).
[159] 28 U.S.C. § 2253(d) (2004).

certified copies of the indictment, plea, and judgment to the petition.[160] If the petitioner does not include these documents with the petition, the respondent (the state) must promptly file copies of those documents with the court.[161]

The petition must be filed in the federal district court for the district wherein the petitioner is in custody or in the district where the petitioner was convicted and sentenced.[162] The deadline for filing the petition is one year[163] from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.[164] The one-year time limitation may be tolled if the petitioner is pursing a properly filed application for state post-conviction relief or other collateral review.[165]

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.[166] If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.[167] In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.[168] In addition to the answer, the respondent must furnish all portions of the state court transcripts it deems relevant to the petition.[169] The

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[160] 28 U.S.C. § 2249 (2004).

[161] *Id.*

[162] 28 U.S.C. §§ 2254, 2241(d) (2004); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. PROC. 22(a).

[163] In states that have "opted-in" to the "Special Habeas Corpus Procedures in Capital Cases," 28 U.S.C. §§ 2261-2266, the deadline for federal *habeas corpus* petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2006). However, a state may only "opt-in" to these expedited procedures if it has (1) the Attorney general of the United States certifies that the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or pretitioner was found not to be indigent. *See* 28 U.S.C. § 2261(b) (2006). The mechanism for appointing, compensating, and reimbursing competent counsel must:

> (1) offer counsel to all state prisoners under capital sentence, and
> (2) provide the court of record the opportunity to enter an order—(a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.

See 28 U.S.C. § 2261(c) (2006).

[164] 28 U.S.C. § 2244(d)(1) (2004).

[165] 28 U.S.C. § 2244(d)(2) (2004).

[166] RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

[167] *Id.*

[168] RULES 4 & 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

[169] RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.[170]

Additionally, either party may submit a request for the invocation of the discovery process.[171] The judge may grant such request if the requesting party establishes "good cause."[172] The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.[173] This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.[174]

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.[175] The judge may not hold an evidentiary hearing on a claim for which the applicant failed to develop the factual basis during the state court proceedings unless: (1) the claim is based on newly recognized constitutional law or newly discovered, previously unavailable evidence, or (2) the facts underlying the claim would be sufficient to establish that but for constitutional error no reasonable fact finder would have found the applicant guilty of the underlying offense.[176] If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.[177] However, if an evidentiary hearing is required, the judge should appoint counsel to the petitioner[178] and conduct the hearing as promptly as possible.[179]

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner's claims. Based on the evidence presented, the judge may grant the petitioner a new guilt/innocence or penalty trial or a new proceeding, or leave the conviction and sentence intact.

In order to appeal the district court judge's decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.[180] If the petitioner seeks the appeal, s/he must also request a "certificate of appealability" from either a district or circuit court judge.[181] A judge may issue a "certificate of appealability" only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.[182] If the "certificate of appealability" is granted, the appeal will proceed to the Eleventh Circuit Court of Appeals.

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[170] *Id.*
[171] RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[172] RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[173] RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[174] RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[175] RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[176] 28 U.S.C. § 2254(e)(2) (2004).
[177] RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[178] RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C. § 3006A(g) (2004) (denoting the qualifications for federal habeas corpus counsel).
[179] RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[180] FED. R. APP. P. 4(a)(1)(A).
[181] 28 U.S.C. § 2253(c)(1) (2004); FED. R. APP. P. 22(b)(3).
[182] 28 U.S.C. § 2253(c)(2) (2004).

In rendering its decision, the Eleventh Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Eleventh Circuit may order a new appeal in the federal district court or the state court, an evidentiary hearing by the federal district court, or a new guilt/innocence or sentencing trial in state court.

Both parties may then seek review of the Eleventh Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.[183] The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition, it may deny the petitioner relief or order a new guilt/innocence trial, a new sentencing trial, or a new appeal.

If the petitioner wishes to file a second or successive *habeas corpus* petition, s/he must submit a motion to the Eleventh Circuit Court of Appeals requesting an order authorizing the petitioner to file and the district court to consider the petition.[184] A three-judge panel of the Eleventh Circuit must consider the motion.[185] The panel specifically must assess whether the petition makes a *prima facie* showing that the claim(s) presented in the second or successive petition was not previously raised and that the new claim(s) (1) relies on a new, previously unavailable constitutional rule or (2) relies on newly discovered, previously unascertainable facts that, if proven, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[186] Claims of factual innocence ("actual innocence") must meet the requirements of the latter provision.[187] Any second or successive petition that presents a claim raised in a prior petition will be dismissed.[188]

If the Eleventh Circuit denies the motion, the petitioner may not seek appellate review of such decision.[189] If the Eleventh Circuit grants the motion, then the second or successive motion will continue through the same process that the initial petition went through.

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency.[190]

G. Clemency

The Alabama Governor has the power to grant reprieves to people under sentence of death and to commute sentences of death to sentences of life in prison.[191] There are no established rules or procedures governing the Governor's exercise of clemency power.

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[183] 28 U.S.C. § 1254(1) (2004).
[184] 28 U.S.C. § 2244(a)(3)(A) (2004).
[185] 28 U.S.C. § 2244(b)(3)(B) (2004).
[186] 28 U.S.C. § 2244(b)(2) (2004).
[187] 28 U.S.C. § 2244(b)(2)(B) (2004); *In re* Medina, 109 F.3d 1556, 1565-66 (11th Cir. 1997) (noting that the "§ 2244(b)(2)(B) exception to the bar against second habeas applications has no application to claims that relate only to the sentence").
[188] 28 U.S.C. § 2244(b)(1) (2004).
[189] 28 U.S.C. § 2244(b)(3)(E) (2004).
[190] ALA. CONST. amend. 38.
[191] *Id.*

H. Execution

Whenever a person's death sentence is upheld judicially,[192] the clerk of the court issues an execution warrant within ten days.[193] This may result in the setting of multiple execution dates throughout the capital appeals process.

An inmate's death sentence may not be carried out until the Alabama Supreme Court orders an execution date. The Alabama Supreme Court order setting the execution date serves as a warrant of execution.[194] An execution date may be set for at least thirty days after all appeals have been exhausted or after the inmate has failed to pursue the possible remedies within the time limit.[195]

Once the prison warden receives the warrant of execution, the condemned person is taken to the William C. Holman unit of the Atmore Prison.[196] Once at Holman prison, the inmate is allowed to visit with his or her doctor, lawyer, relatives, friends, and spiritual advisors.[197]

A death sentence may be carried out at any hour on the day of execution, but it must be more than thirty and fewer than 100 days from the date of the final sentence. The method of execution is lethal injection, unless the inmate chooses to be executed by electrocution.[198] The prison warden, his or her deputy, or a designated employee may administer the lethal injection.[199]

Only the following people may attend the execution:

(1) The executioner and any persons needed to assist in conducting the execution;
(2) The Commissioner of Corrections or his or her representative;
(3) Two physicians, including the prison physician;
(4) The spiritual advisor of the condemned;
(5) The chaplain of Holman Prison;
(6) Newspaper representatives chosen by the warden;
(7) Up to two of the condemned's friends or relatives; and
(8) Up to two of the victim's immediate family members. If there was more than one victim, the Commissioner of Corrections determines the number and manner of selection of those witnesses.[200]

Convicts are not allowed to witness executions.[201]

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192 ALA. R. APP. P. 8(d)(1).
193 ALA. CODE § 15-18-80(a).
194 ALA. R. APP. P. 8(d)(1).
195 *Id.*
196 ALA. CODE § 15-18-80(b) (2006).
197 ALA. CODE § 15-18-81 (2006).
198 ALA. CODE § 15-18-82(a) (2006).
199 ALA. CODE §§ 15-18-82(b), 15-18-82.1 (2006).
200 ALA. CODE § 15-18-83(a) (2006).
201 ALA. CODE § 15-18-83(b) (2006).

If the trial judge handling the case believes that the defendant should be pardoned, he or she is able to postpone the execution for as long as is necessary to obtain the action of the Governor on an application for commutation of the death sentence and the action of the Board of Pardons and Paroles on an application for pardon.[202]

[202] ALA. CODE § 15-18-100 (2006).

CHAPTER TWO

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.[1] Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.[2] However, the standards for preserving biological evidence and for seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail adequately to preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.[3] The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.[4]

Accuracy in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,[5] and through the priorities and practices of other police oversight groups.[6]

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[1] *See* ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* http://www.abanet.org/crimjust/policy/cjpol.html#am00115 (last visited on May 22, 2006).

[2] *See* National Conference of State Legislatures, DNA & Crime, *at* http://www.ncsl.org/programs/health/genetics/dna.htm (last visited on May 22, 2006); *see also* Innocence Project, Legislative Page, *at* http://www.innocenceproject.org/docs/Model_DNA_Factsheet.pdf (last visited on May 22, 2006).

[3] *See* 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) ("Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies."); *Id.* (Standard 1-5.1) (police should be "made fully accountable" to their supervisors and to the public for their actions).

[4] *See id.* (Standard 1-5.3(a)) (identifying "[c]urrent methods of review and control of police activities").

[5] Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

[6] Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all 50 states. Similarly, state-based organizations exist in many places, as do government established independent monitoring agencies. *See* CALEA Online, *at* http://www.calea.org/ (last visited on May 22, 2006). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC).

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.[7]

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or law are unavailable.[8] Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice call for them.[9]

ASCLD-LAB, *at* http://www.ascld-lab.org/ (last visited on May 22, 2006); NFSTC, *at* http://www.nfstc.org/ (last visited on Jan. 6, 2006).

[7] Standard 1-7.3 provides:

> (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
>
> (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-7.3); *see also id.* (Standard 1-5.2(a)) (noting the value of "education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society").

[8] *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) ("Adequate Police Resources").

[9] *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

Five death-row inmates have been exonerated since Alabama reinstated the death penalty in 1973.[10] Although several Alabama appellate judges have recognized "the need for, and the importance of, post-conviction deoxyribonucleic acid (DNA) testing in certain cases—especially in capital-murder cases in which the death penalty has been imposed,"[11] neither the Alabama Legislature nor the Alabama Supreme Court has created a mechanism exclusively for obtaining post-conviction DNA testing or the preservation of biological evidence for such testing.

A. Preservation of DNA Evidence and Other Types of Evidence

1. Pre-trial Preservation of DNA and Other Types of Evidence by Law Enforcement

All police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Alabama certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)[12] are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing and avoiding contamination of physical evidence.[13]

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[10] *See* Death Penalty Information Center, *Cases of Innocence 1973 - Present*, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last updated on May 22, 2006). The names of the five exonerated individuals are as follows: Walter McMillian (charges dismissed and released in 1993); Randall Padgett (acquitted on retrial and released in 1997); James Bo Cochran (acquitted on retrial and released in 1997); Gary Drinkard (acquitted at retrial and released in 2001); and Wesley Quick (acquitted on retrial and released in 2003). The definition of innocence used by the Death Penalty Information Center ("DPIC") in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id*.

[11] Dowdell v. State, 854 So. 2d 1195, 1198 (Ala. Crim. App. 2002) (Shaw, J., concurring).

[12] Eleven police departments, sheriff's departments, and university police departments in Alabama have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on May 22, 2006) (use second search function, designating "U.S." and "Alabama" as search criteria); *see also* CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on May 22, 2006) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission; and (6) a hearing where a final decision on accreditation is rendered. *See* CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on May 22, 2006).

[13] COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY

In addition to the requirements for law enforcement agency accreditation, individual law enforcement officers are statutorily required to meet certain criteria,[14] take part in a basic training course[15] at a training academy authorized by the Alabama Peace Officer Standards and Training Commission (APOSTC), which is the regulatory body that oversees the training of law enforcement candidates,[16] and pass a battery of examinations.[17] The basic training course consists of 480 hours of training,[18] including instruction in such relevant areas as crime scene processing, collecting and preserving evidence, death investigations, and sex crimes.[19]

The Alabama Department of Forensic Sciences (ADFS) regional crime laboratories are accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).[20] The ASCLD/LAB specifically requires accredited laboratories to have a written or secure electronic chain of custody records with all necessary data, which provides for the complete tracking of all evidence, and to have a secure area for overnight and/or long-term storage of evidence.[21] All evidence also must be marked for identification, stored under proper seal so that the contents cannot readily escape, and protected from loss, cross transfer, contamination and/or deleterious change.[22]

ACCREDITATION PROGRAM 42-2, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1).

[14] ALA. CODE § 36-21-46 (2005). One must (1) be at least 19 years of age; (2) have obtained a high school diploma or the recognized equivalent; (3) complete a required training course; (4) be certified by a licensed physician as in good health and physically fit for the performance of the duties of a law enforcement officer; and (5) be a person of good moral character and reputation and must not have been convicted of a felony. *Id.*

[15] The law enforcement candidate must successfully complete a basic training program approved by the Alabama Peace Officer Standards and Training Commission. ALA. CODE § 36-21-46 (2005); ALA. ADMIN. CODE R. 650-X-2-.01 (2005) (administrative rule requiring the basic training).

[16] ALA. CODE § 36-21-45 (2005); ALA. ADMIN. CODE R. 650-X-3-.01 (2005) (administrative rule requiring the basic training course be taught at a certified academy).

[17] In order to successfully complete the basic training course and obtain certification, the law enforcement candidate must achieve (1) a score of at least 70% on all written exams, the first-aid exam, the legal issues exam, and the firearms course; (2) a passing score on the physical agility/ability test; and (3) at least 95% attendance throughout the training course. ALA. ADMIN. CODE R. 650-X-4-.01(3) (2005).

[18] ALA. ADMIN. CODE R. 650-X-4-.01(1) (2005). The course generally runs for 3-4 months. *See* Alabama Peace Officer Standards and Training Commission, Basic Training, *at* http://www.apostc.state.al.us/basic_training.htm (last visited on May 22, 2006).

[19] *See* Northeast Alabama Law Enforcement Academy, Basic Training, *at* http://lea.jsu.edu/ (last visited on May 22, 2006) (click on "Basic Training," and then on "480 Hour Basic Training Curriculum"). This basic training course follows the course prescribed by APOSTC and is the same 480 hour curriculum offered at all other academies in the state. *Id.*

[20] The following laboratories in Alabama are currently accredited through the ASCLD/LAB program: (1) ADFS Auburn Laboratory; (2) ADFS Birmingham Regional Laboratory; (3) ADFS Dothan Laboratory; (4) ADFS Florence Laboratory; (5) ADFS Huntsville Regional Laboratory; (6) ADFS Jacksonville Laboratory; (7) ADFS Mobile Regional Laboratory; (8) ADFS Montgomery Regional Laboratory; and (9) ADFS Tuscaloosa Laboratory. *See* American Society of Crime Laboratories Directors, Laboratories Accredited by ASCLD/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AL (last visited on May 22, 2006).

[21] AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

[22] *Id.*

2. Preservation of Evidence During and After Trial

The State of Alabama does not have any uniform procedures for the preservation of evidence during the capital trial or any uniform requirements for how long evidence must be preserved after the conclusion of the defendant's capital trial. However, the Alabama Supreme Court has adopted the United States Supreme Court holding that "[u]nless the criminal defendant can show bad faith on the part of the police [or prosecutors], failure to preserve potentially useful evidence does not constitute a denial of due process of law."[23] However, the Alabama Supreme Court held that there is an exception to the requirement that the defendant prove bad faith, where "'the defendant is unable to prove that the State acted in bad faith but [where s/he can demonstrate that] the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[24]

B. Post-Conviction DNA Testing

1. Post-conviction DNA Testing in Alabama Rule of Criminal Procedure 32

Because Alabama does not have a separate mechanism for seeking post-conviction DNA testing, post-conviction petitioners must seek such relief under Alabama Rule of Criminal Procedure 32.[25] Specifically, Rule 32.4 states that "[a] proceeding under [Rule 32] displaces all post-trial remedies . . . [and] [a]ny other post-conviction petition seeking relief from a conviction or sentence shall be treated as a proceeding under [Rule 32]."[26] A petitioner seeking DNA testing may bring a timely claim under Rule 32.1(a) as a challenge to his/her conviction on constitutional grounds if, at that time, a constitutional requirement for DNA testing exists under caselaw or otherwise.[27] However, while a petitioner may technically be able to bring a claim of newly discovered evidence to overcome the time limitations set out in Alabama's post-conviction scheme,[28] it is doubtful that the court will reach the merits of such a claim requesting post-conviction DNA testing. In order to make a claim of newly discovered evidence in a Rule 32 petition, the petitioner must allege:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Alabama Rule of Criminal Procedure 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

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[23] Snyder v. State, 893 So. 2d 488, 527-28 (Ala. Crim. App. 2003) (citing *Ex parte* Gingo, 605 So. 2d 1237 (Ala. 1992), and Arizona v. Youngblood, 488 U.S. 51 (1988)).

[24] *Gingo*, 605 So. 2d at 1241 (citing *Youngblood*, 488 U.S. at 61 (Stevens, J., concurring)).

[25] ALA. R. CRIM. P. 32.

[26] ALA. R. CRIM. P. 32.4.

[27] ALA. R. CRIM. P. 32.1(a).

[28] ALA. R. CRIM. P. 32.1(e), 32.2(c); *see also* Dowdell v. State, 854 So. 2d 1195, 1197-98 (Ala. Crim. App. 2002). For additional information on Alabama post-conviction scheme, including newly discovered evidence claims and time limitations, see Chapter Eight: State Post-Conviction Proceedings of this report, *infra*, at 143.

(3) The facts do not merely amount to impeachment evidence;
(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.[29]

Rule 32.1(e) requires that newly discovered evidence, which meets the above five elements for a newly discovered evidence claim, to "exist" before such a claim can be reviewed on the merits.[30] Because the results of the testing, rather than the method of testing itself, can be construed as the newly discovered evidence, a claim of newly discovered evidence can likely not be made until testing is performed and the results are discovered.[31]

It also appears that a petitioner would not have a meritorious claim for DNA testing through post-conviction discovery without first knowing the results of such testing. When ascertaining whether discovery is warranted in a Rule 32 proceeding, the post-conviction court must determine: (1) whether the petition includes "a clear and specific statement of the grounds upon which relief is sought" rather than bare and conclusory allegations;[32] and (2) whether the petitioner has shown "good cause" for disclosure of the requested materials.[33] A showing of good cause, however, does not automatically entitle the petitioner to post-conviction discovery under Rule 32, and in order to determine whether "good cause" exists for such discovery, a petitioner must "allege facts that, if proved, would entitle him to relief."[34] Thus, because a petitioner may not be able to state a facially valid claim for newly discovered evidence seeking DNA testing without first knowing the results of such testing, the petitioner may nto be able to discover the evidence s/he needs, i.e., there could be no good cause for post-conviction discovery.[35]

Furthermore, courts may entertain a Rule 32 petition based on newly discovered evidence only if it is filed within the applicable time period[36] after the Court of Criminal Appeals issued its certificate of judgment or six months after the discovery of such material facts, whichever is later.[37] The Court Criminal Appeals in *Dowdell v. State* held that, although

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[29] ALA. R. CRIM. P. 32.1(e)(1)-(5).
[30] ALA. R. CRIM. P. 32.1(e).
[31] *Dowdell*, 854 So. 2d at 1200, 1202 (Shaw, J., concurring).
[32] ALA. R. CRIM. P. 32.6(b).
[33] *Ex parte* Land, 775 So. 2d 847 (Ala. 2000); Jackson v. State, 910 So. 2d 797, 801 (Ala. Crim. App. 2005).
[34] *Dowdell*, 854 So. 2d at 1201 (Shaw, J., concurring) (citing *Land*, 775 So. 2d 852-53).
[35] *Id.* at 1202.
[36] ALA. R. CRIM. P. 32.2(c).
[37] *Id.* On August 1, 2002, Rule 32 was amended to change the period within which an inmate could file a petition from two years to one year. ALA. R. CRIM. P. 32.2 cmt. On July 1, 2002, Alabama Supreme Court issued an order explaining that 1) defendants in cases in which the triggering date (date from which the time for filing a Rule 32 motion begins to run) occurs on or before July 31, 2001, shall have two years from the triggering date within which to file a post-conviction petition pursuant to rule 32; 2) defendants in cases in which the triggering date occurs during the period beginning August 1, 2001, and ending July 31, 2002, shall have one year from August 1, 2002, within which to file a post-conviction petition; and 3) defendants in cases in which the triggering date occurs on or after August 1, 2002, shall have one year from the triggering date within which to file a post-conviction petition. *Id.*

defendant claimed that the he only recently learned of the method of DNA testing to establish his innocence, Dowdell could not establish that the method of DNA testing was "not known [to him or his] counsel at the time of trial or sentencing or . . . in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence."[38] The court reasoned that, because Alabama courts have recognized DNA testing as admissible since 1991 and, since that time, Alabama courts have addressed by opinion the admissibility of DNA testing on numerous occasions, Dowdell's claim that he had only recently became aware of DNA testing was not credible and did not provide a rationale for overcoming the time bar.[39] The court concluded that had Dowdell filed his request for DNA testing within a reasonable time—six months—after DNA testing became admissible in Alabama, his allegation that he only recently learned of the availability of DNA testing would have been credible and the court could have reached the merits of his newly discovered evidence claim.[40]

While it appears that Rule 32 is the only mechanism for bringing a claim for post-conviction DNA testing, it is unclear whether such a claim is actually available to a petitioner who is asserting it after the time for filing a Rule 32 petition has run.

2. Time and Procedural Limitations on Seeking DNA Testing in Alabama

To apply for post-conviction DNA testing, an individual must petition the court by filing a motion under Alabama Rule of Criminal Procedure 32.[41] The death-row petitioner must file his/her Rule 32 petition within one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction and sentence on appeal.[42] Petitions based on newly discovered material facts must be filed within one year after the Court of Criminal Appeals issued its certificate of judgment or six months after the discovery of such material facts, whichever is later.[43]

The procedural bars that exist in Rule 32.2 "apply with equal force to all cases, including those in which the death penalty has been imposed."[44] For a more in-depth discussion of the potential procedural bars on post-conviction claims seeking DNA testing, see the State Post-Conviction Proceedings Section of this Report.[45]

C. Location of and Funding for DNA Testing

If a petitioner receives DNA testing of biological evidence in his case, the Alabama Department of Forensic Sciences (Department) will perform the testing at either the

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38 *Dowdell*, 854 So. 2d at 1197-98.
39 *Id.*
40 *Id.* at 1198.
41 ALA. R. CRIM. P. 32.
42 ALA. R. CRIM. P. 32.2(c).
43 *Id.*
44 State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).
45 *See infra*, at 143.

Huntsville, Mobile, or Montgomery laboratories which are all equipped to provide services in Forensic Biology (DNA).[46]

The Department of Forensic Sciences was allocated $22,218,230 in fiscal year 2006.[47] However, the exact portion of this allocation dedicated exclusively to the preservation and testing of biological evidence is unknown.

[46] Alabama Department of Forensic Sciences, Laboratory Information, *at* http://www.adfs.state.al.us/adfs_info_labs.htm (last visited on May 22, 2006).

[47] Ala. Executive Budget Office, General Fund, Fiscal Year 2006, *at* http://www.budget.state.al.us/GF2006.pdf (last visited on May 22, 2006).

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence[48] for as long as the defendant remains incarcerated.

After an exhaustive review of Alabama law, it does not appear that the State of Alabama requires all government entities to preserve physical evidence for as long as the defendant remains incarcerated. For example, in *May v. State*, the police failed to preserve a bloody palm print, resulting in the defense's inability to obtain independent analysis of the evidence.[49]

However, the Alabama Supreme Court has applied the federal constitutional prohibition against the intentional destruction by prosecutors or police of evidence useful to the defense, where the destruction was done in bad faith.[50] This constitutional restriction does not require evidence-holding agencies to keep evidence for any specific amount of time and they can destroy evidence at any time as long as it was not done in bad faith—with knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.[51] The burden of proving this constitutional violation is on the defendant.[52] Even where the defendant cannot prove bad faith, s/he may still gain relief if s/he can demonstrate that the lost or destroyed evidence was so critical to the defense that its absence would make the trial fundamentally unfair.[53] It appears that in the vast majority of reported cases dealing with destruction of evidence, the defendant did not sufficiently demonstrate either that the state destroyed the evidence in bad faith or, in the absence of proof of bad faith, that the evidence was so critical to the defense that its absence from the trial would affect the fairness of the trial.

The State of Alabama, therefore, does not appear to be in compliance with Recommendation #1.

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.

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[48] "Biological evidence" includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf (last visited on May 22, 2006).

[49] Barber v. State, 2005 WL 1252745 (Ala. Crim. App. May 27, 2005).

[50] Snyder v. State, 893 So. 2d 488, 527-28 (Ala. Crim. App. 2003) (citing *Ex parte* Gingo, 605 So. 2d 1237 (Ala. 1992), and Arizona v. Youngblood, 488 U.S. 51 (1988)).

[51] *Id.* at 528.

[52] *Id.*

[53] *Gingo*, 605 So. 2d at 1241 (citing *Youngblood*, 488 U.S. at 61 (Stevens, J., concurring)).

The State of Alabama provides an avenue for defendants to obtain physical evidence for DNA testing during pre-trial discovery, but does not provide inmates a clear method to seek post-conviction DNA testing.

Alabama law provides that within fourteen days of the defendant's written request for discovery, or at another time set by the court, the prosecution must allow the defendant to "analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things, which are within the possession, custody, or control"[54] of the prosecution:

(1) Which are material to the preparation of defendant's defense;
(2) Which are intended for use by the prosecution as evidence at the trial; or
(3) Which were obtained from or belong to the defendant.[55]

Furthermore, the defendant must also be permitted to "inspect and to copy any results or reports of physical or mental examinations or scientific tests or experiments, if the examinations, tests, or experiments were made in connection with the particular case, and the results or reports are within the possession, custody, or control of the state/municipality, and their existence is known to the prosecutor."[56]

Based on this rule, it appears that a defendant who elects to participate in this discovery procedure has the right to inspect and test such tangible objects that are in the possession of the prosecution, which could include biological evidence collected from the defendant and such evidence collected from the co-defendants and victims that could be subject to DNA testing, as it is clearly "material to the preparation of defendant's defense."

Additionally, Alabama law, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, allows the inmate to seek post-conviction DNA testing through a normal Rule 32 post-conviction petition.[57] A death-row petitioner who files a Rule 32 petition within the permitted time of one year after the Court of Criminal Appeals issues a certificate of judgment affirming his/her conviction and sentence on appeal may seek DNA testing of evidence in his/her case as an appropriate ground for relief from the constitutional violation of wrongful conviction pursuant to Rule 32.1(a), if at that time a constitutional right to DNA testing exists by court decision or otherwise.[58] However, for many death-row petitioners, the time for making such a claim had run before DNA testing was widely used or within the knowledge of inmates, law enforcement, and the judiciary.

These petitioners are left to make a post-conviction claim of newly discovered evidence under Rule 32.1(e), which must be filed within six months of discovering the new evidence.[59] It appears, however, that even this outlet would not be available to all death-row petitioners. The Alabama Court of Criminal Appeals appears inclined to dismiss claims of newly discovered evidence as untimely because Alabama courts have

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[54] ALA. R. CRIM. P. 16.1(c).
[55] *Id.*
[56] ALA. R. CRIM. P. 16.1(d).
[57] ALA. R. CRIM. P. 32.4.
[58] ALA. R. CRIM. P. 32.1(a).
[59] ALA. R. CRIM. P. 32.1(e), 32.2(c); Dowdell v. State, 854 So. 2d 1195, 1197-98 (Ala. Crim. App. 2002).

recognized DNA testing as admissible since 1991 and, since that time, Alabama courts have addressed by opinion the admissibility of DNA testing on numerous occasions. Thus, the court has held that a petitioner's allegation that s/he only recently became aware of DNA testing is not credible and does not provide a rationale for overcoming the time bar.[60] This interpretation fails to take into account the evolution of DNA testing since its inception, where new methods of such testing have been continually developed that allow accurate testing of increasingly smaller and more degraded samples of increasingly different types of biological evidence.

Additionally, both claims of newly discovered evidence and the post-conviction discovery procedures under Rule 32 require the new evidence to "exist" before such a claim can be reviewed on the merits.[61] Because the results of the testing, rather than the method of testing itself, can be construed as the newly discovered evidence, a claim of newly discovered evidence cannot be made until testing is performed and the results are discovered.[62]

Although defendants in Alabama appear to have the ability to inspect and analyze evidence in the possession of the prosecution during pre-trial phase of a death penalty case, the ability of all Alabama death-row inmates to obtain post-conviction DNA testing of biological evidence in their cases appears to be illusory at best. The State of Alabama, therefore, is in partial compliance with Recommendation #2.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

CALEA requires accredited law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing and avoiding contamination of physical evidence.[63] Similarly, all of the Alabama Department of Forensic Science's (Department) regional and affiliated crime laboratories accredited by the ASCLD/LAB are required to adopt specific procedures relating to the preservation of evidence.[64]

We were unable to ascertain whether all law enforcement agencies in Alabama, accredited or otherwise, have established and are enforcing written procedures and policies governing the preservation of biological evidence. Furthermore, we were unable to determine whether the procedures promulgated by the Department in order to comply with ASCLD/LAB are being enforced.

We are, therefore, unable to assess whether the procedures adopted by these agencies comply with Recommendation #3.

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[60] *See, e.g.*, *Dowdell*, 854 So. 2d at 1197-98.

[61] ALA. R. CRIM. P. 32.1(e); *Dowdell*, 854 So. 2d at 1201-02 (Shaw, J., concurring) (citing *Land*, 775 So. 2d 852-53).

[62] *Dowdell*, 854 So. 2d at 1200, 1202 (Shaw, J., concurring).

[63] CALEA STANDARDS, *supra* note 13, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1).

[64] ASCLD/LAB 2003 MANUAL, *supra* note 21, at 20-23.

D. Recommendation #4

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Law enforcement agencies in Alabama certified under CALEA are required to establish written directives requiring a training program[65] and an annual, documented performance evaluation of each employee.[66]

Additionally, Alabama statutory law mandates that every law enforcement officer complete a basic training course offered at a APOSTC-certified training academy,[67] which includes instruction on (1) crime scene processing, (2) collection and preservation of evidence, (3) death investigations, and (4) sex crimes.[68] We were unable, however, to obtain the training materials to determine whether this mandatory training course ensures that investigative personnel are prepared and accountable for their performance.

Based on this information, it appears that law enforcement investigative personnel, including law enforcement officers, do receive mandatory basic training and some law enforcement agencies are required to keep performance evaluations. However, the extent to which the APOSTC basic training course and the CALEA certification program comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Law enforcement agencies in Alabama, therefore, are at least in partial compliance with Recommendation #4.

E. Recommendation #5

The State should ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Law enforcement agencies in Alabama certified under CALEA are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.[69] It appears, therefore, that certified law enforcement agencies may have adopted written directives governing complaints against the agency and/or its employees, but the extent to which these procedures comply with Recommendation #5 is unknown.

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[65] CALEA STANDARDS, *supra* note 13, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2).

[66] CALEA STANDARDS, *supra* note 13, at 35-1 (Standard 35.1.2).

[67] The law enforcement candidate must successfully complete a basic training program approved by the Alabama Peace Officer Standards and Training Commission. ALA. CODE § 36-21-46 (2005); ALA. ADMIN. CODE R. 650-X-2-.01 (2005) (administrative rule requiring the basic training); *see also* ALA. CODE § 36-21-45 (2005); ALA. ADMIN. CODE R. 650-X-3-.01 (2005) (administrative rule requiring the basic training course be taught at a certified academy).

[68] *See* Northeast Alabama Law Enforcement Academy, Basic Training, *at* http://lea.jsu.edu/ (last visited on May 22, 2006) (click on "Basic Training," and then on "480 Hour Basic Training Curriculum"). This basic training course follows the course prescribed by APOSTC and is the same 480 hour curriculum offered at all other academies in the state. *Id.*

[69] CALEA STANDARDS, *supra* note 13, at 52-1 (Standard 52.1.1).

F. Recommendation # 6

The State should provide adequate funding to ensure the proper preservation and testing of biological evidence.

The Department of Forensic Sciences (Department) was allocated $22,218,230 in fiscal year 2006.[70] However, the exact portion of this allocation dedicated exclusively to the preservation and testing of biological evidence is unknown. A review of the Department's 2001 annual reports indicates that at that time, the Department's DNA section had a backlog as a result of a shortage in trained reporting scientists, a growing caseload, and lack of sufficient financial resources.[71]

The report stated, however, that the DNA section had increased the number of trained reporting scientists and reduced the case backlog by 1.5 percent between February and December 2000, and an additional 16 percent by September 2001.[72] Furthermore, the report indicated that with a full staff and sufficient funding, the Department could clear its DNA backlog in 21 months.[73] The Department has not released a more recent annual report and although the Department's budget allocation has increased by approximately $7 million since the 2001 annual report was released,[74] we were unable to ascertain whether this had an effect on alleviating the personnel shortages and case backlog.

Because we are unable to determine the current level of funding for preservation and testing of biological evidence and whether the cases backlog and personnel shortages have been eliminated, we cannot assess the State of Alabama's compliance with Recommendation #6.

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[70] Ala. Executive Budget Office, General Fund, Fiscal year 2006, *at* http://www.budget.state.al.us/GF2006.pdf (last visited on May 22, 2006).

[71] ALA. DEP'T OF FORENSIC SCIENCES, FISCAL YEAR 2001 ANNUAL REPORT 5 (2001), *at* http://www.adfs.state.al.us/news_and_pubs/2001AnnualReport.pdf (last visited on May 22, 2006).

[72] *Id.*

[73] *Id.*

[74] Ala. Executive Budget Office, General Fund, Fiscal year 2006, *at* http://www.budget.state.al.us/GF2006.pdf (last visited on May 22, 2006).

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1983 and 2003, approximately 199 previously convicted "murderers" were exonerated nationwide.[1] In about 50% of these cases, there was at least one eyewitness misidentification, and 21% involved false confessions.[2]

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the group should include foils who resemble the suspect, and the administering officer should be unaware of the suspect's identity. Caution in administering lineups and show-ups is especially important because flaws can easily taint later lineup and at-trial identifications.[3]

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.[4] In the sequential approach, the witness views one person at a time and is not told how many s/he will see.[5] As each person is presented, the eyewitness states whether or not it is the perpetrator.[6] Once an identification is made in a sequential procedure, the procedure stops.[7] The witness thus is encouraged to compare the features of each person viewed to the witness' recollection of the perpetrator's rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the "best match."

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness' statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset -- not just from when the suspect has agreed to confess -- can help avoid erroneous convictions. Complete recording is on

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1 *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003* (2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf (last visited on May 22, 2006).
2 *See id.*
3 *See* BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13-17, 42-44 (2002).
4 *Id.* at 39.
5 *Id.*
6 *Id.*
7 *Id.*

the increase in this country and around the world. Those police departments who make complete recordings have found the practice beneficial to law enforcement.[8]

Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

[8] *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

The State of Alabama does not require law enforcement agencies to adopt special procedures on identifications and interrogations. However, it does require all law enforcement officials to take a basic training course, regulated by the Alabama Peace Officer Standards and Training Commission. Moreover, this Section will discuss the standards with which law enforcement agencies must comply to obtain national accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. Lastly, given that Alabama case law governs all pre-trial identifications and interrogations, this Section will also discuss judicial determinations of the propriety of certain law enforcement actions.

A. Alabama Peace Officer Standards and Training Commission

The Alabama Peace Officer Standards and Training Commission (APOSTC) is the regulatory body authorized by the legislature to, among other things, (1) obtain information concerning the recruitment, selection, and training of law enforcement officers in Alabama, and make reports and recommendations on improvements in methods of recruitment, selection, and training of law enforcement officers; (2) periodically review the standards for law enforcement officer applicants and appointees; (3) promulgate standards relating to the physical, mental, and moral fitness of any law enforcement officer applicant and appointee while maintaining the minimum statutory standards; (4) make periodic reports concerning the curriculum for basic training courses offered by law enforcement training schools, make recommendations for improving the schools, curriculum, and courses, and encourage the establishment of new law enforcement training courses and schools; and (5) investigate potential violations and, where necessary, revoke certification of any law enforcement officer for failure to meet the statutory and/or rule-based continuing training or education requirements.[9]

A "peace officer" or "law enforcement officer" is defined in Alabama as "a policeman, deputy sheriff, deputy constable, and other official who has authority . . . to make arrests."[10] In addition to all local officers, the term includes state troopers or members of the state Department of Public Safety, enforcement officers of the Public Service Commission, and the Alabama Board of Corrections."[11] To obtain certification as a peace officer, one must meet certain criteria,[12] take part in a basic training course[13] at a training academy authorized by the APOSTC,[14] and pass a battery of examinations.[15]

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[9] ALA. CODE § 36-21-45 (2005). The APOSTC consists of seven voting members, all of whom must be at least 19 years of age. ALA. CODE § 36-21-41 (2005). The state fraternal order of police, Alabama Peace Officers' Association, and the Law Enforcement Planning Association each designate one member who serves a four-year term. *Id.* The Governor designates the other four members of the commission, each of whom serve a four-year term. *Id.*

[10] ALA. CODE § 36-21-40(4) (2005).

[11] *Id.*

[12] ALA. CODE § 36-21-46 (2005). One must (1) be at least 19 years of age; (2) have obtained a high school diploma or the recognized equivalent; (3) complete a required training course; (4) be certified by a licensed physical as in good health and physically fit for the performance of the duties of a law enforcement officer; and (5) a person of good moral character and reputation and must not have been convicted of a felony. *Id.*

The APOSTC provides law enforcement academies with a mandatory curriculum for the basic training course that consists of 480 hours of training,[16] including four hours of training on interviews and interrogations.[17]

B. Law Enforcement Accreditation Programs

Eleven[18] police departments, sheriff's departments, and university police departments in Alabama have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which is an independent accrediting authority established by the four major law enforcement membership associations in the United States.[19]

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and, if not, developing a plan to come into compliance; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission.[20] After completion of these steps, a hearing is held where a final decision on accreditation is rendered.[21] The CALEA standards are used to "certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training."[22] CALEA Standard 42.2.3 requires the creation of a written directive that

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[13] The law enforcement candidate must successfully complete a basic training program approved by the Alabama Peace Officer Standards and Training Commission. ALA. CODE § 36-21-46 (2005); ALA. ADMIN. CODE R. 650-X-2-.01 (2005) (administrative rule requiring the basic training).

[14] ALA. CODE § 36-21-45 (2005); ALA. ADMIN. CODE R. 650-X-3-.01 (2005) (administrative rule requiring the basic training course be taught at a certified academy).

[15] In order to successfully complete the basic training course and obtain certification, the law enforcement candidate must (1) achieve a score of at least 70% on all written exams, the first-aid exam, the legal issues exam, and the firearms course; (2) pass the physical agility/ability test; and (3) achieve at least 95% attendance throughout the training course. ALA. ADMIN. CODE R. 650-X-4-.01(3) (2005).

[16] ALA. ADMIN. CODE R. 650-X-4-.01(1) (2005). The course generally runs for 3-4 months. *See* Alabama Peace Officer Standards and Training Commission, Basic Training, *at* http://www.apostc.state.al.us/basic_training.htm (last visited on May 22, 2006).

[17] *See* Northeast Alabama Law Enforcement Academy, Basic Training, *at* http://lea.jsu.edu/ (last visited on May 22, 2006) (click on "Basic Training," and then on "480 Hour Basic Training Curriculum"). This basic training course follows the course prescribed by APOSTC and is the same 480 hour curriculum offered at all other academies in the state. *Id.*

[18] CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on May 22, 2006) (using second search function and designating "U.S." and "Alabama" as search criteria).

[19] CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on May 22, 2006) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

[20] CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on May 22, 2006).

[21] *Id.*

[22] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

"establishes steps to be followed in conducting follow-up investigations . . . [including] identifying . . . suspects."[23]

C. Constitutional Standards Relevant to Identifications and Interrogations

Pre-trial witness identifications, such as those taking place during lineups, photospreads, and showups, are governed by the constitutional due process guarantee of a fair trial.[24] A due process violation occurs where the trial court allows testimony concerning pre-trial identification of the defendant if (1) the identification procedure employed by law enforcement was impermissibly suggestive,[25] and (2) under the totality of the circumstances,[26] the suggestiveness gave rise to a substantial likelihood of irreparable misidentification.[27]

"Reliability is the linchpin in determining the admissibility of identification testimony."[28] In making the determination of whether, under the totality of the circumstances, the use of an impermissibly suggestive pre-trial identification procedure would lead to a substantial likelihood of irreparable misidentification, the court should consider the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the [length of time] between the crime and the confrontation."[29]

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[23] *Id.* at 42-3 (Standard 42.2.3).

[24] *See* Neil v. Biggers, 409 U.S. 188, 196-99 (1972).

[25] *Neil*, 409 U.S. at 196-97; Hull v. State, 581 So. 2d 1202, 1204 (Ala. Crim. App. 1990).

[26] *Neil*, 409 U.S. at 196 (noting that whether the impermissible suggestiveness of a pre-trial identification gave rise to a very substantial likelihood of misidentification must be "determined 'on the totality of the circumstances'").

[27] The United States Supreme Court has stated that, for testimony regarding the pre-trial procedure to be excluded, its impermissible suggestiveness should give rise to a very substantial likelihood of "irreparable" misidentification. *See, e.g.*, *Neil*, 409 U.S. at 196-97; Simmons v. United States, 390 U.S. 377, 384 (1968). However, the Alabama courts use this standard, citing to *Neil*, without always including the word "irreparable" and without providing an explanation for such omission. *Compare Hull*, 581 So. 2d at 1207, *with* Jackson v. State, 414 So. 2d 1014, 1017 (Ala. Crim. App. 1982). This may best be explained by a remark in *Neil* where the United States Supreme Court stated that "[w]hile the [very substantial likelihood of irreparable misidentification] . . . standard . . . determin[es] whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of the word "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Neil*, 409 U.S. at 198.

[28] *Jackson*, 414 So. 2d at 1017 (citing Manson v. Brathwaite, 432 U.S. 98 (1977)).

[29] *Neil*, 409 U.S. at 199; *Manson*, 432 U.S. at 114. *Compare Hull*, 581 So. 2d at 1205-07 (noting that based on the facts that (1) the witness viewed the perpetrator in daylight, (2) she was likely not able to give her undivided attention to seeing the perpetrator, (3) the witness gave a fairly general, but consistent description of the perpetrator on multiple occasions, (4) the witness, although picking out the defendant in pre-trial identification procedures, never stated a level of certainty in the identification, and (5) fifty-one weeks had elapsed between the incident and the initial identification and the witness had seen the defendant's face on television news reports, the court held that the impermissibly suggestive identification procedure created a "very substantial likelihood of misidentification"), *and* Oakley v. State, 457 So. 2d 459, 461-62 (Ala. Crim. App. 1984) (noting that based on the facts that (1) although the witness had 15-20 seconds to view the assailant, (2) there was not a high degree of attentiveness on her part toward viewing the assailant, (3) the witness's description of the perpetrator did not meet the description of the defendant until she was told she had picked the wrong photograph, (4) the witness showed uncertainty in her identification until she was told she had picked the wrong picture, and (5) two and one-half years passed

These factors must be weighed against the effect of the impermissibly suggestive procedure to determine whether the identification was so unreliable as to create a substantial likelihood of misidentification.[30]

To determine the admissibility of an in-court identification, the court will use these same factors to establish whether an in-court identification by a witness has a sufficient independent basis for reliability or whether it purely relies on the impermissibly suggestive pre-trial procedure.[31] A witness's mere assertion that his/her in-court identification was based on his/her observation of the perpetrator during the crime is not sufficient by itself to establish a basis for the in-court identification independent of the tainted pre-trial procedure.[32] The prosecution must demonstrate this independent basis of reliability by clear and convincing evidence.[33]

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between the crime and the identification, the court held that the impermissibly suggestive identification procedure created a "very substantial likelihood of misidentification," creating no independent basis for the in-court identification), *with* Cargill v. State, 432 So. 2d 520, 523 (Ala. Crim. App. 1983) (noting that the identification procedure was not impermissibly suggestive and, even if it was, it had other indicia of reliability based on the facts that (1) the witness had ample opportunity to view the perpetrator during the incident, (2) the witness clearly trained his attention on the perpetrator because the perpetrator was "right over [him] . . . where [he] could see [him] well," (3) the prior identification was so accurate that it allowed police to produce a composite sketch, (4) the witness twice identified the defendant as the perpetrator without hesitation, and (5) although eight months had elapsed between the robbery and in-court identification, the witness helped police secure an arrest warrant for the defendant only one and one-half months after the incident); *see also Jackson*, 414 So. 2d at 1017-18.

[30] *Hull*, 581 So. 2d at 1205; *Jackson*, 414 So. 2d at 1017.

[31] *See Hull*, 581 So. 2d at 1205; *Jackson*, 414 So. 2d at 1018; Brazell v. State, 369 So. 2d 25, 29 (Ala. Crim. App. 1978).

[32] *Oakley*, 457 So. 2d at 461.

[33] *Id.*

II. ANALYSIS

A. 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, at a minimum, should address the subjects, and should incorporate the social scientific teachings and best practices set forth in the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (which has been reproduced below, in relevant part and with slight modifications).

A number of law enforcement agencies in Alabama have obtained or are in the process of obtaining accreditation by CALEA. This program, however, does not require the accredited agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. For example, Standard 42.2.3 of CALEA merely requires law enforcement agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects.[34]

While individual law enforcement agencies may have created specific guidelines mirroring the requirements of the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices) in order to comply with Standard 42.2.3 of CALEA, we were unable to obtain sufficient information to ascertain whether Alabama law enforcement agencies, accredited or otherwise, are in compliance with the ABA Best Practices.

Regardless of whether the law enforcement agency has obtained accreditation, all pre-trial identification procedures administered by law enforcement agencies are ultimately subject to constitutional due process limitations. Thus, in assessing compliance with each ABA Best Practice, it also is necessary to discuss the Alabama courts' treatment of certain actions by law enforcement officials in administering pre-trial identification procedures.

1. General Guidelines for Administering Lineups and Photospreads

a. The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) to be unaware of which of the participants is the suspect.

Numerous law enforcement agencies in Alabama are accredited or in the process of obtaining accreditation by CALEA, which requires these agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects.[35] Although the CALEA standards do not specifically require that all those present at a pre-trial identification be unaware of which participant

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[34] CALEA STANDARDS, *supra* note 22, at 42-3 (Standard 42.2.3).

[35] *Id.*

is the suspect, a law enforcement agency complying with the CALEA standards could create a guideline that requires all those present at a lineup to be unaware of which participant is the suspect. We were, however, unable to ascertain whether law enforcement agencies, accredited by CALEA or otherwise, are complying with this particular ABA Best Practice.

b. The guidelines should require eyewitnesses to be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.

The CALEA standards do not specifically require that accredited agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, and that, although they need not identify anyone, any identification must be in their own words. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

On this issue, the Alabama courts have found that certain practices by law enforcement officials are tantamount to "coaching" the witness and, therefore, are impermissibly suggestive. For example, the Alabama Court of Criminal Appeals found a pre-trial photospread procedure to be impermissibly suggestive where a witness was shown a photospread with only two photographs, told by law enforcement officials that one of the two individuals was the suspect, and then, when the witness identified the non-suspect, the witness was told s/he picked the wrong photograph and given another opportunity to identify the other photograph as that of the perpetrator.[36] In fact, Alabama courts show a preference for an explanation that the suspect "may or may not" be in the lineup and have found such an instruction "not overly suggestive."[37] Nonetheless, while it is "generally inadvisable" for someone connected with administering the pre-trial identification procedure to tell the witness that the suspect is in the lineup, Alabama courts have held that doing so does not, by itself, "contaminate" the lineup.[38]

Additionally, although we were unable to determine whether law enforcement officers ask witnesses to state a level of certainty in their identifications as a matter of course, a number of cases in Alabama illustrate witnesses stating a general level of certainty in their identifications.[39]

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[36] *Oakley*, 457 So. 2d at 461.

[37] *See, e.g.*, Thomas v. State, 399 So. 2d 915, 919 (Ala. Crim. App. 1981).

[38] Fletcher v. State, 337 So. 2d 58, 60-61 (Ala. Crim. App. 1976).

[39] *See* Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995) (noting that the witness identified the defendant as one of the perpetrators from the lineup, indicating an "intense certainty that her identification was correct"); *Oakley*, 457 So. 2d at 462 (noting that before the witness was told she had chosen the wrong photograph, she said that one of the pictures "pretty much looked like [the perpetrator]"); Dill v. State, 429 So. 2d 633, 635-36 (Ala. Crim. App. 1982) (noting that, upon identifying the defendant, the witness stated that he had no "doubt in his mind as to whether the defendant was the person who robbed

Based on Alabama case law, it appears that Alabama courts do not approve of law enforcement officials advising the witness that the lineup contains the suspect. The cases also indicate that, as a matter of practice, witnesses sometimes indicate their level of confidence in their identification. We were, however, unable to ascertain whether Alabama case law, police practice, or compliance with the relevant CALEA standards requires full compliance with this ABA Best Practice.

2. Foil Selection, Number, and Presentation Methods

a. The guidelines should require that lineups and photospreads use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.

b. The guidelines should require that foils be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.

A review of relevant case law demonstrates that in many reported cases, law enforcement officials prepare lineups or photospreads containing six or more people,[40] and attempt to include a number of foils—participants who match the physical description of the perpetrator.[41] However, certain pre-trial identification procedures have been found impermissibly suggestive because they lack any foils. For example, the United States Supreme Court and Alabama Courts have long recognized that the "practice of showing a suspect singly for the purposes of identification"—a showup—has been "widely condemned as being unnecessarily suggestive and conducive to irreparable mistaken identifications that constitute a denial of due process of law."[42] Alabama courts have identified two specific dangers in a one-man showup where a witness is shown a single suspect and asked, "is this the perpetrator?" First, a one-man showup "conveys a clear message that the police suspect" is the subject of the showup.[43] Second, a one-man showup gives the witness no choice in making its identification and the reliability of the identification is not tested objectively, as is the case with a multi-person lineup or photospread.[44]

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him"); Hobbs v. State, 401 So. 2d 276, 280 (Ala. Crim. App. 1981) (noting that the witness identified the defendant at the lineup and stated she was "one hundred percent" sure of the identification).

[40] *See, e.g.*, Jenkins v. State, 627 So. 2d 1034, 1046 (Ala. Crim. App. 1992) (photospread); *Thomas*, 399 So. 2d at 919 (lineup); Young v. State, 346 So. 2d 509 (Ala. Crim. App. 1977) (lineup). *But see* Walkins v. State, 449 So. 2d 1270, 1271 (Ala. Crim. App. 1984) (five-man photographic lineup).

[41] *See, e.g.*, Burgess v. State, 827 So. 2d 134, 170 (Ala. Crim. App. 1998) (noting that the photospread contained young black males of approximately the same age, same build, same hair color and style, and same complexion as the defendant); Carter v. State, 442 So. 2d 150, 153 (Ala. Crim. App. 1983) (noting that the six other participants were selected because of their similarity to the defendant in height, weight, age, hair style and race).

[42] Manson v. Brathwaite, 432 U.S. 98, 104 (1977); Stovall v. Denno, 388 U.S. 293, 302 (1967); *Ex parte* Appleton, 828 So. 2d 894, 899 (Ala. 2001); Gavin v. State, 891 So. 2d 907, 958 (Ala. Crim. App. 2003).

[43] *Appleton*, 828 So. 2d at 899.

[44] *See id.* at 899-900.

Despite the fact that a one-man showup is inherently suggestive, Alabama courts have held that an "on-the-scene confrontation may be consistent with good police work"[45] when it is "conducted promptly after the commission of a crime or demanded by necessity, emergency or exigent circumstances."[46] Alabama courts have held that despite the inherent suggestiveness of a one-man showup, "'it does not necessarily follow that the procedure . . . would taint [a] subsequent in-court identification,'"[47] without more facts evidencing impermissible suggestiveness and, that the impermissible suggestiveness gives rise to a very substantial likelihood of irreparable misidentification. Alabama courts have found certain one-man showups to be violative of due process,[48] and others to be reasonable.[49]

Furthermore, Alabama courts have deemed certain pre-trial identification procedures not impermissibly suggestive where the suspect/defendant was the only participant of a certain age,[50] height,[51] complexion,[52] and with a particular amount of facial hair.[53] Additionally, slight discrepancies such as the photo of a defendant being a black-and-white newspaper file photograph while the other photos were black-and-white mugshots, did not taint the pre-trial identification procedure.[54] The simple fact that the defendant

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[45] Brazell v. State, 369 So. 2d 25, 29 (Ala. Crim. App. 1978).

[46] *Appleton*, 828 So. 2d at 900.

[47] *Gavin*, 891 So. 2d at 960 (citing Quarles v. State, 711 So. 2d 1115, 1117 (Ala. Crim. App. 1997)).

[48] *See, e.g.*, *Brazell*, 369 So. 2d at 28 (holding that the showup was impermissibly suggestive because (1) the witness went to the station to "actually identify the guy" and was shown articles of clothing of a suspected perpetrator, which implies that the police told him they had a suspect, (2) showing only one suspect suggested that the defendant had been wearing those clothes and therefore, committed the crime, and (3) the record showed no necessity, emergency or exigent circumstances for the showup; and there was a very substantial likelihood of misidentification because (1) the showup was held nine hours after the crime, (2) the witness admitted making assumptions about the suspect based on the officer's conduct, (3) there were glaring inconsistencies between the witness's initial description of the suspect and the defendant, and (4) the witness could not identify the defendant as the perpetrator during the suppression hearing).

[49] Cooley v. State, 439 So. 2d 193, 195 (Ala. Crim. App. 1983) (holding that the showup was not impermissibly suggestive because it was done at the scene of the crime only a few hours after the robbery, the promptness of which insured that the recollection of the perpetrator was accurate and fresh in the witness's mind, lessening the likelihood of irreparable misidentification).

[50] *Cf.* Harris v. State, 629 So. 2d 618, 619 (Ala. Crim. App. 1976) (holding that the fact that one person in the lineup, not the defendant, was much older than the rest of the participants does not by itself make a lineup impermissibly suggestive).

[51] *See* Watkins v. State, 449 So. 2d 1270, 1272 (Ala. Crim. App. 1984) (holding that although the police made the defendant stand and the other individuals in the photographic lineup bend their knees, this did not render the procedure impermissibly suggestive because the police were attempting to comport with the law requiring all participants to be of similar height and the officers did not know that the lineup photograph would be taken lengthwise); Jones v. State, 450 So. 2d 165, 169-70 (Ala. Crim. App. 1983) (holding that the fact that the defendant was the shortest person in the lineup did not render the procedure impermissibly suggestive because his height was not so dissimilar).

[52] *See* Williamson v. State, 384 So. 2d 1224, 1227, 1229 (Ala. Crim. App. 1980) (holding that the fact that all other participants in the six-man photospread were of either a darker or lighter complexion did not render the procedure impermissibly suggestive).

[53] *See* Frazier v. State, 528 So. 2d 1144, 1149 (Ala. Crim. App. 1986) (holding that a photospread where the defendant was the only participant with a full beard while all others had a mustache and some facial hair around the chin did not render the procedure impermissibly suggestive).

[54] Jackson v. State, 593 So. 2d 167, 172 (Ala. Crim. App. 1991). *But see* Hull v. State, 581 So. 2d 1202, 1204 (Ala. Crim. App. 1991) (holding that photographic spread containing a black-and-white photograph of the defendant and color photographs of four other subjects was "impermissibly suggestive").

was in an eight-picture photospread twice does not render the pre-trial identification procedure impermissibly suggestive, where the defendant did not look the same in each photo, and the other foils had similar traits as the defendant.[55]

Alabama case law also discusses instances where the suspect/defendant's clothing is different from that of other participants. Such a lineup is not impermissibly suggestive where the differences between the clothes worn by the defendant and the other participants were slight.[56] Similarly, the fact that the suspect/defendant was the only participant wearing the same clothing during the lineup as the witnesses described the perpetrator wearing during the crime, while injecting some suggestiveness into the procedure, did not render the lineup so impermissibly suggestive as to vitiate the entire procedure.[57] In another case, even where the witnesses were told the suspect was in custody and the defendant was the only participant in the photospread noticeably wearing an orange prison jumpsuit,[58] the lineup procedure was merely suggestive, but not inadmissible because it did not rise to the level of impermissible suggestiveness under the totality of the circumstances.

Based on this information, we were unable to ascertain whether Alabama case law or police practice requires full compliance with this ABA Best Practice.

3. Recording Procedures

a. The guidelines should require that, whenever practicable, the police videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.

b. The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.

Although a number of Alabama cases note a photograph of the entire lineup being entered into evidence and examined by the court for the purposes determining the existence of impermissible suggestiveness,[59] it does not appear that compliance with this ABA Best Practice of taking a photograph of the entire lineup and making a detailed record of the procedure, in the absence of video recording, is required by the Alabama courts.

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[55] Childers v. State, 339 So. 2d 597, 599 (Ala. Crim. App. 1976).

[56] *See* Fletcher v. State, 337 So. 2d 58, 61 (Ala. Crim. App. 1976) (holding that the fact that the defendant was the only participant wearing sneakers did not render the lineup impermissibly suggestive because the difference was "no more distinctive as to the defendant than is the manner of the dress as to each of the others in the lineup").

[57] *See* Griffin v. State, 356 So. 2d 723, 725 (Ala. Crim. App. 1978).

[58] *See* Dawson v. State, 675 So. 2d 897 (Ala. Crim. App. 1995).

[59] *See, e.g.*, Jones v. State, 450 So. 2d 165 (Ala. Crim. App. 1983); Ingram v. State, 437 So. 2d 128 (Ala. Crim. App. 1982); Lewis v. State. 399 So. 2d 907 (Ala. Crim. App. 1981).

c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.

A review of Alabama case law demonstrates that in some cases, witnesses indicated a percentage or general level of confidence in their identification.[60] Despite this, we were unable to ascertain whether Alabama case law or police practice requires full compliance with this ABA Best Practice.

4. Immediate Post-Lineup or Photospread Procedures

a. The guidelines should require that police and prosecutors avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.

In at least one case, an Alabama court held that providing witness feedback on whether s/he selected the suspect was inappropriate. In *Oakley v. State*, the Alabama Court of Criminal Appeals held that showing a witness a two-image photospread, telling the witness that one of the two individuals is the suspect, and then, when the witness identifies the non-suspect, telling the witness that she picked the wrong photograph was impermissibly suggestive.[61] The facts of *Oakley* were so egregious that this decision does not establish clear disapproval of procedures in which officers or prosecutors provide witnesses with feedback. Particularly, the court in *Oakley* relied on other factors, in addition to the negative feedback, to reach the conclusion that the procedure was impermissibly suggestive, including (1) law enforcement counseled the witness that the suspect was in one of the two photos, (2) the feedback led to the inevitable conclusion that the other photo in this two-picture photospread was the suspect, and (3) the witness showed uncertainty in her identification.[62]

We were, therefore, unable to ascertain whether Alabama case law or police practice requires full compliance with this ABA Best Practice.

In conclusion, even though numerous law enforcement agencies should have adopted written directives to be in compliance with the CALEA standards, the CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices required in Recommendation #1. Moreover, we were unable to obtain the written directives adopted by law enforcement agencies to assess whether they comply with

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[60] *See Dawson*, 675 So. 2d at 900 (noting that the witness identified the defendant as one of the perpetrators from the lineup, indicating an "intense certainty that her identification was correct"); Oakley v. State, 457 So. 2d 459, 462 (Ala. Crim. App. 1984) (noting that before the witness was told she had chosen the wrong photograph, she stated that one of the pictures "pretty much looked like [the perpetrator]"); Dill v. State, 429 So. 2d 633, 636 (Ala. Crim. App. 1982) (noting that, upon identifying the defendant, the witness stated that he had no "doubt in his mind as to whether the defendant was the person who robbed him"); Hobbs v. State, 401 So. 2d 276, 280 (Ala. Crim. App. 1981) (noting that the witness identified the defendant at the lineup and stated she was "one hundred percent" sure of the identification).

[61] *Oakley*, 457 So. 2d at 461.

[62] *Id.*

Recommendation #1. We are, therefore, unable to conclude with certainty whether the State of Alabama meets the requirements of Recommendation #1.

B. Recommendation #2

> **Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.**

The APOSTC's basic training course curriculum provides for four hours of instruction on interviews and interrogations.[63] However, we were unable to obtain the teaching materials for the classes on interviews and interrogations to determine whether the basic training course includes any instruction on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses

The Alabama District Attorney's Association offers prosecutors instructional materials from previous District Attorney Conferences.[64] It appears, however, that prosecutors in Alabama are not required to be instructed on effective identification procedures, nor do the instructional materials include information on how to implement guidelines for conducting pre-trial identification procedures and non-suggestive methods for interviewing witnesses.

Because we do not know the content of law enforcement officials' basic training on interviews and interrogations and because we are not aware of any required training for district attorneys in these areas, we are unable to conclude whether the State of Alabama meets the requirements of Recommendation #2.

C. Recommendation #3

> **Law enforcement agencies and prosecutor's 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.**

We were unable to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Alabama periodically update any existing guidelines for conducting pre-trial identifications. Therefore, we were unable to conclude with certainty whether the State of Alabama meets the requirements of Recommendation #3.

D. Recommendation #4

> **Law enforcement agencies should videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention**

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[63] *See* Northeast Alabama Law Enforcement Academy, Basic Training, *at* http://lea.jsu.edu/ (last visited on May 22, 2006) (click on "Basic Training," and then on "480 Hour Basic Training Curriculum").

[64] *See* State of Alabama Office of Prosecution Services, Alabama District Attorney's Association, Downloads, *at* http://www.adaa-ops.org/downloads/ (last visited on May 22, 2006).

centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.

As of September 14, 2005, it does not appear that any law enforcement agencies in Alabama regularly record the entirety of custodial interrogations.[65]

Because law enforcement agencies in Alabama are not required to videotape custodial interrogations, the State of Alabama does not meet the requirements of Recommendation #4.

E. Recommendation #5

The State should provide adequate funding to ensure the proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.

We are unable to ascertain whether the State of Alabama provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations. Therefore, we cannot determine whether the State of Alabama meets the requirements of Recommendation #5.

F. 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.

Consistent with an overwhelming majority of both federal and state courts, the Alabama Supreme Court has held that "expert testimony can be introduced into evidence in cases turning on an eyewitness identification."[66] However, admissibility of this expert testimony "is subject to the discretion of the trial court," and "will not be disturbed on appeal absent a clear abuse of that discretion."[67] The State of Alabama, therefore, meets the requirements of Recommendation #6.

G. 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.

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[65] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL CONVICTIONS SPEC. REP., at A1 (2005). A review of Alabama case law indicates that a law enforcement agency in at least one county has videotaped a custodial interrogation. *See* White v. State, 546 So. 2d 1014, 1023 (Ala. Crim. App. 1989) (Coffee County).

[66] *Ex parte* Williams, 594 So. 2d 1225, 1227 (Ala. 1992).

[67] *Id.*

It does not appear that the Alabama Pattern Jury Instructions-Criminal Cases includes a jury instruction on the factors to be considered in gauging lineup accuracy. Alabama courts, however, have noted that a requested jury instruction regarding the realistic "shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court's oral charge."[68] Every defendant is entitled to have instructions given which "would not be misleading, which correctly state the law of [the] case, and which are supported by . . . evidence."[69] The Alabama Court of Criminal Appeals has found the following charge to be a correct statement of law:

> The Court charges the jury that the possibility of human error or mistake, and the probable likeness or similarity of objects and persons are elements that you must act upon in considering testimony as to identity. You must carefully consider these factors passing upon the credibility that you attach to the witness's testimony, and you must be satisfied beyond a reasonable doubt as to the accuracy of the witness's identification of the defendant.[70]

However, the court has also held that there is no basis for such an instruction where the eyewitness made a positive identification.[71] Thus, while Alabama courts "recognize the dangers of eyewitness identifications" and are "unwilling to hold that cross examination and argument will always supply a sufficient forum in which to cover the issue of identification without proper instructions from the trial judge," identification instructions need not "be given in every case [in Alabama] involving eyewitness identification."[72] The court has held that such a requirement would mandate the giving of an identification instruction when it is unnecessary and serve only to confuse the jury.[73]

The State of Alabama, therefore, only partially meets the requirements of Recommendation #7, because it allows instructions to the jury regarding factors to be considered when determining the accuracy of eyewitness identifications, but does not require such instructions to be given in all cases where identification of the defendant is the central issue in the jury trial.

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[68] Jones v. State, 450 So. 2d 165, 167-68 (Ala. Crim. App 1983); *see also* Parker v. State, 568 So. 2d 335, 339 (Ala. Crim. App. 1990) (noting in dicta that "the better practice is for the trial judge to instruct the jury on the principles of mistaken identity where identification is a major issue at trial and where the defendant has made a proper request").

[69] Brooks v. State, 380 So. 2d 1012, 1015 (Ala. Crim. App. 1980).

[70] *Jones*, 450 So. 2d at 167 (citing Smith v. State, 307 So. 2d 57, 58 (Ala. Crim App. 1975)).

[71] *Id.* at 169; *see also* Minnifield v. State, 392 So. 2d 1288, 1291 (Ala. Crim. App. 1981); Rowser v. State, 346 So. 2d 533, 535 (Ala. Crim. App. 1977).

[72] *Jones*, 450 So. 2d at 168.

[73] *Id.*

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.[1] While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing properly to analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to lack of proper training and supervision, lack of testing procedures or the failure to follow procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

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[1] *See* Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

In 1935, the State of Alabama established the Office of the State Toxicologist.[2] In 1980, the Alabama Legislature enacted legislation that changed the agency's name to the Department of Forensic Sciences (Department) and required the Chief Medical Examiner's Office to be housed within the Department.[3] The Department's responsibilities include, but are not limited to, providing a statewide system of crime laboratories[4] and acting as the "scientific arm" of law enforcement agencies by investigating "unlawful, suspicious, or unnatural deaths and crimes," as well as examining evidence collected at crime scenes, issuing reports of its findings, and maintaining a statewide DNA database.[5]

A. Crime Laboratories

1. The Department's Statewide System of Crime Laboratories

The Department's statewide system of crime laboratories includes a headquarters laboratory in Auburn, Alabama (Headquarters Laboratory) and nine other laboratories in the following locations:

(1) Birmingham;
(2) Calera;
(3) Dothan;
(4) Florence;
(5) Huntsville;
(6) Jacksonville;
(7) Mobile;
(8) Montgomery; and
(9) Tuscaloosa.[6]

The Department's system of ten laboratories together provide laboratory services in a number of areas, including Breath Alcohol Testing, Crime Scene Investigation, Death Investigation, Drug Chemistry, Firearms/Toolmarks, Forensic Biology (DNA), Fire Debris, Fingerprints, Questioned Documents, Trace Evidence, and Toxicology.[7]

The laboratory services provided at each of the ten laboratories vary from laboratory to laboratory. Each individual laboratory provides the following services:

(1) Auburn (Headquarters) - Drug Chemistry and Crime Scene Investigation;

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[2] 1935 Ala. Acts 225.
[3] 1980 Ala. Acts 591.
[4] ALA. CODE § 36-18-3 (2005) (allowing the director of the Department to maintain a laboratory in Auburn, as well as other laboratories as are necessary to carry out its duties).
[5] ALA. DEPT. OF FORENSIC SCIENCES, FUNCTIONAL ANALYSIS AND RECORDS DISPOSITION AUTHORITY 1-1 to 1-2 (2002), *available at* http://www.archives.state.al.us/officials/rdas/forensic.pdf (last visited on May 22, 2006).
[6] Laboratory Information, Alabama Department of Forensic Sciences, *at* http://www.adfs.state.al.us/adfs_info_labs.htm (last visited on May 22, 2006).
[7] *Id.*

(2) Birmingham – Toxicology, Drug Chemistry, Trace Evidence, Firearms/Toolmarks, Fire Debris Analsysis, Questioned Documents, and Crime Scene Investigation;
(3) Calera ("Implied Consent Unit") – Breath Alcohol Testing;
(4) Dothan - Drug Chemistry and Crime Scene Investigation;
(5) Florence - Drug Chemistry and Crime Scene Investigation;
(6) Huntsville – Drug Chemistry, Firearms/Toolmarks, Forensic Biology (DNA), Death Investigation, and Crime Scene Investigation;
(7) Jacksonville - Drug Chemistry and Crime Scene Investigation;
(8) Mobile – Death Investigation, Toxicology, Drug Chemistry, Latent Fingerprint Identification, Firearms/Toolmarks, Forensic Biology (DNA), and Crime Scene Investigation;
(9) Montgomery - Drug Chemistry, Firearms/Toolmarks, Forensic Biology (DNA), and Crime Scene Investigation; and
(10) Tuscaloosa – Death Investigation, Drug Chemistry, and Crime Scene Investigation.[8]

After concluding its investigation, testing, and analysis in any given case, the Department must draft a report and provide a certified copy to the person or agency that requested the investigation.[9] Because we have been unable to obtain written procedures for the collection, preservation, and testing of evidence adopted by the Department, it is instructive to review the requirements of the accreditation program through which the Department's laboratories have obtained voluntary, national accreditation to understand the procedures, guidelines, standards, and methods used by the Department's laboratories.[10]

2. Crime Laboratory Accreditation

Nine of the Department's ten laboratories have been accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) since 2003, including: (1) Auburn Laboratory, (2) Birmingham Regional Laboratory, (3) Dothan Laboratory, (4) Florence Laboratory, (5) Huntsville Regional Laboratory, (6) Jacksonville Laboratory, (7) Mobile Regional Laboratory, (8) Montgomery Regional Laboratory, and (9) Tuscaloosa Laboratory.[11] "The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory

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[8] *Id.*

[9] ALA. CODE § 36-18-2 (2005).

[10] *See, e.g.*, AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 [hereinafter ASCLD/LAB 2003 MANUAL] (on file with author). It should be noted that laboratories receiving federal funding must also comply with the Federal Bureau of Investigation's DNA Quality Assurance Standards, requiring periodic external audits to ensure compliance with the required quality assurance standards. *See* 42 U.S.C. § 14131(a)(1) (2005); DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, 2 FORENSICS SCI. COMM. 3 (July 2000). We did not obtain sufficient information to state whether any Department laboratories are currently receiving federal funding.

[11] *See* American Society of Crime Laboratories Directors, Laboratories Accredited by ASCLD/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AL (last visited on May 22, 2006); *see also* Department of Forensic Sciences, Press Release: Forensic Sciences Laboratories System Achieves National Accreditation, *at* http://www.adfs.state.al.us/news_and_pubs/adfs_pressrelease_accreditation.htm (last visited on May 22, 2006).

Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards."[12]

a. Application Process for ASCLD/LAB Accreditation

To obtain accreditation by the ASCLD/LAB, the laboratory must submit an "Application for Accreditation," which requests information on the qualifications of staff, laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.[13] In addition to the application, the laboratory must also submit a "Grade Computation/Summation of Criteria Ratings," which is based on the laboratory's self-evaluation as to whether it is in compliance with all of the criteria contained in the ASCLD/LAB Laboratory Accreditation Board Manual.[14]

b. ASCLD/LAB Accreditation Standards and Criteria

The ASCLD/LAB Laboratory Accreditation Board 2003 Manual (Manual) contains various standards and criteria and each criterion has been assigned a rating of "Essential," "Important," or "Desirable."[15] In order to obtain accreditation through ASCLD/LAB, "[the] laboratory must achieve not less than 100% of the Essential,[16] 75% of the Important,[17] and 50% of the Desirable[18] criteria."[19] Some of the Essential criteria contained in the Manual require as follows:

(1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;[20]
(2) A training program to develop the technical skills of employees in each applicable functional area;[21]
(3) A chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;[22]
(4) The proper storage of evidence to protect the integrity of the evidence;[23]

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[12] American Society of Crime Laboratories, Department of Forensic Sciences, *at* http://www.ascld.org/accreditation.html (last visited on May 22, 2006).
[13] ASCLD/LAB 2003 MANUAL, *supra* note 10, at 3, app. 1.
[14] *Id.* at 3.
[15] *Id.* at 2.
[16] The Manual defines "Essential" as "[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence." *Id.*
[17] The Manual defines "Important" as "[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence." *Id.*
[18] The Manual defines "Desirable" as "[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory." *Id.*
[19] *Id.* (emphasis omitted).
[20] *Id.* at 14.
[21] *Id.* at 19.
[22] *Id.* at 20.
[23] *Id.* at 21.

(5) A comprehensive quality manual;[24]
(6) The performance of an annual review of the laboratory's quality system;[25]
(7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;[26]
(8) The performance and documentation of administrative reviews of all reports issued;[27]
(9) The monitoring of the testimony of each examiner at least annually;[28] and
(10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.[29]

The Manual also contains "Essential" criteria on personnel qualifications, requiring the examiners to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.[30] Additionally, the examiners must successfully complete a competency test prior to assuming casework and successfully complete annual proficiency tests.[31]

Once the laboratory has assessed whether it is in compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.[32]

c. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.[33] The inspection team also will interview all trainees to evaluate the laboratory's training program.[34] At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.[35]

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the "audit committee" consisting of a member of the ASCLD/LAB Board, the Executive Director, at least three staff inspectors, and the inspection team captain.[36] Decisions on accreditation must be made within twelve months of "the date of the laboratory's first notification of an audit

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[24] *Id.* at 23.
[25] *Id.* at 27.
[26] *Id.* at 27.
[27] *Id.* at 31.
[28] *Id.* at 32.
[29] *Id.* at 33-34.
[30] *Id.* at 38-45.
[31] *Id.*
[32] *Id.* at 5.
[33] *Id.*
[34] *Id.* at 6.
[35] *Id.*
[36] *Id.*

committee's consideration of the draft inspection report."[37] During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.[38]

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."[39] After the five year time period, the laboratory must apply for reaccredidation and undergo another on-site inspection.[40]

B. Medical Examiner Offices

1. The Chief Medical Examiner and the State Medical Examiners

The State of Alabama Chief Medical Examiner is housed within the Department of Forensic Sciences.[41] The Chief Medical Examiner has an administrative office at the Department's Headquarters in Auburn[42] and works primarily out of the Department's medical examiner office in Montgomery.[43] S/he is appointed by the Director of the Department.[44] To be eligible for the position of Chief Medical Examiner, the individual must be a pathologist certified in forensic pathology[45] by the American Board of Pathology.[46]

The Chief Medical Examiner's responsibilities are not codified. They are understood to include, but are not limited to:

(1) Managing workflow among the four medical examiner offices;
(2) Overseeing death investigations;
(3) Taking part in the hiring process for medical examiners employed by the Department;
(4) Evaluating the performance of medical examiners;
(5) Creating policies and standard operating procedures to govern the actions of medical examiners and employees, and maintain consistency in investigations;

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[37] *Id.* at 7.
[38] *Id.*
[39] *Id.* at 1.
[40] *Id.*
[41] Alabama Department of Forensic Sciences, Laboratory Information, *at* http://www.adfs.state.al.us/adfs_info_labs.htm (last visited on May 22, 2006).
[42] *Id.*
[43] Telephone Interview with James R. Lauridson, M.D., Chief Medical Examiner, Alabama Department of Forensic Sciences (Dec. 15, 2005).
[44] *Id.*
[45] Forensic pathology is the study of disease, but through a legal lens of disease and injury as evidence. *Id.*
[46] *Id.* For a list of the American Board of Pathology requirements for certification and re-certification, see American Board of Pathology, Requirements for Primary and Subspecialty Certifications, *at* http://www.abpath.org/ReqForCert.htm (last visited on May 22, 2006).

(6) Creating and implementing training and educational programs for medical examiners.[47]

The Department maintains medical examiner facilities in Huntsville, Tuscaloosa, Montgomery and Mobile, and a new facility is planned for Birmingham.[48] These offices investigate unlawful, unnatural and suspicious deaths which are referred to the Department by state or local law enforcement agencies, local coroners and district attorneys.[49] The medical examiners "obtain and correlate [crime] scene information, background history, and postmortem examination findings to establish the cause and manner of death."[50] The Department's medical examiner offices provide these services to the entire State of Alabama except for Jefferson County (Birmingham), which maintains its own coroner/medical examiner's office to provide death investigation services to the county.[51]

A state medical examiner must be a forensic pathologist who graduated from an accredited medical school and completed up to five years of additional training in pathology and an additional year of training in forensic pathology.[52] The required education in pathology for a state medical examiner is far more extensive than that which is required to become a local elected coroner, who has limited expertise in death investigations.[53] The Department does not require its forensic pathologists to obtain board certification from the American Board of Pathology, but most of the Department's medical examiners are board certified.[54]

2. Coroner's Offices and County Medical Examiner Offices

In addition to the Chief Medical Examiner and the state medical examiner offices, each county maintains either a coroner's office or a county medical examiner office.[55] Investigations by county coroners and/or medical examiners generally are limited to inquiries determining the cause and manner of death, the identity of the deceased, and the circumstances surrounding death.[56] The powers and responsibilities associated with each position are similar and the Alabama Legislature has enacted special provisions in a number of counties, some of which relate to the qualifications and duties of county coroners and/or medical examiners. When such an investigation reveals that the death

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[47] Telephone Interview with James R. Lauridson, M.D., Chief Medical Examiner, Alabama Department of Forensic Sciences (Dec. 15, 2005).

[48] Alabama Department of Forensic Sciences, Death Investigation, *at* http://www.adfs.state.al.us/death_investigation.htm (last visited on May 22, 2006).

[49] *Id.*

[50] *Id.*

[51] *Id.* Because the Jefferson County Coroner/Medical Examiner Office is not a part of the Department of Forensic Sciences, it is not bound by the rules and statutes governing the Department.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Bibb County has abolished the office of coroner and replaced it with a medical examiner. ALA. CODE § 45-4-60 (2005).

[56] *See, e.g.*, ALA. CODE § 45-2-61.02(a) (2005).

may have been the result of unlawful acts, the case is referred to law enforcement and a Department medical examiner office for thorough investigation.[57]

a. Appointment and Duties of County Coroners

All coroners are elected officials, who hold office for four years.[58] County coroners are charged with summoning a jury and holding inquests—inquiries into the manner and cause of an individual's death—and performing other functions as provided by law.[59] Additionally, the coroner must report the death of a child to the county and/or state medical examiner, who will then determine whether the death is unexpected or unexplained and, if necessary, begin an investigation.[60]

It appears that Baldwin County is the only county that has its own statutory scheme which sets out the qualifications of the county coroner. The Baldwin County coroner must (1) have at least a high school education, (2) complete a 20-hour coroner death investigation course before commencing his/her term, and (3) complete 20 hours of additional training in every subsequent year of service.[61]

b. Appointment and Duties of County Medical Examiners

It appears that Bibb County is the only county in Alabama that has abolished the office of the county coroner and replaced it with an office of the medical examiner.[62] The Bibb County medical examiner is appointed by the Senior State Medical Examiner in Region II[63] of the Alabama Department of Forensic Sciences.[64] The appointment shall be made, with the approval of the Director of the Department, from a list of qualified physicians submitted by the Bibb County Medical Society and previously reviewed by the Bibb County District Attorney.[65] Once appointed, the county medical examiner will be considered a contract employee of the Department and does not serve a specific term.[66] To be eligible for the office of medical examiner, the individual must be a physician licensed to practice medicine in Alabama.[67] The Bibb County medical examiner must complete eight hours of training annually on performing death investigations. This training will be provided by state medical examiners within the Department.[68]

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[57] *See, e.g.*, *id.*; *see also* Telephone Interview with James R. Lauridson, M.D., Chief Medical Examiner, Alabama Department of Forensic Sciences (Dec. 15, 2005).

[58] ALA. CODE § 11-5-1 (2005).

[59] ALA. CODE § 11-5-4 (2005).

[60] ALA. CODE § 26-16-99 (2005).

[61] ALA. CODE § 45-2-61.01 (2005).

[62] ALA. CODE § 45-4-60 (2005).

[63] The medical examiner's office in Region II is located in Tuscaloosa. Alabama Department of Forensic Sciences, Laboratory Information, *at* http://www.adfs.state.al.us/adfs_info_labs.htm (last visited on May 22, 2006). A map of the geographic area covered by each medical examiner's office can be found at Alabama Department of Forensic Sciences, Death Investigation, *at* http://www.adfs.state.al.us/death_investigation.htm (last visited on May 22, 2006).

[64] ALA. CODE § 45-4-60.01 (2005).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] ALA. CODE § 45-4-60.03 (2005).

The Bibb County medical examiner possesses all of the duties and authority traditionally prescribed to the coroner.[69] Among the county medical examiner's responsibilities is ordering an inquiry into a death:

(1) Of a person who died suddenly and unexpectedly;
(2) Due to violence, resulting from suicide, accident, homicide, or undetermined injury;
(3) From suspected exposure to drugs alcohol, or toxic agents;
(4) Due to poisoning;
(5) While in custody of law enforcement or a penal institution;
(6) In the involvement of his/her occupation;
(7) Which occurred when unattended by a physician;
(8) Due to neglect;
(9) Of any stillborn of 20 or more weeks gestation unattended by a physician;
(10) Due to criminal abortion;
(11) Of an infant or child under 19 years of age where the medical history has not established some preexisting medical condition to clearly explain the death;
(12) Which is possibly attributable to environmental exposure;
(13) Suspected to be caused by infectious or contagious disease;
(14) Which occurs under suspicious or unusual circumstances;
(15) When the body is to be cremated, dissected, or buried at sea; and
(16) When the body does not have the proper medical certification.[70]

In performing this inquiry, the county medical examiner is authorized to take charge of the body and work with law enforcement to determine, through examination of physical evidence, the identity of the deceased and the cause, manner, and circumstances of death.[71] Additionally, the Bibb County medical examiner must appoint one or more assistant county medical examiners from a list of qualified physicians to assist in death investigations.[72]

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[69] ALA. CODE § 45-4-60.13 (2005).
[70] ALA. CODE § 45-4-60.04 (2005).
[71] ALA. CODE § 45-4-60.05 (2005).
[72] ALA. CODE § 45-4-60.02 (2005). Each assistant county medical examiner must be approved by the senior state medical examiner of Region II and the Director of the Department. *Id.*

II. ANALYSIS

A. 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.

The State of Alabama does not require crime laboratories or medical examiner offices to be accredited. Nine of the ten crime laboratories of the Department of Forensic Sciences of (Department), however, are currently accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).[73]

ASCLD/LAB requires laboratory personnel to possess certain qualifications.[74] For example, the ASCLD/LAB Laboratory Accreditation Board 2003 Manual requires the laboratory examiners to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.[75] The examiners must also successfully complete a competency test prior to assuming casework responsibility and annual proficiency tests.[76]

ASCLD/LAB also requires laboratories to take certain measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the ASCLD/LAB program requires the laboratory to have clearly written procedures for handling and preserving the integrity of evidence; preparation, storage, security and disposition of case records and reports; and maintenance and calibration of equipment.[77] ASCLD/LAB requires these procedures to be included in the laboratory's quality manual.[78] ASCLD/LAB, however, does not require the laboratory to publish its procedures.

Although nine of the ten Department crime laboratories are accredited through ASCLD/LAB, we were unable to obtain any laboratory manuals containing standard

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[73] *See* American Society of Crime Laboratories Directors, Laboratories Accredited by ASCLD/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#AL (last visited on May 22, 2006). The Implied Consent Unit in Calera, Alabama, is not accredited by ASCLD/LAB. Alabama Department of Forensic Sciences, Laboratory Information, *at* http://www.adfs.state.al.us/adfs_info_labs.htm (last visited on May 22, 2006). However, the services provided by the Implied Consent Unit are limited to breath alcohol testing. *Id.*

[74] *See supra* notes 30-31 and accompanying text.

[75] ASCLD/LAB 2003 MANUAL, *supra* note 10, at 37-50.

[76] *Id.*

[77] *Id.* at 21.

[78] Similarly, the ASCLS/LAB program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to, the following: (1) control and maintenance of documentation of case records and procedure manuals, (2) validation of test procedures used, (3) handling evidence, (4) use of standards and controls in the laboratory, (5) calibration and maintenance of equipment, (6) practices for ensuring continued competence of examiners, and (7) taking corrective action whenever analytical discrepancies are detected. *Id.* at 23-24.

operating procedures and policies as required by this accreditation program to determine whether these procedures and policies required for accreditation ensure the validity, reliability, and timely analysis of forensic evidence as required by this Recommendation. Furthermore, we were unable to ascertain the existence of any programs within the Department to provide introductory or continuing training to crime laboratory analysts that also would ensure the validity, reliability, and timely analysis of forensic evidence.

The Chief Medical Examiner of the Department of Forensic Sciences is required to be a pathologist certified in forensic pathology by the American Board of Pathology. Other state medical examiners within the Department must be forensic pathologists who graduated from an accredited medical school and completed up to five years of additional training in pathology and an additional year of training in forensic pathology.[79] Although all other medical examiners are not required by the State of Alabama to be certified as forensic pathologists by the American Board of Pathology, most of the Department's medical examiners are certified.[80]

However, the Office of the Chief Medical Examiner does not currently employ any standard operating procedures for its state medical examiners to maintain reliability and consistency in its work among its four offices.[81] Additionally, the Office of the Chief Medical Examiner does not provide standardized training for new and existing state medical examiners to ensure the validity and reliability of medical examiners' death investigations.[82] In a telephone interview, Dr. James R. Lauridson, Chief Medical Examiner, indicated that two of his primary goals as Chief Medical Examiner are to create standard operating procedures and standardized training programs.[83]

With respect to county medical examiner and coroner offices, we were unable to obtain sufficient information to state with any degree of certainty whether any such offices are currently accredited. The Alabama Legislature has enacted special statutes which provide for specific training requirements and duties of county coroners and medical examiners. For instance, Baldwin County requires 20 hours of coroner death investigation training before beginning the term as county coroner and an additional 20 hours of training each subsequent year.[84]

Based on this information, the State of Alabama is only in partial compliance with Recommendation #1.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

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[79] Alabama Department of Forensic Sciences, Death Investigation, *at* http://www.adfs.state.al.us/death_investigation.htm (last visited on May 22, 2006).

[80] *Id.*

[81] Telephone Interview with James R. Lauridson, M.D., Chief Medical Examiner, Alabama Department of Forensic Sciences (Dec. 15, 2005).

[82] *Id.*

[83] *Id.*

[84] ALA. CODE § 45-2-61.01 (2005).

A review of the Department's 2001 annual reports indicates that at that time, the Department's DNA section had a backlog as a result of a shortage in trained reporting scientists, a growing caseload, and lack of sufficient financial resources.[85] The report stated, however, that the DNA section had increased the number of trained reporting scientists and reduced the case backlog by 1.5 percent between February and December 2000, and an additional 16 percent by September 2001.[86] Furthermore, the report indicated that with a full staff and sufficient funding, the Department could clear its DNA backlog in 21 months.[87] The Department has not released a more recent annual report and although the Department's budget allocation has increased by approximately $7 million since the 2001 annual report was released,[88] we were unable to ascertain whether this had an effect on alleviating the personnel shortages and case backlog.

We are, therefore, unable to appropriately assess the adequacy of the funding provided to both Department crime laboratories and medical examiner offices.

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[85] ALA. DEP'T OF FORENSIC SCIENCES, FISCAL YEAR 2001 ANNUAL REPORT 5 (2001), *at* http://www.adfs.state.al.us/news_and_pubs/2001AnnualReport.pdf (last visited on May 22, 2006).

[86] *Id.*

[87] *Id.*

[88] Ala. Executive Budget Office, General Fund, Fiscal year 2006, *at* http://www.budget.state.al.us/GF2006.pdf (last visited on May 22, 2006).

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.[1]

Prosecutorial misconduct can encompass various actions, including but not limited to failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.[2] The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

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[1] *See* STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? (2004), *available at* http://www.publicintegrity.org/pm/ (last visited on May 22, 2006).

[2] *Id.*; *see also* Innocence Project, Police and Prosecutorial Misconduct, *at* http://www.innocenceproject.org/causes/policemisconduct.php (last visited on May 22, 2006).

I. FACTUAL DISCUSSION

A. Prosecution Offices

1. District Attorneys

The State of Alabama is divided into forty-one judicial districts.[3] Each judicial district has an elected district attorney[4] who is responsible for all prosecutions in the district court.[5] District attorneys and assistant district attorneys are required to, among other things:

> (1) Attend the grand juries, advise them in relation to matters of law, and examine and swear in witnesses;
> (2) Draw up all indictments and prosecute all indictable offenses;
> (3) Prosecute and/or defend any civil action in the circuit court in which the state is interested;
> (4) If a criminal prosecution is removed from a court of his or her circuit, county, or division of a county to a federal court, appear in that court and represent the state;
> (5) Attend each special session of the circuit court held for the trial of persons charged with criminal offenses;
> (6) Whenever requested to do so by the Governor of Alabama or by the Board of Pardons and Paroles, make a full and thorough investigation in each case arising in their circuit, county, or division of a county, and fully report their findings, with recommendations that pardon or parole be granted or refused, and assign fully and in detail their reasons for the recommendations. Advise any parole officer who may have jurisdiction in his/her respective circuit, county, or division of a county and, when requested, make a full, thorough, and impartial investigation of each case being investigated, give all information possible with reference to the case, and advise him/her upon his or her request with reference to the law and procedure on all matters pertaining to the office of the parole officer;
> (7) Go to any place in the State of Alabama and prosecute any case or cases, or work with any grand jury, when called upon to do so by the Attorney General or the Governor of the State of Alabama, and attend sessions of courts and transact all of the duties of the district attorney in the courts whenever called upon by the Attorney General or the Governor to do so;
> (8) Carefully read and check the record on appeal in all criminal cases appealed from the circuit court of their judicial circuit to the Court of Criminal Appeals or the Supreme Court of Alabama, and call to the

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[3] Alabama State Bar, The Judicial System – The Courts and Administrative Officers, *at* http://www.alabar.org/olDirectory/judicial_circuits.cfm (last visited on May 23, 2006).

[4] *See* ALA. CONST. art. VI, § 160(a) ("A district attorney for each judicial circuit shall be elected by the qualified electors of those counties in such circuit. Such district attorney shall be licensed to practice law in this state and shall, at the time of his election and during his continuance in office, reside in his circuit. His term of office shall be for six years and he shall receive such compensation as provided by law. Vacancies in the office of district attorney and in his staff shall be filled as provided by law.")

[5] ALA. CODE § 12-12-8 (2006).

attention of the trial judge any errors or discrepancies that may appear in the record;

(9) Whenever requested by the Attorney General of the State of Alabama, file memorandum briefs in criminal cases appealed from the circuit court of their judicial circuits to the Court of Criminal Appeals or the Supreme Court of Alabama;

(10) Attend clemency hearings before the Governor of Alabama, in all cases arising in their judicial circuits, and furnish to the Governor all pertinent information in their possession concerning the applicant or applicants for clemency; and

(11) When requested to do so, represent the chief of police of any municipality in their respective judicial circuits in all *habeas corpus* proceedings filed in the circuit courts of their respective judicial circuits.[6]

It also is the duty of every district attorney to attend each session of the court for which s/he is district attorney, unless s/he has a "good excuse."[7] A district attorney may, within ten days, file an affidavit explaining that the failure to attend was due to personal or familial sickness, inevitable accident, or "an epidemic or contagious disease or a well-grounded apprehension thereof."[8]

Each district attorney may appoint full-time or part-time assistant district attorneys[9] and has the authority to employ investigators and clerical, secretarial, and other personnel in any manner s/he determines is necessary.[10]

Although there are no statewide procedures that govern the operation of district attorney's offices beyond those discussed above, the State of Alabama has established the "Office of Prosecution Services"[11] to "assist the prosecuting attorneys throughout the state in their efforts against criminal activity in the state."[12]

2. Office of the Attorney General

The State of Alabama elects an Attorney General every four years.[13] To be eligible to serve as Attorney General, one must have been a United States citizen for at least seven

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[6] ALA. CODE § 12-17-184 (2006).

[7] ALA. CODE § 12-17-185 (2006).

[8] *Id.*

[9] ALA. CODE § 12-17-198 (2006).

[10] ALA. CODE § 12-17-220(a) (2006).

[11] The Office of Prosecution Services is composed of an executive director and "whatever staff is necessary to carry out the purpose" of the office. *See* ALA. CODE § 12-17-231 (2006); *see also* ALA. CODE § 12-17-232 (2006) (noting that the "Executive Committee of the Alabama District Attorneys Association shall appoint the executive director, shall fix the conditions of employment and tenure in office, and shall be responsible for the efficient discharge of his or her duties, all in accordance with the constitution and bylaws of the association. The executive committee shall fix the salary of the executive director within the total sum of funds available from all sources, but limited to federal grants, dues, contributions, gifts, and the funds described in Section 12-17-233, fix their conditions of employment and tenure in office and shall be responsible for the efficient discharge of their duties.").

[12] ALA. CODE § 12-17-230(a) (2006).

[13] ALA. CONST. art. V, § 114.

years, resided in the State of Alabama for at least five years preceding the election, and be at least 25 years old when elected.[14]

The Attorney General directs and controls all litigation concerning the interest of the State of Alabama or any department of the state.[15] The Attorney General or his or her assistant must attend all appellate-level criminal cases and civil actions in which the State of Alabama is a party.[16] In addition, the Attorney General must perform the following duties, among others:

(1) Give his or her opinion in writing, or otherwise, on any question of law connected with the interests of the state or with the duties of any of the departments, when required by the Governor, Secretary of State, Auditor, Treasurer, Superintendent of Education, Commissioner of Agriculture and Industries, Director of Department of Finance, Comptroller, State Health Officer, Public Service Commissioners, Commissioner of Conservation and Natural Resources, or the Director of the Department of Revenue or any other officer or department of the state, and he or she also must give his or her opinion to the Chairman of the Judiciary committee of either house, when required, on any matter under the committee's consideration;

(2) Attend, on the part of the state, to all criminal cases pending in the Supreme Court or Court of Criminal Appeals. He or she shall also appear in the courts of other states or of the United States, in any case in which the state may be interested in the result;

(3) For each three month period, cause to be published copies of the written official opinions that have been issued during the relevant period. A copy of the report must be sent to, among others, each district attorney in the state;

(4) In the month of October of the last year of his or her term of office, compile a report, which includes suggestions for the suppression of crime and the improvement of the criminal administration. The report also must contain a statement of the number of criminal cases disposed of in the state for the past four years; and, taking each character of cases separately, show the number disposed of in each judicial circuit and in each criminal court or other court or territory having a separate district attorney, the number of convictions, the number of acquittals, the number of *nolle prosequis* entered, the number of cases which were abated or otherwise disposed of, the number of sentences to death, the number of sentences to the penitentiary, and the number of other sentences, including fines imposed;

(5) At such time as s/he deems appropriate, examine all of the current general statutes regarding their clarity and constitutional validity; and

(6) At such time as s/he deems appropriate, make a report in writing to the Governor and to the Chairman of the Judiciary Committee of the House of Representatives and of the Senate, pointing out the laws or parts of laws of Alabama which have been held invalid by courts of last resort since the

[14] ALA. CONST. art. V, § 132.
[15] ALA. CODE § 36-15-21 (2006).
[16] ALA. CODE § 12-3-32 (2006).

> last session of the Legislature, and also making suggestions regarding inaccuracies, inadvertences, mistakes and omissions in statutes, which, in his or her opinion, should be corrected.[17]

The Attorney General, personally or through one of his or her assistants, may "at any time s/he sees proper, either before or after indictment, superintend and direct the prosecution of any criminal case in any of the courts of this state. The district attorney prosecuting in such court shall assist and act in connection with the Attorney General or his assistant in such case."[18] The Attorney General also will give the state's district attorneys "any opinion, instruction or advice necessary or proper to aid and assist in the investigation or prosecution of any case in which the state is interested, in any other circuit than that of the district attorney so directed."[19]

The duties imposed by this section upon the Attorney General and his or her assistants shall be performed by the Attorney General personally or by his or her assistants.[20] No attorney other than the Attorney General may represent the State of Alabama in any litigation unless s/he has been appointed as a deputy or assistant attorney general.[21]

The Alabama Code provides that the Attorney General may appoint up to twelve deputy attorneys general.[22] The Attorney General then will appoint one of the depute attorneys general to serve as the Chief Deputy Attorney General.[23] The Chief Deputy Attorney General may exercise the Attorney General's powers and authority in the Attorney General's absence.[24] This person must have the same qualifications that are required to run for Attorney General.[25] All deputy attorneys general must be authorized to practice law in the State of Alabama.[26] The Attorney General also may appoint as many assistant attorneys general "as the public interest requires by reason of the volume of work in his or her office."[27]

3. Supernumerary District Attorneys

According to the Alabama Code, supernumerary district attorneys:

> Shall take the oath of office prescribed by the constitution for judicial officers and shall have and exercise all the duties, power and authority of district attorneys of the judicial circuits or circuit courts and shall, upon request of the Governor, the Chief Justice of the Supreme Court or the Attorney General, conduct investigation of or the prosecution of any criminal case or the prosecution or defense of any case in which the state

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17 ALA. CODE § 36-15-1 (2006).
18 ALA. CODE § 36-15-14 (2006).
19 ALA. CODE § 36-15-15 (2006).
20 ALA. CODE § 36-15-1 (2006).
21 *Id.*
22 ALA. CODE § 36-15-5.1(a) (2006).
23 ALA. CODE § 36-15-5.2(a) (2006).
24 ALA. CODE § 36-15-5.2(b) (2006).
25 *Id.*
26 ALA. CODE § 36-15-5.1(d) (2006).
27 ALA. CODE § 36-15-6(a) (2006).

> is interested. The Governor, any member of the Supreme Court of courts of appeals or the Attorney General may request a supernumerary district attorney to perform duties as those prescribed for assistant attorneys general, either in their respective offices or at such other places within or without the state as such officials may assign him. When on such special assignment as the request of designation of one of the aforementioned officials and performing duties as those prescribed for assistant attorneys general, the supernumerary district attorney shall have all the powers and authority of an assistant attorney general and … while performing such duties a the request of the Attorney General, he shall be designated as a special attorney general.[28]

To become a supernumerary district attorney, one must be an elected Alabama district attorney, former district attorney, and/or former circuit solicitor who served continuously for:

(1) Fifteen years as district attorney, former district attorney or former circuit solicitor and who is not less than sixty years of age and who has become permanently and totally disabled, proof of such disability being made by certificates of three reputable physicians; or
(2) Fifteen years as district attorney, former district attorney or former circuit solicitor and/or as a judge of a court of record and who is not less than sixty-five years of age; or who has served as such continuously for more than fifteen years and has attained age sixty-five less one year for each year of service in excess of fifteen years and who is still in service as such district attorney or judge or a court of record; or
(3) Ten years as district attorney, former district attorney or former circuit solicitor and who is not less than seventy years of age; or
(4) Not less than fifteen years as district attorney, former district attorney or former circuit solicitor and/or as a judge of a court of record and who is not less than seventy years of age.[29]

People who meet these qualifications may elect to become supernumerary district attorneys by filing a written declaration with the Governor.[30]

In addition, any elected district attorney, former district attorney, or former circuit solicitor who has served in that office as district attorney for not less than twenty-four years, or for not less than six terms, the last ten years of such service having been continuous, may choose to become a supernumerary district attorney by filing a written declaration with the Governor at any time not more than ninety days prior to the end of the twenty-four year period.[31]

B. The Office of Prosecution Services/Alabama District Attorney's Association

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[28] ALA. CODE § 12-17-216 (2006).
[29] ALA. CODE § 12-17-210 (2006); *see also* ALA. CODE § 12-17-211 through 12-17-213 (2006).
[30] ALA. CODE § 12-17-210(a) (2006).
[31] ALA. CODE § 12-17-210(b) (2006).

The State of Alabama established the Office of Prosecution Services,[32] otherwise known as the Alabama District Attorney's Association,[33] to assist the prosecuting attorneys throughout the state[34] by:

(1) Obtaining, preparing, supplementing, and disseminating indexes to and digests of the decisions of the Alabama Supreme Court and the Court of Appeals of Alabama and other courts, statutes, and legal authorities relating to criminal matters;
(2) Preparing and distributing model indictments, search warrants, interrogation advice, and other common and appropriate documents employed in the administration of criminal justice at the trial level;
(3) Preparing and distributing a basic prosecutor's manual and other educational materials;
(4) Promoting and assisting with the training of prosecuting attorneys;
(5) Providing legal research assistance to prosecuting attorneys;
(6) Providing such assistance to law enforcement agencies as may be lawful; and
(7) Providing such other assistance to prosecuting attorneys which is necessary to successfully implement this statute or which may be authorized by law.[35]

The Office of Prosecution Services also conducts a limited number of training programs for state prosecutors.[36]

The Office of Prosecution Services is not allowed to exercise any power, undertake any duty, or perform any function that is assigned by law to the Governor, the Attorney General, the Chief Justice of the Supreme Court, or any district attorney of any court of record in the state.[37]

C. The Alabama Rules of Professional Conduct

The State Bar of Alabama (the State Bar) has created the Alabama Rules of Professional Conduct, which specifically address the professional and ethical responsibilities of prosecutors.

The Alabama Rules of Professional Conduct state that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[38] To ensure that these obligations are met, Rule 3.8 of the Alabama Rules of Professional

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[32] ALA. CODE § 12-17-230(a) (2006).
[33] Alabama District Attorney's Association, State of Alabama – Office of Prosecution Services, *at* http://www.adaa-ops.org/ (last visited May 23, 2006).
[34] ALA. CODE § 12-17-230(a) (2006).
[35] ALA. CODE § 12-17-230(b) (2006).
[36] Alabama District Attorney's Association, Calendar of Events, *at* http://www.adaa-ops.org/calendar/#2006 (last visited on May 23, 2006).
[37] ALA. CODE § 12-17-234 (2006).
[38] ALA. RULES OF PROF'L CONDUCT Rule 3.8 cmt.

Conduct requires that a prosecutor in a criminal case comply with a number of rules, including:

(1) Refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(2) Making reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(3) Not seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(4) Not willfully failing to make timely disclosure to the defense of 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, disclosing to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(5) Exercising reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making, and not causing or influencing anyone to make a statement that the prosecutor would be prohibited from making.[39]

The Alabama Rules of Professional Conduct also require all attorneys, including prosecutors, to report professional misconduct. Rule 8.3 of the Alabama Rules of Professional Conduct specifically states, "[a] lawyer possessing unprivileged knowledge of [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation"[40] In addition, "a lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request."[41]

The power to investigate grievances and to discipline members of the State Bar, including prosecutors, is vested in the Disciplinary Board of the State Bar.[42] The General Counsel of the State Bar is responsible for, among other things, screening information relating to alleged lawyer misconduct, investigating allegations, and recommending an appropriate disposition of misconduct claims.[43] Alternatively, the Disciplinary Board may grant "local grievance committees" of circuit, county or city bar associations the authority to investigate complaints and recommend discipline.[44]

A disciplinary investigation or proceeding may be initiated by the General Counsel of the State Bar or a local grievance committee, upon receiving a complaint or upon the General

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39 ALA. RULES OF PROF'L CONDUCT Rule 3.8(1).
40 ALA. RULES OF PROF'L CONDUCT Rule 8.3(a).
41 ALA. RULES OF PROF'L CONDUCT Rule 8.3(b).
42 ALA. RULES OF DISCIPLINARY P. Rule 4(b).
43 ALA. RULES OF DISCIPLINARY P. Rule 6(a).
44 ALA. RULES OF DISCIPLINARY P. Rule 7.

Counsel's or local grievance committee's own motion.[45] A recommendation based upon the investigation must be submitted to, and acted upon by, the Disciplinary Board.[46] The Disciplinary Board will hold a formal hearing to try any disciplinary charge filed by the General Counsel.[47] The parties have a right to appeal any adverse decision.[48]

D. Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

The State of Alabama gives district attorneys the discretion to seek the death penalty in any case in which the defendant is charged with capital murder under section 13A-5-40 of the Alabama Code.[49] A notice of intent to seek the death penalty is not required and no notice of the prosecutor's intention to seek death must be given beyond charging the defendant with capital murder.

Charging a defendant with capital murder does not mean that the district attorney *will* seek death, however; instead, charging a defendant with capital murder means only that the prosecutor *may* seek death.[50]

2. Plea Bargaining

There is no right to plea bargain under the Alabama Constitution and the prosecutor may proceed to trial if s/he chooses.[51] It does not appear that any state or county guidelines exist governing plea bargaining in capital cases.[52]

3. Discovery

a. Discovery Requirements

State and federal law provides that defendants are entitled to all exculpatory information or evidence.[53] The prosecutor "is not required to deliver his[/her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[54] In capital cases, this means that the

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45 ALA. RULES OF DISCIPLINARY P. Rule 3(c).
46 ALA. RULES OF DISCIPLINARY P. Rule 12.
47 *Id.*
48 *Id.*
49 ALA. CODE § 13A-5-40 (2006).
50 ALA. CODE § 13A-5-45 (2006). The statute states that the court *shall* conduct a sentencing hearing to impose life without parole or death upon conviction for capital murder, but to the best of our knowledge, District Attorneys generally are granted discretion to charge a defendant with capital murder, but not seek a death sentence. In a situation where a prosecutor agrees to a sentence of life without parole, the judge will generally accept this determination, although s/he potentially could schedule a sentencing hearing and consider, and even actually impose, a sentence of death.
51 Smith v. State, 908 So. 2d 273, 282-83 (Ala. Crim. App. 2000).
52 Telephone Interview with Randy Hillman, Executive Director, Office of Prosecution Services (Dec 8, 2004).
53 This is known as *Brady* material. *See* Brady v. Maryland, 373 U.S. 83 (1963); *Ex parte* Womack, 541 So.2d 47 (Ala. 1988); *see also* ALA. R. CRIM. P. 16.1 cmt.
54 United States v. Bagley, 473 U.S. 667, 675 (1985).

prosecution must turn over evidence that would be mitigating at the penalty phase of the trial, in addition to evidence that goes against guilt,[55] including the "disclosure of impeachment evidence which could be used to show bias or interest on the part of a key State witness. Accordingly, the State is under a duty to reveal any [deal or] agreement, even an informal one, with a witness concerning criminal charges pending against that witness."[56] A prosecutor must not only disclose the evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[57]

Because the Alabama Court of Criminal Appeals has held that that there is no constitutional right to discovery in criminal cases, discovery requests should be specific.[58] As a rule, defendants are entitled to discovery of:

(1) Written or recorded statements made by the defendant to any law enforcement officer, official, or employee;
(2) Oral statements made by the defendant, before or after arrest, to any law enforcement officer, official, or employee which the state intends to introduce in evidence at trial;
(3) Written or recorded statements made by any co-defendants or accomplices to any law enforcement officer, official, or employee which the state intends to introduce into evidence;
(4) Oral statements made by any co-defendant or accomplices before of after arrest, to any law enforcement officer, official, or employee which the state intends to offer in evidence at the trial;
(5) Books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things which (1) are material to the preparation of defendant's defense (this does not include documents made by the prosecutor or the prosecutor's agents, or by law enforcements agents, or statements made by state/municipality witnesses or prospective state/municipality witnesses), (2) are intended for use by the state/municipality as evidence at trial, or (3) were obtained from or belong to the defendant; and
(6) Results or reports of physical or mental examinations or scientific tests or experiments.[59]

Internal state or municipality reports, memoranda, witness lists, or other documents made by the prosecutor, the prosecutor's agents, or by law enforcement agents in connection with the investigation or prosecution of the case are not discoverable except as provided above. In addition, statements made by state or municipality witnesses or prospective witnesses also are not discoverable except as provided above.[60]

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55 Green v. Alabama, 442 U.S. 95 (1979); *Ex parte* Monk, 557 So. 2d 832 (Ala. 1989).
56 Giglio v. United States, 405 U.S. 150, 154-55 (1972).
57 Kyles v. Whitley, 514 U.S. 419, 437-39 (1995).
58 Maples v. State, 758 So. 2d 1, 18 (Ala. Crim. App. 1999).
59 ALA. R. CRIM. P. 16.1.
60 ALA. R. CRIM. P. 16.1(e).

The Alabama Rules of Criminal Procedure provides that the state must disclose information that could be used to impeach witnesses.[61] This includes evidence of a promise of lenience or benefit to a state witness or someone known to the witness,[62] witness statements that contradict trial testimony,[63] witness criminal record information,[64] and in some cases, information about the victim.[65]

The Alabama Supreme Court has held that capital cases, by their very nature, are "sufficiently different from other cases to justify the exercise of judicial authority" to order broad – or "open file" – discovery.[66] This has been justified by the fact "that 'any evidence' may be relevant to mitigating a sentence of death."[67] As explained in *Ex parte Monk*:

> In a capital case the definition of "favorable evidence" expands at the sentencing stage to far beyond what it is at any stage of any other type of criminal proceeding….This statutory mandate that a defendant shall be allowed to offer evidence of mitigating circumstances is another reason why broad discovery must be allowed. The prosecutor cannot screen files for potential mitigating evidence to disclose to the defense counsel because, "[w]hat one person may view as mitigating, another may not."[68]

The judge's ability to order broad discovery does not mean that he or she has an obligation to do so, however. Instead, "the extent to which discovery will be allowed lies within the discretion of the trial court."[69]

Once the defense makes a specific discovery request, the state has a continuing duty to disclose discoverable information to the defense.[70]

b. Challenges to Discovery Violations

Rule 16.5 of the Alabama Rules of Criminal Procedure provides for relief when either the prosecution or the defense fails to comply with a discovery request or order. The trial court has wide discretion in fashioning relief and/or sanctions for noncompliance[71] and may order discovery or inspection, grant a continuance, prohibit the prosecution from

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[61] ALA. R. CRIM. P. 16.3.
[62] Williams v. State, 710 So. 2d 1276 (Ala. Crim. App. 1996).
[63] Jacobs v. Singletary, 952 F.2d 1282, 1287-98 (11th Cir. 1992); *Ex parte* Kimberly, 463 So. 2d 1109 (Ala. 1984).
[64] United States v. Bagley, 473 U.S. 667 (1985).
[65] *Ex parte* Willingham, 695 So. 2d 148 (Ala. 1996).
[66] *Ex parte* Monk, 557 So. 2d 832, 836 (Ala.1989). Open file discovery allows the defense to review the prosecution's entire case file.
[67] Council v. State, 682 So. 2d 495, 499 (Ala. Crim. App. 1996).
[68] *Monk*, 557 So. 2d at 837 (quoting Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir.1983)).
[69] Broadnax v. State, 825 So. 2d 134, 156 (Ala. Crim. App. 2000).
[70] ALA. R. CRIM. P. 16.3 ; *see also Ex parte* Brown, 548 So. 2d 993 (Ala. 1989); *Ex parte* Watkins, 509 So. 2d 1064 (Ala. 1984); Padgett v. State, 668 So. 2d 78 (Ala. Crim. App. 1995); Peal v. State, 491 So. 2d 991 (Ala. Crim. App. 1985).
[71] ALA. R. CRIM. P. 16.5 cmt.; Wilson v. State, 874 So. 2d 1145 (Ala. 2003); Buchanan v. State, 554 So. 2d 477 (Ala. Crim. App. 1989).

introducing undisclosed evidence, or enter a different, just order.[72] The court should not impose a harsher sanction than necessary to accomplish the goals of the discovery rules, however.[73]

Following the trial, a defendant may obtain relief for the prosecution's failure to disclose *Brady* material at trial by showing that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to his or her defense; and (3) the evidence was material.[74] Evidence is deemed to be material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[75] This test does not require a reasonable probability of acquittal, but instead requires a showing that the suppression of evidence undermines confidence in the outcome.[76] The Alabama Court of Criminal Appeals has interpreted this to mean that to obtain relief for a discovery violation, the defense must show that "the use of the information at trial would have changed the result by creating a reasonable doubt where one did not otherwise exist."[77] Materiality is evaluated by assessing the cumulative weight of the withheld evidence.[78]

The trial court's failure to take corrective action based on a discovery violation committed by the state is subject to scrutiny for harmless error[79] and constitutes reversible error only if the defendant can "show prejudice to substantial rights."[80]

4. <u>Limitations on Arguments</u>

a. Substantive Limitations

In general, the prosecutor is "allowed wide latitude in drawing reasonable inferences from the evidence,"[81] but there are limitations. For example, the prosecutor may not comment on the defendant's failure to testify during the guilt or sentencing phase of the trial.[82] "Where there has been a direct comment on, or direct reference to, a defendant's failure to testify and the trial court does not act promptly to cure the comment, the defendant's conviction must be reversed."[83] To determine if a prosecutorial remark impairs the defendant's right not to testify, the court will decide "whether the defense can show that the remark, given the context in which it was made, was intended to comment

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[72] ALA. R. CRIM. P. 16.5.

[73] McCrory v. State, 505 So. 2d 1272 (Ala. Crim. App. 1986).

[74] Smith v. State, 639 So. 2d 543, 547 (Ala. Crim. App. 1993); *see also Ex parte* Common, 578 So. 2d 1089 (Ala. 1991).

[75] Kyles v. Whitley, 514 U.S. 419, 433 (1995).

[76] United States v. Bagley, 473 U.S. 667, 678 (1985).

[77] Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 674-75; *see also* Smith v. State, 639 So. 2d 543 (Ala. Crim. App. 1993) (quoting Adler v. State, 591 So. 2d 133, 134 (Ala. Crim. App. 1991).

[78] *Kyles*, 514 U.S. at 436.

[79] ALA. R. APP. P. 45.

[80] Morrison v. State, 601 So. 2d 165, 173 (Ala. Crim. App. 1992) (quoting Buchannon v. State, 554 So. 2d 477, 486 (Ala. Crim. App. 1989); McLemore v. State, 562 So. 2d 639, 645 (Ala. Crim. App. 1989)).

[81] Maples v. State, 758 So. 2d 1, 22 (Ala. Crim. App. 1999).

[82] *Id.* at 21. *See, e.g.*, *Ex parte* Purser, 607 So. 2d 301, 304-05 (Ala. 1992); *Ex parte* Wilson, 571 So. 2d 1251, 1259 (Ala. 1990); *Ex parte* Williams, 461 So. 2d 852, 853 (Ala. 1984).

[83] *Purser*, 607 So. 2d at 304.

on the defendant's silence or was of such character that a jury would naturally and necessarily construe it as a comment on the defendant's silence."[84]

However, when there is only an indirect reference to the defendant's failure to testify, there must be a "virtual identification" of the defendant as the person who did not testify for it to constitute reversible error.[85] A "virtual identification" does not exist where the prosecutor's comments were directed toward the fact that the State's evidence was uncontradicted or had not been denied.[86]

In addition, a prosecutor cannot express his or her personal opinion of the defendant's guilt if it is not "based on the evidence." The Alabama Court of Criminal Appeals held in 2004 that "it is not improper for a prosecutor to argue to the jury that a defendant is guilty or to urge the jury to find the defendant guilty of the crime charged so long as that argument is based on the evidence."[87] The prosecutor may not "argue for the purpose of proving guilt that a defendant will commit future illegal acts."[88] The Alabama Court of Criminal Appeals also has held that "[i]t is not improper for a prosecutor to urge the jury to return a recommendation for the death penalty."[89]

Courts have found a large number of other themes to be improper, when used in prosecutorial argument, including the war on crime,[90] the possibility of escape,[91] the future dangerousness of the defendant, [92] the possibility of parole,[93] the personal opinions of the prosecutor,[94] the jury's duty to reject mercy,[95] the jury's lack of responsibility in making the ultimate decision,[96] and the jury's duty to impose death.[97]

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[84] *Maples*, 758 So. 2d at 21.

[85] Deardorff v. State, 2004 WL 1418105, *12 (Ala. Crim. App. June 25, 2004).

[86] *Id.*

[87] Minor v. State, 2004 WL 1909380, *37 (Ala. Crim. App. Aug. 27, 2004).

[88] *Ex parte* Smith, 581 So. 2d 531 (Ala. 1991).

[89] *Minor*, 2004 WL 1909380, at *45; Wilson v. State, 777 So. 2d 856, 897 (Ala. Crim. App. 1999).

[90] Hance v. Zant, 696 F.2d 940, 951-53 (11th Cir. 1983) (noting that the prosecutor was "exhorting them to join in the war against crime"); Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985) (noting that the prosecutor characterized jurors as "soldiers in the war on crime").

[91] Hance v. Zant, 696 F.2d at 951-53.

[92] *Ex parte* Smith, 581 So. 2d 531 (Ala. 1991).

[93] *Ex parte* Rutledge, 482 So. 2d 1262 (Ala. 1984); Eaton v. State, 177 So. 2d 444 (Ala. 1965); *Minor*, 2004 WL 1909380, at *46.

[94] United States v. Young, 470 U.S. 1, 9 (1989); *see also* Allen v. State, 659 So. 2d 135, 137 (Ala. Crim. App. 1994); Quinlivan v. State, 579 So.2d 1386, 1388 (Ala. Crim. App. 1991); Arthur v. State, 575 So. 2d 1165, 1180 (Ala. Crim. App. 1990).

[95] Nelson v. Nagle, 995 F.2d 1549, 1557 (11th Cir. 1993); Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992).

[96] Caldwell v. Mississippi, 472 U.S. 320 (1985); *see also* Taylor v. State, 116 So. 415 (1928); Plyer v. State, 108 So. 83 (1926); Beard v. State, 95 So. 333 (1923).

[97] *Young*, 470 U.S. at 6, 8-9; Wallace v. Kemp, 581 F. Supp. 1471, 1482 (M.D. Ga. 1984), *aff'd*, 757 F.2d 1102 (11th Cir. 1985).

b. Challenges to Prosecutorial Arguments

According to the United States Court of Appeals for the Eleventh Circuit, "[a]rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor ... must be scrutinized carefully."[98]

The Alabama Court of Criminal Appeals has stated that "[q]uestions of the propriety of argument of counsel are largely within the trial court's discretion and that court is given broad discretion in determining what is permissible argument."[99] One option, if defense counsel objects to the argument at trial, is for courts to provide a curative instruction designed to counter an improper prosecutorial argument.[100] In fact, the Alabama Court of Criminal Appeals has held that a "trial court's immediate curative instruction concerning the prosecution's comment creates a prima facie presumption against error."[101]

The trial court's decision to remedy (or not remedy) an improper statement that is objected to at trial is subject to a harmless error analysis on appeal.[102] Under the harmless error standard, a court may affirm the conviction or sentence even if it finds error, on the ground that the error was harmless.[103] In order for error to be deemed harmless, the state must establish that the error "probably did not injuriously affect the appellant's substantial rights."[104] When a prosecutor's error is of a constitutional dimension, the question is not simply whether the prosecutor made improper statements, but whether the comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[105] To determine whether it must reverse non-constitutional error, the court "must determine with 'fair assurance . . . that the judgment was not substantially swayed by the error.'"[106]

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[98] Cargill v. Turpin, 120 F.3d 1366, 1379 (11th Cir. 1997) (quoting Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir.1985) (*en banc*)).

[99] Wilson v. State, 874 So. 2d 1155 (Ala. Crim. App. 2003) (citations omitted).

[100] Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir. 1988), *overruled on other grounds by* Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997); *see also* Minor v. State, 914 So. 2d 372, 430 (Ala. Crim. App. 2004).

[101] *Minor*, 914 So. 2d at 430 (quoting Smith v. State, 756 So.2d 892, 928 (Ala. Crim. App. 1997), aff'd, 756 So. 2d 957 (Ala. 2000)).

[102] *See* Lewis v. State, 889 So. 2d 623, 666 (Ala. Crim. App. 2003) (citing Sattari v. State, 577 So. 2d 535 (Ala. Crim. App. 1990), and *Ex parte* Whisenhant, 482 So. 2d 1241 (Ala. 1983)).

[103] *Id.*

[104] *Id.*; *see also* ALA. R. APP. P. 45.

[105] *Lewis*, 889 So. 2d at 652-53.

[106] *Id.* at 666.

II. ANALYSIS

A. Recommendation #1

Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

The State of Alabama does not require district attorney's offices to have written policies governing the exercise of prosecutorial discretion. The State Bar of Alabama, however, has established the Alabama Rules of Professional Conduct (the rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.[107] The rules describe the prosecutor's role as that of a "minister of justice and not simply that of an advocate" and advise the prosecutor to "see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[108] The rules also require prosecutors to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.[109]

Currently, the State of Alabama gives district attorneys the discretion to seek the death penalty in any case in which the defendant is charged with capital murder under section 13A-5-40 of the Alabama Code.[110] A notice of intent to seek the death penalty is not required and no notice of the prosecutor's intention to seek death must be given beyond charging the defendant with capital murder. Charging a defendant with capital murder does not mean that the district attorney *will* seek death, however; instead, charging a defendant with capital murder means only that the prosecutor *may* seek death.[111]

In the absence of written policies, individual district attorney's offices could have different bases for deciding to seek the death penalty. For example, Jefferson County District Attorney David Barber has stated that his philosophy is to charge any crime that meets any of the legal criteria as capital murder, and to seek the death penalty, while Shelby County District Attorney Robby Owens reports that he does not seek the death penalty unless "the murder was calculated, there's no question of guilt and he believes the defendant isn't worth saving."[112] We note that we were unable to ascertain whether each district attorney's office has written policies governing the exercise of prosecutorial discretion, however.

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[107] ALA. RULES OF PROF'L CONDUCT Rule 3.8 cmt.
[108] *Id.*
[109] ALA. RULES OF PROF'L CONDUCT Rule 3.8.
[110] ALA. CODE § 13A-5-40 (2006).
[111] ALA. CODE § 13A-5-45 (2006). The statute states that the court *shall* conduct a sentencing hearing to impose life without parole or death upon conviction for capital murder, but to the best of our knowledge, District Attorneys generally are granted discretion to charge a defendant with capital murder, but not seek a death sentence. In a situation where a prosecutor agrees to a sentence of life without parole, the judge will generally accept this determination, although s/he potentially could schedule a sentencing hearing and consider, and even actually impose, a sentence of death. *Id.*
[112] *Many Murders, Few Executions*, BIRMINGHAM NEWS, Nov. 7, 2005.

Because the State of Alabama does not require district attorney's offices to have written policies governing the exercise of prosecutorial discretion, the State of Alabama fails to meet Recommendation #1.

B. Recommendation #2

> **Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.**

The State of Alabama has, by court opinion and by statute, established certain trial procedures relevant to the reliability and/or admissibility of eyewitness identifications and expert testimony on eyewitness identifications. For example, the Alabama Supreme Court has held that the admission of expert testimony regarding the reliability of eyewitness identification is in the discretion of the trial court.[113] Additionally, while the *Alabama Pattern Jury Instruction – Criminal Cases* does not include an instruction on the factors to be considered in gauging lineup accuracy, Alabama courts have noted that a requested jury instruction regarding the realistic "shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court's oral charge."[114]

Every defendant is entitled to have instructions given which "would not be misleading, which correctly state the law of [the] case, and which are supported by . . . evidence."[115] The Alabama Court of Criminal Appeals has found the following charge to be a correct statement of the law:

> The Court charges the jury that the possibility of human error or mistake, and the probable likeness or similarity of objects and persons are elements that you must act upon in considering testimony as to identity. You must carefully consider these factors passing upon the credibility that you attach to the witness's testimony, and you must be satisfied beyond a reasonable doubt as to the accuracy of the witness's identification of the defendant.[116]

Because the State of Alabama does not require district attorney's offices to establish procedures and polices for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit, the State of Alabama is not in compliance with Recommendation #2. We note that we were unable to ascertain whether each district attorney's office has established procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

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[113] *Ex parte* Williams, 594 So. 2d 1225, 1227 (Ala. 1992).

[114] Jones v. State, 450 So. 2d 165, 168 (Ala. Crim. App 1983); *see also* Parker v. State, 568 So. 2d 335, 339 (Ala. Crim. App. 1990) (noting in dicta that "the better practice is for the trial judge to instruct the jury on the principles of mistaken identity where identification is a major issue at trial and where the defendant has made a proper request).

[115] Brooks v. State, 380 So. 2d 1012, 1015 (Ala. Crim. App. 1980).

[116] *Jones*, 450 So. 2d at 167 (citing Smith v. State, 307 So. 2d 57, 58 (Ala. Crim App. 1975)).

C. 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.

Despite the obligations provided by the discovery provisions, state and federal law, and the Alabama Rules of Professional Conduct, it appears that some prosecutors still occasionally fail to comply with the discovery requirements. For example, a Center for Public Integrity study of Alabama appellate opinions addressing alleged prosecutorial error or misconduct from 1970 until June 2003 revealed 325 cases of alleged prosecutorial misconduct.[117] In 69 of these, judges reversed or remanded a defendant's conviction, sentence or indictment due to a prosecutor's conduct.[118] In an additional five, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant.[119] Of the cases in which judges ruled a prosecutor prejudiced the defendant, nine involved withholding evidence from the defense,[120] including cases where prosecutors have failed to provide the defendant with information about witness statements,[121] defendant's exculpatory statements, co-defendant's mental health records,[122] the hypnosis of a witness,[123] and crime laboratory reports.[124]

Prosecutors were found to have engaged in prosecutorial misconduct in at least one case where the defendant later was exonerated of the crime.[125] Walter McMillian was convicted of capital murder and sentenced to death in 1988. Between 1988 and 1992, the three witnesses that placed Mr. McMillan at the scene of the crime recanted their testimony. In 1993, the Alabama Court of Criminal Appeal ruled that prosecutors had failed to disclose exculpatory evidence in violation of their discovery requirements.[126] As a result, the court overturned Mr. McMillian's conviction. Mr. McMillian later was released and the charges against him were dismissed.

State and federal law provides that defendants are entitled to all exculpatory information and evidence.[127] The prosecutor "is not required to deliver his [or her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[128] In capital cases, this has been interpreted to mean that the prosecution must turn over evidence that would be mitigating

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[117] Center for Pubic Integrity, Harmful Error, *available at* http://www.publicintegrity.org/pm/states.aspx?st=AL (last visited on May 23, 2006).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994).
[122] McMillian v. State, 616 So. 2d 933 (Ala. Crim. App. 1993).
[123] Martin v. State, 839 So. 2d 665 (Ala. Crim. App. 2001).
[124] Padgett v. State, 668 So. 2d 78 (Ala. Crim. App. 1995).
[125] *See, e.g.*, *McMillian*, 616 So. 2d at 933.
[126] *Id.*
[127] Brady v. Maryland, 373 U.S. 83 (1963); *Ex parte* Womack, 541 So. 2d 47 (Ala. 1988); *see also* ALA. R. CRIM. P. 16.1 cmt.
[128] United States v. Bagley, 473 U.S. 667, 675 (1985).

at the penalty phase of the trial, in addition to evidence that goes against guilt,[129] including the "disclosure of impeachment evidence which could be used to show bias or interest on the part of a key State witness. Accordingly, the State is under a duty to reveal any [deal or] agreement, even an informal one, with a witness concerning criminal charges pending against that witness."[130] A prosecutor must not only disclose the evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[131]

As indicated in the Alabama Rules of Criminal Procedure, the state must disclose information that could be used to impeach witnesses.[132] This includes evidence of a promise of lenience or benefit to a state witness or someone known to the witness,[133] witness statements that contradict trial testimony,[134] witness criminal record information,[135] and in some cases, information about the victim.[136]

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[129] Green v. Alabama, 442 U.S. 95 (1979); *Ex parte* Monk, 557 So. 2d 832 (Ala. 1989).

[130] Giglio v. United States, 405 U.S. 150, 154-55 (1972).

[131] Kyles v. Whitley, 514 U.S. 419, 437-39 (1995). Because the Alabama Court of Criminal Appeals has held that that there is no constitutional right to discovery in criminal cases, discovery requests must be specific. Maples v. State, 758 So. 2d 1, 18 (Ala. Crim. App. 1999).

As a rule, defendants are entitled to discovery of:

(1) Written or recorded statements made by the defendant to any law enforcement officer, official, or employee;
(2) Oral statements made by the defendant, before or after arrest, to any law enforcement officer, official, or employee which the state intends to introduce in evidence at trial;
(3) Written or recorded statements made by any co-defendants or accomplices to any law enforcement officer, official, or employee which the state intends to introduce into evidence;
(4) Oral statements made by any co-defendant or accomplices before of after arrest, to any law enforcement officer, official, or employee which the state intends to offer in evidence at the trial;
(5) Books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things which (1) are material to the preparation of defendant's defense. This does not include documents made by the prosecutor or the prosecutor's agents, or by law enforcements agents, or statements made by state/municipality witnesses or prospective state/municipality witnesses, (2) are intended for use by the state/municipality as evidence at trial, or (3) were obtained from or belong to the defendant; and
(6) Results or reports of physical or mental examinations or scientific tests or experiments.

ALA. R. CRIM. P. 16.1. Internal state or municipality reports, memoranda, witness lists, or other documents made by the prosecutor, the prosecutor's agents, or by law enforcement agents in connection with the investigation or prosecution of the case are not discoverable except as provided above. In addition, statements made by state or municipality witnesses or prospective witnesses also are not discoverable except as provided above. ALA. R. CRIM. P. 16.1(e).

[132] ALA. R .CRIM. P. 16.3.

[133] Williams v. State, 710 So. 2d 1276 (Ala. Crim. App. 1996).

[134] Jacobs v. Singletary, 952 F.2d 1282, 1287-98 (11th Cir. 1992); *Ex parte* Kimberly, 463 So. 2d 1109 (Ala. 1984).

[135] United States v. Bagley, 473 U.S. 667 (1985).

[136] *Ex parte* Willingham, 695 So. 2d 148 (Ala. 1996).

The Alabama Supreme Court has held that capital cases, by their very nature, are "sufficiently different from other cases to justify the exercise of judicial authority" to order broad – or "open file" – discovery.[137] This has been explained by the fact "that 'any evidence' may be relevant to mitigating a sentence of death."[138] As explained in *Ex parte Monk*:

> In a capital case the definition of "favorable evidence" expands at the sentencing stage to far beyond what it is at any stage of any other type of criminal proceeding….This statutory mandate that a defendant shall be allowed to offer evidence of mitigating circumstances is another reason why broad discovery must be allowed. The prosecutor cannot screen files for potential mitigating evidence to disclose to the defense counsel because, "[w]hat one person may view as mitigating, another may not."[139]

The judge's ability to order broad discovery does not mean that he or she has an obligation to do so, however. Instead, "the extent to which discovery will be allowed lies within the discretion of the trial court."[140]

Once the defense makes a specific discovery request, the state has a continuing duty to disclose discoverable information to the defense.[141]

Although many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, this is not always the case. We, therefore, conclude that the State of Alabama is only in partial compliance with Recommendation #3.

D. Recommendation #4

> **The State 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.**

The State of Alabama has entrusted the State Bar of Alabama with investigating grievances and disciplining practicing attorneys. These powers are vested in the Disciplinary Board of the State Bar[142] and the General Counsel of the State Bar is responsible for, among other things, screening information relating to alleged lawyer

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[137] *Ex parte* Monk, 557 So. 2d 832, 836 (Ala.1989). Open file discovery allows the defense to review the prosecution's entire case file.

[138] Council v. State, 682 So. 2d 495, 499 (Ala. Crim. App. 1996).

[139] *Ex parte* Monk, 557 So. 2d 832, 837 (Ala. 1989) (quoting Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir.1983).

[140] Broadnax v. State, 825 So. 2d 134, 156 (Ala. Crim. App. 2000).

[141] ALA. R. CRIM. P. 16.3 ; *see also Ex parte* Brown, 548 So. 2d 993 (Ala. 1989); *Ex parte* Watkins, 509 So. 2d 1064 (Ala. 1984); Padgett v. State, 668 So. 2d 78 (Ala. Crim. App. 1995); Peal v. State, 491 So. 2d 991 (Ala. Crim. App. 1985).

[142] ALA. RULES OF DISCIPLINARY P. Rule 4(b).

misconduct, investigating allegations, and recommending an appropriate disposition of misconduct claims.[143] Alternatively, the Disciplinary Board may grant "grievance committees" of circuit, county or city bar associations the authority to investigate complaints and recommend discipline.[144] A disciplinary investigation or proceeding may be initiated by the General Counsel of the Alabama State Bar or a local grievance committee, upon complaint of another person or entity or upon the General Counsel's or local grievance committee's own motion.[145] All attorneys, including prosecutors, are required to report professional misconduct.[146]

According to the American Bar Association Center for Professional Responsibility, the State Bar received 1,514 complaints about alleged attorney misconduct in 2004 and had another 96 complaints pending from previous years.[147] Of these cases, 348 were investigated, 1,133 were summarily dismissed for lack of jurisdiction, 187 were dismissed after investigation, and 63 were formally charged.[148] Furthermore, 50 lawyers were privately sanctioned in 2004 and 41 lawyers were publicly sanctioned.[149] Of the forty-one lawyers who were publicly sanctioned, three of them were disbarred, fifteen were suspended, two were suspended on an interim basis (for risk of harm or criminal conviction), nineteen were publicly reprimanded and/or censured, two were placed on probation, and three were transferred to disability/inactive status.[150] We were unable to determine how many, if any, of these attorneys were or are prosecutors. The organization HALT, which evaluates lawyer discipline systems across the country, assigned a grade of "D+" to Alabama's system, based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of disciplinary procedures, the amount of public participation, and promptness of follow-up on complaints.[151]

In addition, since the death penalty was reinstated in Alabama, 85% of all cases where the defendant was sentenced to death alleged prosecutorial misconduct at some point in the trial process.[152] Furthermore, as previously discussed in Recommendation #3, the Center for Public Integrity's study of Alabama criminal appeals, including both death and non-death cases, from 1970 to June 2003, revealed 325 cases in which the defendant alleged prosecutorial error or misconduct.[153] In 69 of these cases, judges ruled that the prosecutor's conduct prejudiced the defendant and remedied the misconduct by reversing or remanding the conviction, sentence, or indictment.[154] In an additional five cases, a

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[143] ALA. RULES OF DISCIPLINARY P. Rule 6(a).
[144] ALA. RULES OF DISCIPLINARY P. Rule 7.
[145] ALA. RULES OF DISCIPLINARY P. Rule 3(c).
[146] ALA. RULES OF PROF'L CONDUCT Rule 8.3.
[147] ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems (2004), *at* http://www.abanet.org/cpr/discipline/sold/sold-home.html (last visited on May 23, 2006).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] HALT, LAWYER DISCIPLINE 2006 REPORT CARD, ALABAMA, *at* http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/AL_LDRC_06.pdf (last visited on May 23, 2006).
[152] American Civil Liberties Union, Database on Death Row Inmates in Alabama (on file with author).
[153] Center for Pubic Integrity, Harmful Error, *at* http://www.publicintegrity.org/pm/states.aspx?st=AL (last visited on May 23, 2006).
[154] *Id.*

dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant.[155] "Of the cases in which judges ruled a prosecutor prejudiced the defendant, 28 involved the prosecution discriminating in jury selection, 27 involved trial behavior, nine involved withholding evidence from the defense, three involved a prosecutor taking the witness stand, one involved the denial of a speedy trial and one involved the use of perjured testimony."[156] In the majority of cases in which the defendant alleged prosecutorial misconduct (223 out of the 325), however, the prosecutor's conduct or error was found to be harmless.[157] We were unable to determine how many of the prosecutors in these cases, if any, were referred to the State Bar for discipline.

The majority of cases where the defendant was sentenced to death in which allegations about prosecutorial misconduct were made were tried in only a handful of the 67 counties in Alabama. Prosecutors in Mobile County tried 10 of these cases, prosecutors in Montgomery County tried 8, prosecutors in Houston were responsible for 5, and prosecutors in Morgan and Colbert counties handled two claims of prosecutorial misconduct each.[158] Twenty-five percent of the death-sentenced cases at which prosecutorial misconduct was alleged at trial were presided over by judges in Montgomery County and 25% were presided over by judges in Mobile County. Cases that were heard in Mobile and Montgomery Counties accounted for approximately 50% of the capital murder cases at which prosecutorial misconduct was alleged.[159]

Although the State of Alabama, through the State Bar, has established a procedure by which grievances are investigated and members of the State Bar are disciplined, because of the mandatory confidentiality provisions contained in those procedural rules, the procedure's effectiveness is not ascertainable. Based on this information, the State of Alabama is only in partial compliance with Recommendation #4.

E. 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.

The Alabama Court of Criminal Appeals, relying on precedent from the United States Supreme Court, has found that a prosecutor is required to disclose evidence of which s/he is aware as well as "favorable evidence known to others acting on the government's behalf," even if the evidence is "known only to police investigators and not to the prosecutor."[160] Given that a prosecutor is responsible for disclosing favorable evidence that s/he is not personally aware of but is known to others acting on the government's behalf (i.e., law enforcement officers), it is in the best interest of all prosecutors to ensure

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[155] *Id.*
[156] *Id.*
[157] Center for Public Integrity, Harmful Error, Nationwide Numbers, *at* http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y (last visited on May 23, 2006).
[158] American Civil Liberties Union, Database on Death Row Inmates in Alabama (on file with author).
[159] *Id.*
[160] Kyles v. Whitley, 514 U.S. 419, 437-39 (1995); Martin v. State, 839 So. 2d 665, 669 (Ala. Crim. App. 2001).

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 mitigation evidence. We are, however, aware of one instance in which the relevant police agency failed to disclose material evidence to the prosecutor.[161] This information is insufficient to draw any conclusions as to whether all prosecutors are meeting or failing to meet Recommendation # 5.

F. Recommendation #6

The State 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.

The State of Alabama does not offer any courses that are specifically designed for Alabama capital case prosecutors. Alabama prosecutors may take courses through national organizations such as the National College of District Attorneys and the American Prosecutors' Research Institute, however. The training programs are not mandatory, but prosecutors may earn their required Continuing Legal Education credits at these trainings. The Office of Prosecution Services also conducts a limited number of training programs for state prosecutors, although they do not appear to be geared toward capital case prosecutors.[162] Lastly, there are no 2006 continuing legal education programs specifically designed for capital prosecutors publicized through the state bar.[163]

Based on this information, the State of Alabama is not in compliance with Recommendation #6.

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[161] *See, e.g.*, *Martin*, 839 So. 2d at 669.

[162] Alabama District Attorney's Association, Calendar of Events, *at* http://www.adaa-ops.org/calendar/#2006 (last visited on May 23, 2006).

[163] Alabama State Bar, CLE Calendar Search, *at* http://www.alabar.org/cle/date_search.cfm?startrow=1 (last visited on May 23, 2006).

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants..

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. It also requires that counsel invest substantial time and effort into building client trust. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for the defense counsel's errors, the result of the proceeding would have been different.[1] The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.[2] In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

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[1] Strickland v. Washington, 466 U.S. 668 (1984).

[2] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ (last visited on May 23, 2006).

I. FACTUAL DISCUSSION

A. Alabama's Indigent Legal Representation System

Alabama does not have a statewide indigent defense system. Instead, each of Alabama's forty-one judicial circuits is responsible for setting up its own system for providing counsel to indigent defendants.

By statute, each of the forty-one judicial circuits is supposed to have an indigent defense commission, appointed by the presiding judge of the circuit.[3] However, there are many circuits throughout the state which have not established an indigent defense commission, or in some instances where one has been established it does not function. Nevertheless, each indigent defense commission is by statute responsible for:

(1) Advising the presiding circuit judge on the indigent defense system to be utilized in each county of the circuit;
(2) Advising the presiding circuit judge on the operation and administration of indigent defense systems within the circuit;
(3) Selecting the public defender by majority vote, if a public defender system is established within the circuit, determining the budget for the public defender and supervising the operation of the public defender office;
(4) Selecting one or more contract counsel by majority vote, if a contract counsel system is established within the circuit, contracting with contract counsel, subject to the approval of the presiding circuit judge, and determining the compensation to be paid to contract counsel under each contract, subject to the review of the Administrative Director of Courts and the approval of the State Comptroller.[4]

Each commission is supposed to be comprised of five members who meet at least once a year, at the presiding circuit judge's request,[5] and in addition to the duties listed above, make periodic written reports to the administrative director of courts that include budgetary requirements and the costs of furnishing indigent defense services within the circuit.[6]

In circuits with one or two circuit court judges, the presiding judge of the circuit court, with the advice and consent of the indigent defense commission, will determine the indigent defense system to be used in each county of the circuit.[7] In circuits with three or more circuit court judges, a majority of the circuit court judges, with the advice and consent of the indigent defense commission, will determine the indigent defense system to be used in each county of the circuit.[8] Within each judicial circuit, the presiding judge is responsible for administering the indigent defense system and the individual circuit courts may adopt rules to effectuate this system, so long as they are not in conflict with

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[3] ALA. CODE § 15-12-4(a) (2006).
[4] ALA. CODE § 15-12-4(e) (2006).
[5] ALA. CODE § 15-12-4(b), (d) (2006).
[6] ALA. R. JUD. ADMIN. 8(b).
[7] ALA. CODE § 15-12-2(a)(1) (2006).
[8] ALA. CODE § 15-12-2(a)(2) (2006).

any rules of the Alabama Supreme Court.[9] If a majority of the circuit judges in a circuit that has two or more circuit court judges cannot determine the manner that the circuit will provide its indigent defense services, the presiding judge will determine the indigent defense system to be used, with the advice and consent of the indigent defense commission.[10]

Four judicial circuits have centralized public defender offices,[11] although two of those offices are part-time and three of them do not represent capital defendants.[12] Twenty-seven judicial circuits utilize a court appointment system in which judges appoint attorneys to represent defendants in individual cases.[13] Under this model, private attorneys represent indigent defendants for an hourly fee. An additional ten circuits use a contract defender system in which circuits hire individual attorneys, firms, associations, corporations, or partnerships of lawyers for a monthly fee in exchange for an agreement to handle a set number or percentage of the circuit's indigent defense cases.[14]

1. Public Defender Offices

In those judicial circuits that maintain public defender offices, an attorney from the public defender office represents indigent defendants whenever authorized by law and able to do so. If an attorney from the public defender office cannot represent the indigent defendant, a private attorney will be appointed.[15]

In each county or circuit where a public defender system is chosen as a method of providing indigent defense services, the local indigent defense commission will select a public defender.[16] The public defender will be appointed for a fixed term of up to six years and may be removed for cause by the indigent defense commission.[17]

Public defenders have the power and responsibility to:

(1) Provide defense services to indigent defendants charged with misdemeanors and felonies within his or her geographic jurisdiction and referred to him or her by the court;
(2) At the request and with the consent of a municipal governing body and the indigent defense commission, represent indigent defendants in a municipal court within his or her geographic jurisdiction;

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[9] ALA. CODE § 15-12-3 (2006).
[10] ALA. R. JUD. ADMIN. 8(a) (2006).
[11] AMERICAN CIVIL LIBERTIES UNION, BROKEN JUSTICE: THE DEATH PENALTY IN ALABAMA 4 (2005) [hereinafter BROKEN JUSTICE].
[12] Telephone Interview with Bobby Woolridge, Public Defender, Tuscaloosa County (May 3, 2006).
[13] *See* Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003); BROKEN JUSTICE, *supra* note 11, at 4.
[14] *See* Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003); BROKEN JUSTICE, *supra* note 11, at 4.
[15] ALA. R. CRIM. P. 6.4(b).
[16] ALA. CODE § 15-12-40 (2006).
[17] ALA. CODE § 15-12-41 (2006).

(3) With the consent of the indigent defense commission, represent an indigent defendant in a state appellate court; and

(4) If empowered to do so by the presiding circuit judge and the indigent defense commission, administer the system of appointing private counsel for indigent defendants within his or her geographic jurisdiction.[18]

A public defender will receive a salary that is set by the indigent defense commission and approved by the Administrative Director of Courts,[19] but it may not exceed the salary paid to a district attorney.[20] All public defender salary costs and other expenses will be paid by the state from the fair trial tax fund or other funds appropriated by the Legislature.[21] Except in counties that are authorized to impose a court cost for defender services, the county must fund defender services from the revenues of the court costs and the state will pay a reasonable share of the cost of maintaining the office, as determined by the Administrative Director of the Courts.[22] The judicial circuit's indigent defense commission, subject to approval of the Administrative Director of Courts, may approve expenses from the public defender, including those for attorneys, investigators, and other personnel and non-personnel expenses.[23]

2. Court Appointment Systems

The appointed counsel system is the most commonly utilized indigent defense system in Alabama, although appointment methods vary among the judicial circuits.[24] Under this system, judges appoint attorneys to represent indigent defendants for an hourly fee. In some circuits, appointments are made from among all members of the local bar who are eligible to represent capital defendants.[25] In other circuits, attorneys may request that they be added to a list from which appointments are made. In still other circuits, judges may select from among the attorneys present in the courtroom at the time the need for appointed counsel arises.[26]

3. Contract Defender Systems

In contract defender systems, the circuit's indigent defense commission is responsible for contracting with one or more contract counsel.[27] Each contract defender is employed pursuant to the terms and conditions of employment set forth in their contract.[28] The contract is subject to the approval of the presiding circuit judge.[29]

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18 ALA. CODE § 15-12-42 (2006).
19 ALA. CODE § 15-12-43(a) (2006).
20 *Id.*
21 ALA. CODE § 15-12-43(b) (2006). The Tuscaloosa Public Defender also receives county funding.
22 *Id.*
23 ALA. CODE § 15-12-45 (2006).
24 *See* EQUAL JUSTICE INITIATIVE, A REPORT ON ALABAMA'S INDIGENT DEFENSE SYSTEM 5-6 (1997).
25 *Id.*
26 *Id.*
27 ALA. CODE § 15-12-26(a) (2006).
28 ALA. CODE § 15-12-26(b) (2006).
29 *Id.*

4. Funding for Indigent Defense Services

Funds for indigent defense are provided by the "Fair Trial Tax Fund," which is designed to reimburse counties for indigent defense expenditures,[30] including capital defense expenditures. The fair tax trial fund contains fees that are added to the filing fee in civil cases, as well as costs in criminal cases. The state covers expenditures if revenues in the fair tax trial fund are insufficient to reimburse the counties' costs.[31]

The total cost of indigent defense has been and is projected to continue rising. Expenditures for indigent defense were $17 million in the 1998 fiscal year, over $21 million in the 1999 fiscal year, and $30 million in the 2000 fiscal year.[32] Total expenditures grew to over $37 million in the 2002 fiscal year,[33] over $40 million in fiscal year 2003,[34] and approximately $48 million in 2005.[35] As discussed below, however, the state ceased compensating defense attorneys for office overhead in early 2005. As a result, it is possible that this growth in expenditures for indigent defense may have slowed or even reversed course in the last year.

B. Appointment Qualifications, Training, Compensation, and Resources Available to Attorneys Handling Death Penalty Cases Covered by Alabama's Indigent Legal Representation System

1. Appointment of Counsel

An accused charged with capital murder for which the death penalty is being sought is entitled to appointed counsel at trial[36] and on direct appeal[37] if s/he can establish that s/he is indigent.[38] There is no constitutional or statutory right to counsel in state post-

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[30] ALA. CODE § 12-19-252 (2006); *see also* THE SPANGENBERG GROUP, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL (2003) [hereinafter RATES OF COMPENSATION].

[31] ALA. CODE § 12-19-252 (2006); *see also* RATES OF COMPENSATION, *supra* note 30.

[32] THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES (2003).

[33] *Id.*

[34] *See* Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003). Of this $40 million, approximately $16 million was from the fair tax trial fund and $22 million was from the general fund.

[35] E-mail interview with William N. Clark, Partner, Redden, Mills & Clark (June 2, 2006).

[36] ALA. CODE §§ 15-12-20, -21 (2006).

[37] ALA. CODE § 15-12-22(b) (2006).

[38] ALA. CODE §§ 15-12-1, -5 (2006); ALA. R. CRIM P. 6.3. The Alabama Code defines an indigent as "[a]ny person involved in a criminal or juvenile proceeding in the trial or appellate courts of the state for which proceeding representation by counsel is constitutionally required, who under oath or affirmation states that he or she is unable to pay for his or her defense, and who is found by the court to be financially unable to pay for his or her defense." ALA. CODE § 15-12-1 (2006). "In determining indigency, the judge shall recognize ability to pay as a variable depending on the nature, extent and liquidity of assets, the disposable net income of the defendant, the nature of the offense, the effort and skill required to gather pertinent information and the length and complexity of the proceedings." ALA. CODE § 15-12-5 (2006). In determining indigency, "a judge may require an investigation and report by a district attorney, public defender, sheriff, probation officer or other officer of the court. Provided, further, that the trial court judge shall, in all cases requiring a determination of indigency, require the accused to execute an affidavit of substantial hardship on a form approved by the Supreme Court, The completed affidavit of substantial

conviction proceedings, although the court may appoint counsel "if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person."[39] There is no constitutional or statutory right to counsel in clemency proceedings.

In a case where the defendant is entitled to counsel, the trial judge must determine, prior to arraignment, whether or not: (1) the defendant has arranged to be represented by counsel; (2) the defendant wants counsel assistance; and (3) the defendant is able financially or otherwise to obtain attorney assistance.[40] If the defendant has not arranged to be represented, wants the assistance of counsel, and is not able to obtain this assistance, the court must appoint counsel to represent and assist the defendant.[41] It is the attorney's responsibility "to represent and assist the defendant to the best of his or her ability."[42]

On direct appeal, the trial court judge must appoint counsel to represent and assist the indigent defendant if s/he is unable to obtain the assistance of counsel.[43] If the trial court judge fails to appoint counsel, the presiding judge of the Court of Criminal Appeals has the authority to do so.[44] Again, it is the attorney's responsibility "to represent and assist the defendant to the best of his or her ability."[45]

Individuals sentenced to death do not have the right to appointed counsel in state post-conviction proceedings, but the trial court judge, presiding judge, or chief justice of the court in which the proceedings are pending or may be commenced may appoint counsel "to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person."[46]

2. Attorney Qualifications

Court appointed counsel in a death penalty case must be a duly licensed member of the Alabama State Bar Association[47] and have at least five years' prior experience in the "active practice of criminal law."[48]

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hardship and the subsequent order of the court either denying or granting court appointed counsel to the accused shall become a part of the official court record in the case." ALA. CODE § 15-12-5(c) (2006).

[39] ALA. CODE § 15-12-23(a) (2006).
[40] ALA. CODE § 15-12-20 (2006).
[41] ALA. CODE § 15-12-21(a) (2006).
[42] *Id.*
[43] ALA. CODE § 15-12-22(b) (2006).
[44] *Id.*
[45] *Id.*
[46] ALA. CODE § 15-12-23(a) (2006).
[47] Irvin v. State, 203 So. 2d 283 (Ala. Crim. App. 1967).
[48] ALA. CODE § 13A-5-54 (2006).

While not binding, the Alabama Circuit Judge's Association passed a resolution in January 2005 adopting the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.[49] The Guidelines were "adopted as a recommendation to the circuit judges of Alabama," but "are not hard and fast rules. The purpose of their adoption . . . is so that an optimum standard can be set for circuit judges to attempt to achieve in capital cases. It's [sic] adoption is not to be considered a rule or requirement but only a recommendation. However, as to Guidelines 5.1 and 8.1 which apply to the qualification and experience of defense counsel appointed in capital cases these recommendations would be adhered to as closely as is practical."[50]

Guideline 5.1 provides that:

a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

b. In formulating qualification standards, the jurisdiction should insure:

   i. That every attorney representing a capital defendant has:

      (a) obtained a license or permission to practice in the jurisdiction;

      (b) demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

      (c) satisfied the training requirements set forth in Guideline 8.1.

   ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

      (a) substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

      (b) skill in the management and conduct of complex negotiations and litigation;

      (c) skill in legal research, analysis, and the drafting of litigation documents;

      (d) skill in oral advocacy;

      (e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

      (f) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

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[49] Ala. Cir. Judge's Ass'n, Resolution (Jan. 21, 2005) (on file with author).

[50] *Id.*

(g) skill in the investigation, preparation, and presentation of mitigating evidence; and

(h) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.[51]

3. Training

a. Training Requirements

Alabama does not require any training for capital defense attorneys beyond the State Bar of Alabama requirement that all lawyers must complete twelve hours of continuing legal education per year to maintain state bar licensure.[52]

The Alabama Circuit Judge's Association non-binding resolution discussed above, however, states that American Bar Association Guideline 8.1 of the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, which deals with attorney training, "would be adhered to as closely as is practical."[53]

Guideline 8.1 provides that:

a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. The training program should include, but not be limited to, presentations and training in the following areas:

i. relevant state, federal, and international law;

ii. pleading and motion practice;

iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

iv. jury selection;

v. trial preparation and presentation, including the use of experts;

vi. ethical considerations particular to capital defense representation;

vii. preservation of the record and of issues for post-conviction review;

viii. counsel's relationship with the client and his or her family;

ix. post-conviction litigation in state and federal courts; and

x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two

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[51] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 5.1, *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES].

[52] ALA. CODE § 40-12-49 (2006).

[53] ABA GUIDELINES, *supra* note 51, at 5.1.

years, a specialized training program that focuses on the defense of death penalty cases.

d. All non-attorneys wishing to be eligible to participate on defense teams should receive continuing professional education appropriate to their areas of expertise.[54]

In addition, while Alabama does not require lawyers to have additional qualifications to represent defendants in death penalty cases beyond those discussed above, the State Bar of Alabama does certify lawyers as specialists in criminal trial advocacy.[55] To obtain this state certification, the applicant must obtain certification in criminal trial advocacy from the National Board of Trial Advocacy (NBTA). To do this, an applicant must be a member of the bar in good standing, spend a minimum of 30% of his/her time working in criminal trial advocacy for at least the three years preceding the application, submit a legal writing sample, participate in forty-five hours of continuing legal education relating to criminal trial advocacy in the three years preceding the application, receive peer review from three judges and three attorneys familiar with the applicant's courtroom activities, serve as lead counsel in a number of trials to verdict or judgment and demonstrate other trial and courtroom skills, serve as lead counsel in forty contested matters involving the taking of evidence, and successfully pass the NBTA examination.[56] Initial certification lasts for five years, at which point the attorney must apply for recertification.[57] In addition, as part of the normal continuing legal education requirements set by the State Bar of Alabama, a certified attorney must complete a minimum of six hours per year of continuing legal education in criminal trial advocacy.[58]

b. Training Sponsors

The Alabama Criminal Defense Lawyers Association offers a two-day conference on death penalty issues in January of each year titled "Loosening the Death Belt" that provides a variety of training relevant to capital defense.[59]

In addition, the Alabama Bar Institute for Continuing Legal Education offers occasional training programs covering criminal law and death penalty topics, including two online programs titled "2004 Alabama Update: Criminal Defense Law" and "2005 Alabama Update: Criminal Defense Law Update."[60]

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[54] ABA GUIDELINES, *supra* note 51, at 8.1.

[55] *See* State Bar of Alabama, Specialization, *at* http://www.alabar.org/members/specialization.cfm (last visited on May 23, 2006).

[56] *See* National Board of Trial Advocacy, About the NBTA, *at* http://www.nbtanet.org/public/misc/about-nbta.shtml (last visited on May 23, 2006).

[57] *Id.*

[58] ALA. R. CERTIFICATION 6.03, *at* http://www.alabar.org/members/specrules.cfm (last visited on May 23, 2006).

[59] Alabama Criminal Defense Lawyers Association, Seminars, *at* http://melcooper.com/acdlaorg/seminarinfo/index-seminarinfo.htm (last visited on May 23, 2006).

[60] *See* Alabama Bar Institute for Continuing Legal Education, Current Seminars, http://www.legalspan.com/abicle/catalog.asp?UGUID=&CategoryID=20020923110130104445 (last visited on May 23, 2006).

5. Compensation Limits and Rates of Appointed Attorneys

Alabama law provides that appointed trial counsel "shall be entitled to receive for their services a fee to be approved by the trial court. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of … sixty dollars ($60) per hour for time expended in court and forty dollars ($40) per hour for time reasonably expended out of court in the preparation of the case."[61] In cases where the original charge is a capital offense or carries a possible sentence of life without parole, there is no limit to the total amount that may be charged.[62] Counsel also are eligible to be reimbursed for any expenses reasonably incurred in defense of the defendant, so long as they are approved in advance by the trial court.[63]

While these reimbursable expenses previously included attorneys' overhead expenses, it does not appear that attorneys currently may be reimbursed for the overhead expenses associated with indigent defense. Beginning in 1994, the Alabama Court of Criminal Appeals suggested that overhead expenses could be included as part of the "reasonably incurred expenses" that were to be paid to attorneys representing indigent defendants.[64] The highest commonly used hourly overhead rate was $30 per hour, bringing the maximum typical hourly compensation rate to $70 per hour for work out of court and $90 per hour for work in court.[65] In 1999, the law governing court-appointed counsel fees was amended to say that reimbursed expenses must have been incurred "in the defense of [the] client"[66] and a plurality of the Alabama Supreme Court stated in dicta that this change was intended to eliminate the payment of office overhead expenses.[67] In response, the Alabama legislature passed a non-binding Joint Resolution stating that the statutory amendment was not intended to eliminate the reimbursement of overhead expenses.[68] Despite this, the Attorney General issued an opinion in 2005 that overhead expenses were not eligible for reimbursement.[69] Following this opinion, the State Comptroller began denying the reimbursement of overhead payments. The Comptroller's action was challenged and on September 28, 2005, the Circuit Court for Montgomery County ordered the Comptroller to make all overhead payments that had been denied.[70] This order has been appealed, but no opinion yet has been rendered.

If a defendant is convicted and sentenced to death and cannot obtain the assistance of counsel on appeal, the trial court will appoint counsel to "represent and assist the

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[61] ALA. CODE § 15-12-21(d) (2006).
[62] ALA. CODE § 15-12-21(d)(1) (2006).
[63] ALA. CODE § 15-12-21(d) (2006).
[64] May v. State, 672 So. 2d 1307-08 (Ala. Crim. App. 1994).
[65] RATES OF COMPENSATION, *supra* note 30.
[66] ALA. CODE § 15-12-21(d) (2006).
[67] Lyons v. Norris, 829 So. 2d 748, 751 n.1 (Ala. 2002).
[68] 2002 Ala. Acts 129.
[69] Op. Ala. Att'y. Gen. 2005-063 (Feb. 1, 2005).
[70] Circuit Court of Montgomery County, Amended Order, Case No. 05-1544 (Sept. 28, 2005), *available at* http://www.nacdl.org/public.nsf/defenseupdates/alabama006/$FILE/AL_Overhead_decision.pdf (last visited on May 23, 2006).

defendant in the appeal."[71] The amount of the fee is based on the "number of hours spent by the counsel in working on the appeal and shall be computed at the rate of sixty dollars ($60) per hour for time reasonably expended in the prosecution of the appeal, and any subsequent petition for writ of certiorari."[72] Fees may not exceed $2,000 per appeal, including any subsequent petition for *certiorari*.[73] The same uncertainty surrounding overhead payments at trial exists for overhead payments associated with the direct appeal. Currently, no overhead payments are being approved.

If counsel is appointed in a state post-conviction proceeding, his/her fee is based on the "number of hours spent by the counsel in working on the proceedings and shall be computed at the rate of sixty dollars ($60) per hour for time expended in court and forty dollars ($40) per hour for time reasonably expended in preparation of the proceedings."[74] Fees may not exceed $1,000.[75]

6. Resources Available to Indigent Defense Attorneys

The statutory provisions that allow for the reimbursement of "expenses reasonably incurred in the defense of his[/]her client, to be approved in advance by the trial court"[76] include the fees and expenses of experts.[77] "The denial of funds for the employment of investigators and experts does not amount to a deprivation of constitutional rights," however.[78] To be entitled to funds for an expert, the defendant "must show more than a mere possibility that he or she will receive useful assistance from the expert. Rather, the defendant must show a reasonable probability that the expert would aid in the defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial."[79] "To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense."[80]

In cases where the defendant is represented by a lawyer working in a public defender office, the indigent defense commission, subject to the approval of the Administrative Director of Courts, may approve expenditures for "attorneys, investigators, [and] other personnel and nonpersonnel expenses."[81]

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[71] ALA. CODE § 15-12-22(b) (2006).
[72] ALA. CODE § 15-12-22(d)(1) (2006).
[73] ALA. CODE § 15-12-22(d)(3) (2006).
[74] ALA. CODE § 15-12-23(d) (2006).
[75] *Id.*
[76] ALA. CODE §§ 15-12-21(d), 15-12-22(d) (2006).
[77] ALA. CODE § 15-12-21(d) (2006).
[78] Nelson v. State, 452 So. 2d 1367, 1369 (Ala. Crim. App. 1984) (citing Dutton v. State, 434 So. 2d 853 (Ala. Crim. App. 1983)).
[79] Dobyne v. State, 672 So. 2d 1354, 1358 (Ala. 1995); Dubose v. State, 662 So. 2d 1189, 1192 (Ala. 1995).
[80] *See, e.g.*, McGowan v. State, 2003 WL 22928607, *12 (Ala. Crim. App. Dec. 12, 2003) (quoting *Ex parte* Moody, 684 So. 2d 114, 119 (Ala. 1996)).
[81] ALA. CODE § 15-12-45 (2006). In Tuscaloosa County, public defenders petition the judge in individual cases for such additional funding.

In addition, if the defendant's mental condition is in question, the court must appoint a psychiatrist or psychologist to examine the defendant or order that an examination be conducted by a psychiatrist or psychologist appointed by the commissioner of the Department of Mental Health and Mental Retardation.[82] The circuit court may, but is not required to, appoint other experts and order the defendant to submit to physical, neurological, or psychological examinations, when the court is advised by the examining psychologist or psychiatrist that such examinations are necessary for an adequate determination of the defendant's mental condition.[83] If there is reasonable ground to believe that a defendant lacks the capacity to stand trial, or that a defendant may proceed on the basis of mental disease or defect as a defense, the presiding judge must order the defendant's commitment to the Department of Mental Health and Mental Retardation for observation and examination.[84]

Pre-approved expert fees are supposed to be billed only after the court has been notified that the expert's work has been completed.[85]

C. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Cases Not Covered by Alabama's Indigent Legal Representation System: Clemency

The State of Alabama does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency.

Apart from the Alabama Rules of Professional Conduct requiring competence,[86] there are no qualification standards for attorneys who handle state clemency proceedings. Neither the Alabama Code nor the Rules of Criminal Procedure require attorneys to possess any qualifications or complete any training.

D. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Federal Habeas Corpus Petitions

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal *habeas corpus* in one of Alabama's three federal judicial districts – Northern, Middle, and Southern -- is entitled to appointed counsel and other resources if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."[87] Death sentenced offenders seeking habeas relief in Alabama Federal District Courts receive counsel either from the Capital Habeas Unit (CHU) of the Middle District of Alabama Federal Defender Program, Inc. (a

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[82] ALA. R. CRIM. P. 11.3(a).
[83] ALA. R. CRIM. P. 11.3(d).
[84] ALA. CODE § 15-16-22(a) (2006).
[85] ALA. CODE §§ 15-12-21(d), 15-12-22(d) (2006); Moody v. State, 888 So. 2d 532, 563-74 (Ala. Crim. App. 2003).
[86] ALA. RULES PROF'L. CONDUCT Rule 1.1 (stating that "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").
[87] 18 U.S.C. § 3599(a)(2) (2006); *see also* McFarland v. Scott, 512 U.S. 849, 856-57 (1994) (citing to 21 U.S.C. § 848(q)(4)(B), which has since been repealed).

federally funded, non-profit organization) or from counsel appointed by the Court.[88] The CHU is the sole federal public defender in the state assigned the duty of rpresenting indigent habeas petitioners in capital cases. Consequently, the office handles cases arising in all three of Alabama's Federal Judicial Districts. The CHU handles many, but by no means all, federal capital habeas matters in the state.

As of April 2006, there were five litigating attorneys and one research/writing attorney employed by the CHU, representing clients in 18 death penalty *habeas* cases and preparing to represent at least an additional eleven death row inmates whose cases currently are in state court.[89] In addition, the CHU has three investigators, two paralegals, and two legal secretaries.[90]

All CHU attorneys are required to comply with the qualification requirements contained in section 3599 of Title 18 of the United States Code and are required to attend at least two training conferences per year.[91]

According to section 3599 of Title 18 of the United States Code, inmates entitled to an appointed attorney must be appointed "one or more" qualified attorneys prior to the filing of a formal, legally sufficient federal habeas petition.[92] To be qualified for appointment, at least one of the appointed attorneys must "have been admitted to practice in the [United States Court of Appeals for the Eleventh Circuit] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."[93] For "good cause," the court may appoint another attorney "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation."[94] In cases where the death-sentenced inmate is appointed a lawyer who does not work for CHU, the attorney must be compensated at a maximum rate of $163 per hour.[95]

In addition to counsel, the court also may authorize the attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.[96] The fees and expenses paid for these services may not exceed $7,500 in any case.[97] Because CHU is

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[88] Telephone Interview with Christine Freeman, Executive Director, Federal Defender Program, Inc. (Apr. 10, 2006).
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] 18 U.S.C. § 3599(a)(2) (2006); *see also McFarland*, 512 U.S. at 856-57.
[93] 18 U.S.C. § 3599(c) (2006).
[94] 18 U.S.C. § 3599(d) (2006).
[95] Memorandum from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to United States Courts of Appeals Judges, United States District Court Judges, United States Magistrate Judges, Circuit Executives, Federal Public/Community Defenders, District Court Executives, U.S. Courts of Appeals Clerks, U.S. District Courts Clerks, Senior Staff Attorneys, and Chief Preargument/Conference Attorneys (Dec. 29, 2005), *available at* http://www.fpdaz.org/assets/panel/Panel%20rate%202006.pdf (last visited on May 23, 2006). Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than $125 per hour for in-court and out-of-court work. 18 U.S.C. § 3599(g)(1) (2006).
[96] 21 U.S.C. § 3599(f) (2006).
[97] 21 U.S.C. § 3599(g)(2) (2006).

funded directly by the Office of Defender Services, including funding for personnel costs, operations expenses, and all litigation expenses, the hourly rate and fees and expenses caps do not apply.[98] Thus, CHU attorneys do not need to ask the court for a budgeting conference or for prior approval to secure experts in individual cases.[99]

[98] Telephone Interview with Christine Freeman, Executive Director, Federal Defender Program, Inc. (Apr. 10, 2006).
[99] *Id.*

II. ANALYSIS

A. Recommendation # 1

> **In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings – pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings.**

The State of Alabama does not guarantee counsel at every stage of the legal proceedings. Rather, death sentenced inmates do not have a right to appointed counsel after direct review by the Alabama Court of Criminal Appeals.[100] Based on prevailing state and federal law, indigents charged with or convicted of a capital offense in the State of Alabama have a right to appointed counsel during pre-trial proceedings, at trial, on direct appeal, and in federal *habeas corpus* proceedings.[101] Death-sentenced individuals petitioning for state post-conviction relief and clemency are not entitled to appointed counsel, although the court has the discretion to appoint counsel in state post-conviction proceedings "if it appears to the court that the person … is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person."[102] It appears that state post-conviction appointments happen infrequently.

Indigent defendants entitled to appointed counsel during pre-trial proceedings, trial, and direct appeal must be appointed counsel "as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor."[103] Similarly, death-sentenced inmates entitled to appointed counsel for federal *habeas corpus* must be appointed counsel prior to the filing of a formal, legally sufficient *habeas* petition.[104]

Despite the fact that the State of Alabama does not guarantee counsel to death-sentenced offenders petitioning for state post-conviction relief, some organizations and individual attorneys in Alabama and nationwide provide pro bono representation to these inmates. According to former Attorney General (now Judge) William H. Pryor, Jr., of the 130 death row inmates in state post-conviction or federal *habeas corpus* proceedings as of June 2003, ninety-two of them at some point were represented by out-of-state law firms or public interest groups, eighteen were represented by the Equal Justice Initiative of Alabama, seventeen were represented by Alabama private practitioners, and three were unrepresented.[105]

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[100] ALA. CODE § 15-12-23(a) (2006).
[101] *See* ALA. CODE §§ 15-12-21, -22 (2006); 21 U.S.C. § 848(q)(4)(B) (2004); McFarland v. Scott, 512 U.S. 849, 856-57 (1994).
[102] ALA. CODE § 15-12-23(a) (2006).
[103] ALA. R. CRIM. P. 6.1(a).
[104] *See* 21 U.S.C. § 848(q)(4)(B) (2004); *McFarland*, 512 U.S. at 856-57.
[105] *See* William H. Pryor, Jr., *Letter to the Editor*, NAT'L L.J., Jan. 12, 2004.

Due to limited resources and personnel, in-state organizations and attorneys are incapable of representing all death-sentenced individuals petitioning for state post-conviction relief. For example, the Equal Justice Initiative of Alabama (EJI) has only ten attorneys on staff, including the director.[106] Indigent death-sentenced inmates not represented by EJI, other organizations, or individual attorneys are, therefore, left to represent themselves. In fact, as of April 2006, approximately fifteen of Alabama's death row inmates in the final rounds of state appeals had no lawyer to represent them.[107]

At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

a. At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.

Because death-sentenced inmates are not entitled to appointed counsel for state post-conviction or clemency proceedings, Alabama law only addresses the number of attorneys that must be appointed at trial and on direct appeal. Alabama law does not require that an indigent individual charged with a capital offense be appointed more than one attorney.[108] A defendant may request the appointment of co-counsel, however, and it appears that two attorneys sometimes are appointed for trial in death penalty cases.[109] According to the Court of Criminal Appeals, "while we recognize that in some cases there may be a need to appoint two attorneys, Alabama has no statute requiring that two attorneys be appointed to a capital defendant"[110] and consequently, so long as the defendant was appointed one attorney with the statutorily required experience, s/he had "the counsel to which [s/]he was entitled."[111]

Alabama law provides these attorneys with access to investigators and experts at trial,[112] so long as the defendant shows "with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense."[113] As interpreted by Alabama.courts, however, the

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[106] Equal Justice Initiative of Alabama, EJI Staff, *at* http://www.eji.org/staff.html (last visited on May 23, 2006).

[107] Telephone interview with Robin Maher, Director, ABA Death Penalty Representation Project (Apr. 25, 2006).

[108] *See* ALA. CODE § 13A-5-54 (2006).

[109] *See, e.g.*, Bui v. State, 717 So. 2d 6, 13 (Ala. Crim. App. 1997) (noting that "William Abell, another experienced attorney, was appointed as co-counsel to assist Shinbaum").

[110] Robitaille v. State, 2005 WL 3118795, *4 (Ala. Crim. App. Nov. 23, 2005).

[111] *Id.* (quoting Whitehead v. State, 777 So. 2d 781, 851 (Ala. Crim. App. 1999)).

[112] ALA. CODE §§ 15-12-21(d), 15-12-22(d) (2006).

[113] McGowan v. State, 2003 WL 22928607 (Ala. Crim. App. Dec. 12, 2003) (quoting *Ex parte* Moody, 684 So. 2d 114, 119 (Ala. 1999)).

denial of funds for the employment of investigators and experts does not amount to a deprivation of constitutional rights.[114]

Under federal law, an indigent death-sentenced inmate seeking federal *habeas corpus* relief must be appointed "one or more attorneys"[115] and these attorneys must have access to investigators, experts, or other services as are reasonably necessary for representation.[116]

The qualification requirements for attorneys appointed for trial, direct appeal, and federal habeas corpus proceedings will be discussed below under Recommendation #2.

b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.

Alabama law does not require any member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

However, the Alabama Circuit Judge's Association passed a nonbinding resolution in January 2005 adopting the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,*[117] with a particular emphasis that Guideline 5.1 be "adhered to as closely as is practical."[118] Guideline 5.1 states that, among other things, "the [state] qualification standards should insure that the pool [of defense attorneys available to represent indigent capital defendants] includes sufficient numbers of attorneys who have demonstrated skill in the investigation, preparation, and presentation of evidence bearing upon mental status."[119]

Alabama law does not include a requirement that trial, appellate, and/or post-conviction counsel attend and successfully complete any relevant training or educational programming in the area of capital defense. In-state training on these issues is available to attorneys who handle death penalty cases. For example, the Alabama Criminal Defense Lawyers Association offers a yearly training session, titled "Loosening the Death Belt," which sometimes includes issues surrounding mental retardation and mental health.

To the best of our knowledge, there are no equivalent programs available to other members of the defense team, such as investigators and mitigation specialists. The process for selecting investigators and experts will be discussed below under Subpart c.

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[114] Nelson v. State, 452 So. 2d 1367, 1369 (Ala. Crim. App. 1984) (citing Dutton v. State, 434 So. 2d 853 (Ala. Crim. App. 1983)).
[115] 18 U.S.C. § 3599(a)(2) (2006); *McFarland*, 512 U.S. at 856-57.
[116] 18 U.S.C. § 3599(a)(2), (f) (2006).
[117] Ala. Cir. Judge's Ass'n, Resolution (Jan. 21, 2005) (on file with author).
[118] *Id.*
[119] ABA GUIDELINES, *supra* note 51, at 5.1.

c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

i. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.

ii. Counsel should have the right to have such services provided by persons independent of the government.

iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Given that death-sentenced inmates are not entitled to appointed counsel or resources for investigators or experts during clemency proceedings, the State of Alabama only provides resources for investigators and experts to attorneys handling death penalty cases at trial, on direct appeal, and in state post-conviction proceedings.

An appointed attorney or contract counsel at trial and direct appeal is "entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client," including the costs associated with expert assistance, so long as the expense is "approved in advance by the trial court."[120] To be entitled to funds for an expert, however, the defendant "must show more than a mere possibility that he or she will receive useful assistance from the expert. Rather, the defendant must show a reasonable probability that the expert would aid in the defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial."[121] "To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense."[122]

The Alabama Supreme Court, in *Ex parte Moody*, further held that:

> an indigent defendant is not entitled to the expert of his particular choice, but is entitled to a competent expert in the field of expertise that has been found necessary to the defense. That is, once the court has determined that there is a reasonable probability that expert assistance would aid in the indigent defendant's defense and that the denial of such expert assistance would result in a fundamentally unfair trial, the defendant is not entitled to name the particular expert he wants. An indigent defendant has no right to shop for an expert to contradict experts for the state. Certainly, the trial

[120] ALA. CODE §§ 15-12-21(d), 15-12-22(d) (2006).
[121] Dobyne v. State, 672 So. 2d 1354, 1357 (Ala. 1995).
[122] *See, e.g.*, McGowan v. State, 2003 WL 22928607, *12 (Ala. Crim. App. Dec. 12, 2003) (quoting *Ex parte* Moody, 684 So. 2d 114, 119 (Ala. 1999)).

> court can consider the indigent defendant's request for a particular expert. However, the trial court may choose any competent expert in that particular field of expertise who would aid the defendant in evaluation, preparation, and presentation of the defense.[123]
>
> The factors the trial court should consider in choosing an expert, once it is determined that expert assistance is necessary, are: (1) the number of experts available to choose from; (2) what the indigent defendant expects the expert's testimony to prove at trial or how the defendant expects the expert's testimony would aid in the defense; (3) the indigent defendant's choice of expert; (4) other competent experts available; and (5) the anticipated costs of such an expert. This list of factors is not meant to be exhaustive; the trial court may consider any other relevant information regarding experts in the particular field of expertise.[124]

In cases where the defendant is represented by a lawyer working in a public defender office, the indigent defense commission is authorized to approve expenditures for "attorneys, investigators, other personnel and nonpersonnel expenses," subject to the Administrative Director of Courts' approval.[125]

Under federal law, indigent death-sentenced inmates petitioning for federal *habeas corpus* relief may request and the court may authorize inmates' attorneys to obtain investigative, expert, or other necessary services on behalf of the inmate.[126] Inmates represented by attorneys in the Middle District of Alabama's Capital Habeas Unit of the Federal Defenders Program, Inc. do not need to seek prior approval for securing experts in individual cases given their funding from the Office of Defender Services.[127]

Requests for experts at trial and on direct appeal may be made *ex parte*. According to the Alabama Supreme Court, "[t]here should be equality between 'indigents and those who possess the means to protect their rights.' An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose."[128] Requests for experts in state post-conviction proceedings are held to a different standard, however. In *McGahee v. State*, the Court of Criminal Appeals held that requests for funds for experts in state post-conviction proceedings did not have to be held *ex parte* because the petitioner, instead of being an indigent criminal defendant, was "a convicted capital murderer who, in Rule 32 proceedings, is a civil petitioner with the burden of proving that he is entitled to relief on the grounds alleged in the petition he filed."[129]

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[123] *Ex parte* Moody, 684 So. 2d 114, 121 (Ala. 1996).
[124] *Id*. at 122.
[125] ALA. CODE § 15-12-45 (2006).
[126] 18 U.S.C. § 3599(f) (2006).
[127] Telephone Interview with Christine Freeman, Executive Director, Federal Defender Program, Inc. (Apr. 10, 2006).
[128] *Moody*, 684 So. 2d at 120 (quoting United States v. Tate, 419 F.2d 131 (6th Cir.1969)).
[129] McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003).

In conclusion, the State of Alabama does not require that an indigent individual charged with or convicted of a capital felony be appointed counsel and provided with resources for experts and investigators at every stage of the proceedings. Only one attorney must be appointed at trial and on direct appeal, although it appears that, in practice, two attorneys sometimes are appointed. The State also makes funding available for investigators and experts, but there is no right to counsel for indigent death-sentenced inmates petitioning for state post-conviction relief or clemency. Additionally, the State of Alabama does not require any member of the defense team to be qualified by experience or training to screen for mental or psychological disorders or defects.

Based on this information, the State of Alabama is only in partial compliance with Recommendation #1.

Additionally, based on the above findings, the Alabama Death Penalty Assessment Team makes the following recommendation: the State of Alabama should create a statewide indigent defense commission that would be responsible for overseeing all indigent defense activities in the State.

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

b. In formulating qualification standards, the jurisdiction should insure:

- **i. That every attorney representing a capital defendant has:**
  - **(a) obtained a license or permission to practice in the jurisdiction;**
  - **(b) demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and**
  - **(c) satisfied the training requirements set forth in Guideline 8.1.**
- **ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**
  - **(a) substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
  - **(b) skill in the management and conduct of complex negotiations and litigation;**
  - **(c) skill in legal research, analysis, and the drafting of litigation documents;**
  - **(d) skill in oral advocacy;**

(e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

(f) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

(g) skill in the investigation, preparation, and presentation of mitigating evidence; and

(h) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

The State of Alabama has not adopted the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* although the Alabama Circuit Judge's Association passed a nonbinding resolution in January 2005 adopting the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,*[130] and stated that Rule 5.1, which governs attorney qualifications should be "adhered to as closely as is practical."[131]

Beyond requiring that appointed attorneys in capital cases be licensed to practice law and have at least five years of criminal defense experience, the State of Alabama sets no qualification standards and does not require attorneys to have demonstrated skills in any of the areas contained in Guideline 5.1. In fact, despite these stated minimal qualifications, a capital defense lawyer's failure to have the required five years of criminal law experience does not constitute ineffective assistance of counsel *per se*.[132]

Due in part to the lax appointment standards, the problem of ineffective assistance of counsel is real. For example, Alabama state and federal courts have found defense counsel's performance to be deficient[133] in capital cases for such varied reasons as indadequate investigation of the charged offense,[134] inadequate presentation of a defense,[135] failure to object,[136] inadequate challenge of witnesses,[137] inadequate

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[130] Ala. Cir. Judge's Ass'n, Resolution (Jan. 21, 2005) (on file with author).

[131] *Id.*

[132] *See, e.g.*, McGowan v. State, 2003 WL 22928607, *54 (Ala. Crim. App. Dec. 12, 2003) ("Whenever a decision is made as to approving an attorney who does not technically meet the five-year-experience requirement, it *must* be made properly, carefully, and within the most narrowly tailored limitations."); *see also* Gaddy v. State, 2006 WL 511383, *4 (Ala. Crim. App. Mar. 3, 2006) ("As in *Lear,* counsel's alleged inexperience and lack of resources in the present case would be insufficient in itself to give rise to a sixth amendment violation. Rather, under *Strickland*'s two-part test, defendant must establish specific errors by counsel and resultant prejudice.").

[133] To find ineffective assistance of counsel, the judge must find that (1) the attorney's performance was deficient and (2) counsel's errors resulted in a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The cases listed do not necessarily meet the second prong of this test, although some do, but the attorney's performance was found to be deficient in all of the cited cases.

[134] *Ex parte* Womback, 541 So. 2d 47 (Ala. 1988) (finding counsel deficient for, among other things, failing to investigate evidence that would have impeached state witnesses).

[135] *Ex parte* Duren, 590 So. 2d 369 (Ala. 1991) (finding counsel's performance deficient for presenting a legally invalid defense theory, but performance was not prejudicial).

[136] *Ex parte* Pierce, 851 So. 2d 618 (Ala. 2002) (finding counsel deficient for failing to raise a claim based on witness having inappropriate contact with the jury).

challenge to jury instructions,[138] inadequate investigation and presentation of mitigating evidence,[139] and inadequate performance during guilty pleas.[140] Furthermore, many inmates on Alabama's death row were convicted, sentenced, and had their sentences reviewed under standards that are no longer considered to be acceptable. For example, in 2003, the United States Supreme Court held in *Wiggins v. Smith* that defense attorneys must conduct an investigation into a defendant's life history,[141] yet many of Alabama's current and former death row inmates did not have the benefit of this holding in the early, critical stage of their appeals.

According to the Alabama Appleseed Center, in both capital and non-capital cases, "there were too many attorneys who were not experienced enough, young attorneys just cutting their teeth being appointed, and attorneys who had probably been there too long and had too many cases and were not giving … zealous representation…."[142] According to the ABA Standing Committee on Legal Aid and Indigent Defense, "[y]oung attorneys with little or no experience are just as likely as others to receive court assignments in Alabama, sometimes even for homicide cases."[143]

In cities like Montgomery and Birmingham, where the pool of lawyers is large, lawyers can remove themselves from the list of those willing to represent capital defendants, but in smaller counties, a judge can require a lawyer to take a case or find the lawyer in contempt for refusing.[144] As a result, younger, less experienced lawyers or lawyers whose practice is largely made up of court appointments often end up representing capital defendants and death row inmates.[145]

In some smaller counties, there is no one available to accept capital cases.[146] In *McGowan v. State*, for example, the Court of Criminal Appeals noted "the pool of

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[137] *Womback*, 541 So. 2d at 47 (finding counsel deficient for, among other things, failing to impeach state witnesses).

[138] Daniel v. Thigpen, 742 F. Supp. 1535 (M.D. Ala. 1990) (finding counsel deficient for, among other things, failure to object to inadequate lesser included offense instructions).

[139] Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002) (finding counsel deficient for failing to investigate, obtain, or present evidence of mitigating circumstances); Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995) (finding counsel deficient for failing to present mitigating evidence regarding the defendant's low IQ, alcohol abuse, and the circumstances of her upbringing.); Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994) (finding counsel deficient for, among other things, failing to investigate defendant's medical, psychiatric, and family history).

[140] *Agan*, 12 F.3d at 1012 (finding counsel deficient where, among other things, defendant pled guilty to murder and a death sentence after counsel spent seven hours conducting investigation, failed to obtain material gathered by counsel who withdrew from the case, and made no independent inquiry into defendant's psychiatric background); *Ex parte* Jenkins, 586 So. 2d 176 (Ala. 1991) (finding that counsel appeared to be ineffective because he failed to object to the use of a Florida *nolo contendere plea* to enhance his criminal sanction in violation of Alabama law).

[141] Wiggins v. Smith, 539 U.S. 510 (2003).

[142] Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003).

[143] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ALABAMA, *at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf (last visited on May 23, 2006).

[144] *Questions of Death Row Justice for Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000.

[145] *Id.*

[146] Marcia Coyle, *Counsel's Guiding Hand is Often Handicapped by the System It Serves*, NAT'L L.J., June 11, 1990.

attorneys available did not contain even one available attorney that would optimally meet the requirement of the statute."[147] This lack of qualified attorneys was one of the reasons that the court excused the trial court's appointment of an attorney who did not have the statutorily required five years of criminal law experience.[148] Furthermore, even if courts adhere to the requirement that capital defense attorneys have at least five years of experience in criminal law, there is no requirement that this experience be in capital cases, murder cases, or even serious criminal matters generally.

In an American Bar Association Steering Committee of Legal Aid and Indigent Defendants report on the status of indigent defense nationwide, the ABA found that in both capital and non-capital cases, "contract defenders in Alabama provide constitutionally inadequate representation by 'basically doing nothing' but processing defendants to a guilty plea in as expeditious a manner as possible.[149] Furthermore, in an Alabama Appleseed Center review of four judicial circuits' contract defender systems, the attorney of record did not file any motions in 72% of the capital and non-capital felony cases.[150] In the cases where motions were filed, 71% of them were "canned," non-case specific motions.[151] No motions were filed for experts or funds for investigatory assistance in 99.4% of the cases.[152]

The Appleseed Center concluded that "Alabama has a very fragmented, mixed, and uneven system that lacks state level oversight and standards … and does not provide uniform, quality representation to the majority of indigent defendants in the state."[153]

In another examination of Alabama's indigent defense system, the National Law Journal randomly looked at the records from over twenty trials from 1981 to 1989 and found that the average capital trial lasted 4.2 days and the average sentencing hearing lasted an average of 3.6 hours.[154] A separate 1996 study produced similar results, with the average penalty phase trial, from opening statements to the return of the jury verdict, lasting fewer than three hours.[155] According to the Equal Justice Initiative, "[i]t is common in Alabama's capital cases for the defense to present only one or no witnesses in mitigation. Many penalty phase hearings are devoted entirely to arguments of counsel, jury instructions, and deliberations."[156] An additional report looked at the time defense attorneys spent preparing for capital cases in one Alabama county and found that no more than fifteen hours were spent in any of the capital cases that were examined,[157] despite

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[147] McGowan v. State, 2003 WL 22928607, *53 (Ala. Crim. App. Dec. 12, 2003).
[148] *Id.*
[149] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ALABAMA, *at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf (last visited on May 23, 2006).
[150] Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003).
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] Coyle, *supra* note 146.
[155] *See* EQUAL JUSTICE INITIATIVE, *supra* note 24.
[156] *Id.*
[157] *Id.*

the fact that it should take several thousand hours to adequately prepare for a death penalty trial.[158]

Problems are not limited to Alabama's appointment and contract systems, however. In one of Alabama's public defender offices, there were just eight trials out of the 2,624 cases the office handled in 2001, and six trials out of the 2,769 cases the office handled in 2002. As stated by John Pickens, Executive Director of Alabama Appleseed Center, these sorts of numbers "point to something going on there, other than completely zealous defense."[159]

Furthermore, because Alabama does not guarantee counsel in state post-conviction proceedings, some Alabama death row inmates simply go unrepresented in these proceedings. Of the 194 death row inmates in December 2003, approximately thirty of them were unrepresented by counsel.[160] Many of these inmates may ultimately miss their filing deadlines and consequently forfeit their right to be heard in state post-conviction. As a result, "prisoners have only inconsistent access to a legal process that frequently overturns death sentences."[161]

In conclusion, we are unable to conclude that the State of Alabama has effective and enforceable qualification standards that comply with the vast majority of Guideline 5.1. The State of Alabama, therefore, fails to comply with Recommendation #2.

C. Recommendation # 3

The selection and evaluation process should include:

a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:

i. A defender organization that is either:

(a) a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

(b) a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

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[158] *See* ABA GUIDELINES, *supra* note 51, at 6.1 cmt.

[159] Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003).

[160] Leonard Post, *On Their Own*, NAT'L L.J., Dec. 1, 2003. *But see* William H. Pryor, Jr., *Letter to the Editor*, NAT'L L.J., Jan. 12, 2004 (stating that only three death row inmates were unrepresented by counsel).

[161] David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. TIMES, June 16, 2001.

ii. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The State of Alabama 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 pre-trial, at trial, or on appeal. Rather, this responsibility is divided among Alabama's forty-one judicial circuits.

Compounding the difficulties that go along with maintaining such a diffuse indigent defense system is the fact that "[t]he state's indigent defense systems are not fully independent from undue political and judicial influence."[162] Elected judges are responsible for deciding upon the type of indigent defense system each judicial circuit will use.[163] In addition, the presiding judge of each judicial circuit is responsible for appointing the members of its indigent defense commission.[164] Furthermore, in the twenty-seven judicial circuits that use court-appointment systems, judges are responsible for making appointments in individual cases. All of this highlights the reality that the State of Alabama's indigent defense system not only fails to be independent of the judiciary, but is wholly dependent on it.

The training, selection, and monitoring of counsel will be discussed in Subparts b and c. We note, however, that these responsibilities relate only to the training, selection, and monitoring of counsel at trial and on direct appeal, and that the State of Alabama does not provide appointed counsel to indigent death-sentenced inmates petitioning for state post-conviction relief and clemency.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

To the best of our knowledge, no entity within the State of Alabama has developed and/or maintains a statewide roster of eligible lawyers for each phase of representation. Instead, each judicial circuit must develop its own procedures for appointing counsel to indigent defendants. Our research indicates that some of the judicial circuits that use court appointment systems keep lists of available attorneys, but others do not. In circuits that do maintain lists of qualified attorneys, some circuits will make appointments from among all members of the local bar while other circuits have attorneys voluntarily place their names on a list from which appointments are made.[165] In counties that do not keep rosters of eligible attorneys, judges may simply appoint lawyers they believe to be qualified to handle a particular case or select from among the attorneys present in the courtroom when an appointment becomes necessary.[166]

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[162] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ALABAMA, *at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf (last visited on May 23, 2006).

[163] *See supra* notes 7-10 and accompanying text.

[164] ALA. CODE § 15-12-4(a) (2006).

[165] EQUAL JUSTICE INITIATIVE, *supra* note 24.

[166] *Id.*

c. The statewide independent appointing authority should perform the following duties:

As indicated above, the State of Alabama 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.

i. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

In all cases where an attorney is appointed to represent an indigent capital defendant or death row inmate, the only required qualifications are that the attorney be licensed to practice law and have at least five years of criminal defense experience. In spite of these minimal requirements, judges are not required to certify these attorneys as qualified and may, in some circumstances, appoint lawyers who do not meet these requirements.[167] For example, as discussed previously, the Court of Criminal Appeals in *McGowan v. State* excused the trial court's failure to appoint an attorney with the statutorily required five years of criminal law experience for a variety of reasons, including the fact that "the pool of attorneys available did not contain even one available attorney that would optimally meet the requirement of the statute."[168]

Additionally, while Alabama does not require lawyers to have any additional qualifications in order to represent defendants in death penalty cases, the State Bar of Alabama does certify lawyers as specialists in criminal trial advocacy.[169] We have no information on how many capital defense attorneys, if any, have received certification in criminal trial advocacy.

ii. draft and periodically publish rosters of certified attorneys;

As indicated above, it does not appear that any statewide entity has drafted and/or periodically publishes a roster of certified attorneys in Alabama. Some of the twenty-seven judicial circuits that use court appointment systems do keep rosters of eligible attorneys, but others do not.[170]

iii. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

It does not appear that any entity within the State of Alabama has drafted and/or periodically published certification standards and procedures by which attorneys are certified and assigned to particular cases. Nor does it appear that any of the judicial circuits that use court or contract appointment systems maintain and publish certification standards and procedures.

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[167] *See supra* note 132 and accompanying text.
[168] McGowan v. State, 2003 WL 22928607, *53 (Ala. Crim. App. Dec. 12, 2003).
[169] *See* State Bar of Alabama, Specialization, *at* http://www.alabar.org/members/specialization.cfm (last visited on May 23, 2006).
[170] EQUAL JUSTICE INITIATIVE, *supra* note 24.

iv. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The responsibility for assigning attorneys to represent indigent defendants in death penalty cases is vested in the judiciary. The same judge that determines indigency is responsible for appointing legal counsel to the indigent defendant.[171]

Prior to criminal arraignment in a case in which the defendant is entitled to counsel, the trial judge must determine: (1) whether or not the defendant has arranged to be represented by counsel; (2) whether or not the defendant wants counsel assistance; and (3) whether or not the defendant is able financially or otherwise to obtain attorney assistance.[172] If the court determines that a defendant is entitled to counsel, that the defendant has not expressly waived the right to assistance of counsel, and that the defendant is not able, financially or otherwise, to obtain the assistance of counsel, the court must appoint counsel to represent and assist the defendant.[173]

On direct appeal, the trial court must appoint counsel to represent and assist the indigent defendant.[174] If the trial court judge fails to appoint counsel, the presiding judge of the Court of Criminal Appeals has the authority to appoint counsel.[175]

Following the direct appellate review by the Alabama Court of Criminal Appeals, death-sentenced inmates do not continue to have a right to appointed counsel, but the trial judge, presiding judge, or chief justice of the court in which the state post-conviction proceedings may be commenced or pending may appoint counsel "to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person."[176]

If the judge determines that counsel must or will be appointed, it will utilize whichever system of indigent defense upon which the judicial circuit has settled.

There is no right to counsel in clemency proceedings.

v. monitor the performance of all attorneys providing representation in capital proceedings;

The presiding judge of the judicial circuit, along with the Alabama Bar Association, is responsible for monitoring the performance of attorneys providing representation in capital cases. Ethics charges may be filed with the Alabama Bar Association.[177]

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[171] ALA. CODE § 15-12-5(d) (2006).
[172] ALA. CODE § 15-12-20 (2006).
[173] ALA. CODE § 15-12-21(a) (2006).
[174] ALA. CODE § 15-12-22(b) (2006).
[175] *Id.*
[176] ALA. CODE § 15-12-23(a) (2006).
[177] *See* ALABAMA STATE BAR, FILING A COMPLAINT, *at* http://www.alabar.org/ogc/complaint_brochure.pdf (last visited on May 23, 2006).

vi. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

Because we were unable to determine which judicial circuits maintain rosters of qualified attorneys, we also were unable to determine whether there is a mechanism for reviewing the roster and withdrawing certification from any attorney who fails to provide high quality legal representation.

vii. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

It does not appear that the State of Alabama conducts, sponsors, or approves of any specialized training programs for attorneys representing defendants in capital post-conviction proceedings. The Alabama Criminal Defense Lawyers Association hosts an annual death penalty training seminar, however.

viii. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

It does not appear that the State of Alabama investigates or maintains records concerning complaints about the performance of attorneys providing capital post-conviction representation, separate from the State Bar of Alabama attorney discipline process.

In conclusion, the State of Alabama has failed to remove the judiciary from the attorney training, selection, and monitoring process. Not only does the State have no statewide appointing authority, but some of the judicial circuit appointment systems rely on the judiciary as the appointing authority. Additionally, the State of Alabama has not vested with one or more independent agencies all of the responsibilities contained in Recommendation #3. For example, no independent entity within the State of Alabama is responsible for drafting or publishing a roster of certified trial and appellate attorneys or for monitoring, investigating, and maintaining records concerning the performance of all attorneys handling death penalty cases. Based on this information, the State of Alabama is not in compliance with Recommendation #3.

D. Recommendation # 4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

a. The State should ensure funding for the full cost of high quality legal representation, as defined by the ABA Guideline 9.1, by the defense team and outside experts selected by counsel.[178]

The State of Alabama requires that indigent defendants be appointed counsel at trial and on direct appeal. The State provides 100% of the funding for these costs. If the court chooses to appoint counsel in a state post-conviction proceeding, the State retains the responsibility to provide the funding for the cost of representation.

b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

There are ten judicial circuits in Alabama that utilize contract counsel systems, whereby the circuit contracts with an attorney, firm, association, corporation, or partnership of lawyers for a monthly fee in exchange for an agreement to handle a set number or percentage of the circuit's indigent defense cases.[179] The amount of payment is set by the indigent defense commission, reviewed by the Administrative Director of the Courts, and approved by the Alabama Comptroller.[180]

According to John Pickens, Executive Director of Alabama Appleseed Center, contract systems are "a low cost option," and are "not working."[181] Furthermore, according to the ABA Standing Committee on Legal Aid and Indigent Defendants, "contracts are awarded … primarily on the basis of cost, not quality or other important considerations"[182] and "[c]ontract defenders in Alabama provide constitutionally inadequate representation by 'basically doing nothing' but processing defendants to a guilty plea in as expeditious a manner as possible."[183]

ii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

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[178] In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g. Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." *See* ABA GUIDELINES, *supra* note 51.

[179] ALA. CODE § 15-12-1 (2006); *see also* Testimony of Jonathan Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003); BROKEN JUSTICE, *supra* note 11, at 4.

[180] ALA. CODE § 15-12-27 (2006).

[181] Testimony of Jonathan Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003).

[182] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ALABAMA, *at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf (last visited on May 23, 2006).

[183] *Id.*

In the judicial circuits that maintain public defender offices, there is no requirement that the public defender by paid according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction. Instead, the only requirement is that the public defender's salary not exceed the salary paid to the district attorney.[184] We were unable to determine whether public defenders are, in fact, paid according to a salary scale that is commensurate with the salary scale of the prosecutor's office.

iii. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Alabama provides appointed counsel at trial $60 per hour for in-court time and $40 per hour for time reasonably expended out of court in the preparation of the case.[185] There is no limit on the number of hours that may be charged in a capital case.[186] These rates/limits were raised in 1999 from $40 per hour for in-court time and $20 per hour for out-of-court preparation and a total payment limit of $1,000 for out-of-court work.[187] Seventy percent of Alabama death row inmates were convicted when defense lawyers were limited to $1,000 for their out-of-court work.[188]

On direct appeal, appointed counsel may receive $60 per hour for time reasonably expended in the prosecution of the appeal, and any subsequent petition for writ of *certiorari*,[189] up to a total of $2,000.[190] If counsel is appointed in state post-conviction proceedings, appointed counsel may again receive $60 per hour for time reasonably expended in in court and $40 per hour for time reasonably expended in preparation of the proceedings,[191] but fees may not exceed $1,000.[192]

"Even with recent increases in hourly rates for indigent attorneys fees, the lawyers who represent indigent defendants in criminal cases throughout Alabama do so at a great discount from what they would otherwise receive as either retained criminal defense lawyers or even as an hourly rate in most civil defense matters."[193] The regular hourly fee that Alabama pays to outside counsel is $85 per hour and the fee can be exceeded when the attorney has specialized expertise. For example, private attorneys representing state officials on ethics charges have received as much as $160 per hour and in 1995, an

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[184] ALA. CODE § 15-12-43(a) (2006). Only one of the four State public defender offices handles death penalty cases.
[185] ALA. CODE § 15-12-21(d) (2006).
[186] ALA. CODE § 15-12-21(d)(1) (2006).
[187] ALA. CODE § 15-12-21 cmt. (2006).
[188] Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005
[189] ALA. CODE § 15-12-22(d)(2) (2006).
[190] ALA. CODE § 15-12-22(d)(3) (2006).
[191] ALA. CODE § 15-12-23(d) (2006).
[192] ALA. CODE § 15-12-23(d)(3) (2006).
[193] Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases after* Alabama v. Shelton, ALA. LAWYER, Nov. 2002.

attorney was paid $125 per hour to represent the state examiners on issues related to income tax audits.[194]

Periodic billing generally is not permitted. According to Alabama statute, counsel is not to submit a bill for services rendered until "after the conclusion of the trial or ruling on a motion for a new trial or after acquittal or other judgment disposing of the case"[195] or "within a reasonable time after the disposition of the appeal."[196]

c. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

We were unable to determine statewide whether non-attorney members of the defense team are fully compensated at a rate that is commensurate with the provision of high quality legal representation. According to the Alabama State Bar Office of General Counsel, expert witnesses may be paid his or her "reasonable, usual, and customary fee for preparing and providing expert testimony."[197] When the Tuscaloosa Office of the Public Defender takes a capital case, the attorney will file for extraordinary expenses from the court to cover both investigators and experts.[198]

Indigent defendants do not have the right to the expert of their choice, however, and the court "may choose any competent expert in that particular field of expertise who would aid the defendant in evaluation, preparation, and presentation of the defense."[199] In choosing such an expert, the court may consider, among other factors, "the anticipated costs."[200] Furthermore, because experts are not entitled to periodic billing, "any expert

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194 *See* EQUAL JUSTICE INITIATIVE, *supra* note 24.
195 ALA. CODE § 15-12-21(d) (2006).
196 ALA. CODE § 15-12-22(d) (2006); *see also* ALA. CODE § 15-12-23(e) (2006).
197 Ala. State Bar, Office of Gen. Counsel, Formal Op. 1997-02.
198 Telephone Interview with Bobby Woolridge, Public Defender, Tuscaloosa County (May 3, 2006).
199 *Ex parte* Moody, 684 So. 2d 114, 121-22 (Ala. 1996)
200 *Id.* at 122.

who requires payment before trial could be replaced by another person with expertise in the particular field."[201]

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

The issue of additional compensation in unusually protracted or extraordinary cases is technically not a concern in cases where a public defender is providing representation, as these attorneys are salaried employees.

It does not appear that contract attorneys are provided additional compensation in protracted or extraordinary cases, although individual indigent defense commissions could provide for additional compensation in their contracts.

In cases in which an appointed attorney provides representation at trial, the attorney may be compensated for his/her time in protracted or extraordinary cases since the state pays appointed attorneys an hourly rate with no limit on the total fee.[202] In cases in which an appointed attorney provides representation on appeal or in state post-conviction proceedings, the attorney is not eligible to receive additional compensation in protracted or extraordinary cases since, while the attorney also is paid an hourly rate, his/her compensation is capped at $2,000 for direct appeals and $1,000 for state post-conviction work.[203]

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

The issue of compensation for reasonable incidental expenses is not technically a concern in cases where a public defender is providing representation as these attorneys are salaried employees and may seek reimbursement for incidental expenses from their office.

In cases where a contract attorney is providing representation, it appears that counties have the discretion to include in the contract what expenses will be reimbursed.

In court appointment systems, at trial and on direct appeal, "[c]ounsel shall … be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client, to be approved in advance by the trial court."[204] Alabama law does not provide for the reimbursement of counsel in state post-conviction proceedings.[205]

In addition, while Alabama previous reimbursed appointed attorney for their overhead expenses associated with the appointment, there is uncertainty as to whether this still is allowed. Since 1994, overhead expenses were included as part of the "reasonably

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[201] Burgess v. State, 827 So. 2d 134, 152 (Ala. Crim. App. 1998) (quoting *Moody*, 684 So. 2d at 122).
[202] ALA. CODE § 15-12-21(d) (2006).
[203] ALA. CODE §§ 15-12-22(d), 15-12-23(d) (2006).
[204] ALA. CODE § 15-12-21(d), 15-12-22(d) (2006).
[205] *See* ALA. CODE § 15-12-23 (2006).

incurred expenses" that were to be paid to attorneys representing indigent defendants.[206] In 1999, the law governing court-appointed counsel fees was amended to say that reimbursed expenses must have been incurred "in the defense of [the] client" and a plurality of the Alabama Supreme Court indicated that it believed that this change was intended to eliminate the payment of office overhead expenses.[207] In response, the Alabama legislature passed a non-binding Joint Resolution stating that it did not intend to eliminate the reimbursement of overhead expenses.[208] Despite this, the Attorney General issued an opinion in 2005 that overhead expenses were not eligible for reimbursement.[209] Following this opinion, the State Comptroller began denying the reimbursement of overhead payments. The Comptroller's action was challenged by a single lawyer and, on September 28, 2005, the Circuit Court for Montgomery County ordered the Comptroller to make all overhead payments that had been denied.[210] This order has been appealed, but no opinion yet has been rendered.

In conclusion, we did not obtain sufficient information about reimbursement practices to appropriately assess whether the State of Alabama has ensured adequate funding for the full cost of high quality legal representation at trial. We note, however, that the fee caps for appointed counsel for representation at direct appeal and in state post-conviction proceedings make it impossible for the State to ensure adequate funding. Therefore, the State of Alabama is not in compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The State should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

The State of Alabama does not provide funding for the effective training, professional development, and continuing education of lawyers or other members of the defense team. The Alabama Circuit Judge's Association has passed a resolution in support of state-funded training, however,[211] and attendance at a minimum of two training conferences per year is required for lawyers who work at the Capital Habeas Unit (CHU) of the Middle District of Alabama Federal Defender Program, Inc.[212]

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[206] May v. State, 672 So. 2d 1307 (Ala. Crim. App. 1994).
[207] Lyons v. Norris, 829 So. 2d 748, 751 n.1 (Ala. 2002).
[208] 2002 Ala. Acts 129.
[209] Op. Ala. Att'y. Gen. 2005-063 (Feb. 1, 2005).
[210] Circuit Court of Montgomery County, Amended Order, Case No. 05-1544 (Sept. 28, 2005), *available at* http://www.nacdl.org/public.nsf/defenseupdates/alabama006/$FILE/AL_Overhead_decision.pdf (last visited on May 23, 2006).
[211] Ala. Cir. Judge's Ass'n, Resolution (Jan. 21, 2005) (on file with author).
[212] Telephone Interview with Christine Freeman, Executive Director, Federal Defender Program, Inc. (Apr. 10, 2006).

In addition, the State Bar of Alabama requires attorneys to participate in a minimum of twelve hours of continuing legal education each year,[213] one hour of which must be ethics or professionalism.[214]

b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

- **i. relevant state, federal, and international law;**
- **ii. pleading and motion practice;**
- **iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
- **iv. jury selection;**
- **v. trial preparation and presentation, including the use of experts;**
- **vi. ethical considerations particular to capital defense representation;**
- **vii. preservation of the record and of issues for post-conviction review;**
- **viii. counsel's relationship with the client and his family;**
- **ix. post-conviction litigation in state and federal courts;**
- **x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;**
- **xi. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

As discussed above, the State of Alabama does not require that appointed lawyers in capital receive any training beyond the twelve hours of continuing legal education that is required of all Alabama lawyers. Also discussed previously, the Alabama Circuit Judge's Association has passed a resolution in support of the training requirements contained in Guideline 8.1.[215]

c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.

As previously discussed, there are no training requirements for capital defense attorneys in Alabama and, consequently, attorneys seeking to maintain eligibility to accept appointments are not required to attend and successfully complete any training programs that focus on the defense of death penalty cases.

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[213] ALA. STATE BAR CLE RULES, Rule 3, *at* http://www.alabar.org/cle/rules.cfm (last visited on May 23, 2006).

[214] *Id.*

[215] Ala. Cir. Judge's Ass'n, Resolution (Jan. 21, 2005) (on file with author).

d. The State should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

Alabama does not require non-attorneys who wish to be eligible to participate on defense teams to receive continuing professional education appropriate to their areas of expertise.

In conclusion, the State of Alabama does not require any training for capital defense lawyers beyond that which is required by the State Bar of Alabama of all lawyers in the State. In addition, the State of Alabama provides no funding for the training, professional development, and continuing legal education capital defense lawyers at trial, on direct appeal, and in state post-conviction proceedings, although a small amount of funding for capital defense lawyer training is provided at the CHU of the Middle District of Alabama Federal Defender Program, Inc, for its federal *habeas corpus* attorneys. The State does not provide any funding for the training, professional development, and continuing legal education of other members of the defense team. Therefore, the State of Alabama is not in compliance with Recommendation #5.

CHAPTER SEVEN

DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review.[1] This process of judicial review is called the direct appeal. As the U.S. Supreme Court stated in *Barefoot v. Estelle*, "[d]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."[2] 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 unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeals process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is 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. Meaningful comparative proportionality review helps 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.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases in states other than Alabama, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge in states other than Alabama (where the trial judge always determines the sentence) determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include 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.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the

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1 Gregg v. Georgia, 428 U.S. 153 (1976).

2 Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION

In the State of Alabama, an individual convicted of capital murder and sentenced to death receives an automatic appeal to the Alabama Court of Criminal Appeals.[3] There can be no waiver of appellate review in death penalty cases,[4] even if the death-sentenced defendant pled guilty to capital murder. In addition, an individual sentenced to death may, in some circumstances, have his/her case reviewed by the Alabama Supreme Court and/or the United States Supreme Court. While the Alabama Court of Criminal Appeals is required to review every case where the defendant is convicted of capital murder and sentenced to death, the Alabama Supreme Court and the United States Supreme Court may exercise discretion in deciding whether to grant a review.[5]

A. Review of the Defendant's Death Sentence

When reviewing a death sentence, the Alabama Court of Criminal Appeals is required to "explicitly address" whether:

(1) The death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor;
(2) An independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[6]

1. Imposing a Death Sentence Under the Influence of Passion, Prejudice, or Any Other Arbitrary Factor

The Court of Criminal Appeals has interpreted this to mean that in death cases, the court must determine whether any error occurred in the sentencing proceeding that adversely affected the defendant's rights.[7]

The trial record must be complete enough for the court to perform its required review. An incomplete record creates a "substantial risk that the penalty is being imposed in an arbitrary and capricious manner."[8]

2. An Independent Weighing of the Aggravating and Mitigating Circumstances

The Court of Criminal Appeals has interpreted this to mean that the court must determine whether the judge or jury's findings regarding the aggravating and mitigating circumstances were supported by the evidence.[9]

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[3] ALA. CODE § 12-22-150 (2006).
[4] Sibley v. State, 775 So. 2d 235 (Ala. Crim. App. 1996).
[5] ALA. CODE §§ 13A-5-53, 13A-5-55 (2006).
[6] ALA. CODE § 13A-5-53 (b), (c) (2006).
[7] Floyd v. State, 486 So. 2d 1309 (Ala. Crim. App. 1984); *see also* Johnson v. State, 521 So. 2d 1006, 1013 (Ala. Crim. App. 1986).
[8] *Floyd*, 486 So. 2d at 13014-15.
[9] *Id.*; *see also* Johnson v. State, 521 So. 2d 1006, 1013 (Ala. Crim. App. 1986).

3. The Sentence of Death is Excessive or Disproportionate to the Penalty Imposed in Similar Crimes, Considering Both the Crime and the Defendant

In *Beck v. State*, the Alabama Supreme Court held that the appellate court must analyze whether the crime was punishable by death, whether similar crimes are being punished capitally throughout the state, and whether the death sentence is appropriate in relation to the defendant.[10] The Court held that the "reviewing court [must] examine cases in which the death penalty is imposed and ascertain that the death penalty is imposed with some uniformity and that its imposition is not substantially out of line with sentences imposed for other acts. In other words, the reviewing court should not affirm a death sentence unless the death penalty is being imposed generally in similar cases throughout the state."[11] This requirement is codified in the Alabama Code.[12]

As part of this exercise, reviewing courts should consider the penalty imposed on the defendant in relation to any accomplices.[13] This does not mean that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence: each case must be evaluated independently.[14] The court should consider as mitigation the fact that all other participants to a crime received complete immunity from prosecution, however.[15]

B. Types of Reviewable Trial Errors

The Alabama Court of Criminal Appeals will consider the following types of error on direct appeal:

1. Structural Error

Structural error "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be regarded as fundamentally fair."[16] In the limited circumstances where a court finds structural error, the court automatically will reverse the conviction and/or sentence.[17] The issues identified by the United States Supreme Court as structural error include a biased trial judge,[18] complete denial of criminal defense counsel,[19] denial of access to criminal defense counsel during an overnight trial recess,[20]

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10 Beck v. State, 396 So.2d 645 (Ala. 1980).
11 *Id.* at 664.
12 ALA. CODE § 13A-5-53(b) (2006).
13 *Id.*
14 *Floyd*, 486 So. 2d at 1317; *see also* Taylor v. State, 808 So. 2d 1148 (Ala. Crim. App. 2000).
15 *Ex parte* Burgess, 811 So. 2d 617 (Ala. 2000).
16 Neder v. United States, 527 U.S. 1, 8-9 (1999). Structural error stands in contrast to trial error, which is defined as error that occurs "during the presentation of the case to the jury" and may be "quantitatively assessed in the context of other evidence presented." Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).
17 Poole v. State, 846 So. 2d 370 (Ala. Crim. App. 2001).
18 Turney v. Ohio, 273 U.S. 510 (1927).
19 Gideon v. Wainwright, 372 U.S. 335 (1963).
20 Geders v. United States, 425 U.S. 80 (1976).

denial of self-representation in criminal cases,[21] defective reasonable doubt jury instructions,[22] exclusion of jurors of the defendant's race from a grand jury,[23] erroneously excusing a juror because of his views on capital punishment,[24] and denial of a public criminal trial. [25]

2. Errors Properly Preserved in the Trial Court and Raised and/or Argued in the Court of Criminal Appeals

The Alabama Court of Criminal Appeals will review claims that were properly preserved at trial for error.[26] When making an objection at trial, the specific grounds for the objection must be stated.[27] Thus, a failure to make a specific objection to error at trial may be treated as a waiver on appeal.[28]

When error was preserved at trial, the appellate court will subject these issues to a harmless error analysis.[29] As explained by Alabama Rule of Appellate Procedure 45, harmless error analysis provides that:

> No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire case, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.[30]

3. Errors Unpreserved in the Trial Court, but Timely Raised and/or Argued in the Court of Criminal Appeals and Errors Properly Preserved in the Trial Court, but not Raised or Argued in the Court of Criminal Appeals

In all death penalty cases, the Court of Criminal Appeals "shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."[31] Plain error has been defined as a defect in the proceedings, regardless of whether or not the defect was

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[21] McKaskle v. Wiggins, 465 U.S. 168, 177-178 n. 8 (1984).
[22] Sullivan v. Louisiana, 508 U.S. 275 (1993).
[23] Vasquez v. Hillery, 474 U.S. 254 (1986).
[24] Gray v. Mississippi, 481 U.S. 648 (1987).
[25] Waller v. Georgia, 467 U.S. 39, 39 n.9 (1984).
[26] *See, e.g.*, Wimberly v. State, 759 So. 2d 568 (Ala. Crim. App. 1999); Talley v. State, 687 So. 2d 1261 (Ala. Crim. App. 1996).
[27] ALA. R. CRIM. P. 21.3 ; *see also* Buford v. State, 891 So. 2d 423 (Ala. Crim. App. 2004).
[28] *See, e.g.*, Jones v. State, 895 So.2d 376 (Ala. Crim. App. 2004) ("The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.") (quoting *Ex parte* Frith, 526 So. 2d 880, 882 (Ala. 1987)).
[29] ALA. R. APP. P. 45.
[30] *Id.*
[31] ALA. R. APP. P. 45A.

brought to the trial court's attention.[32] In conducting this plain error review, the Court of Criminal Appeals will search the trial record for error.

According to the United States Supreme Court, the plain error doctrine applies if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[33] The Alabama Court of Criminal Appeals has held that for an error to rise to the level of plain error, it must not only have seriously affected the defendant's substantial rights, but also must have had an unfair prejudicial impact on the jury's deliberations.[34]

A failure to object at trial does not preclude review by the appellate court, but it weighs against any claim of error.[35] This exception to the contemporaneous objection rule is to be used only "sparingly," however, in situations where a "miscarriage of justice" would otherwise result.[36] The standard of review in this situation is stricter than the standard used in reviewing an issue that was properly raised at trial.[37] One factor for the reviewing court to consider in its determination as to whether an alleged error rises to the level of plain error is whether an objection at trial would have cured the error or allowed the trial court to prevent the injustice.[38]

D. Disposition of Appeal in the Alabama Court of Criminal Appeals

The Alabama Court of Criminal Appeals, in reviewing the conviction and sentence, may affirm the conviction and/or death sentence, overturn the conviction, set the death sentence aside and send the case back to the trial court to correct any errors, or set the death sentence aside and send the case back to the trial court with orders to sentence the defendant to life in prison without parole.[39]

E. Review by the Alabama Court of Criminal Appeal and Discretionary Review by Alabama Supreme Court

If the Alabama Court of Criminal Appeals upholds the appellant's conviction and sentence, the appellant must apply for a rehearing in the Court of Criminal Appeals.[40] If the Court of Criminal Appeals denies the rehearing request, the appellant has 14 days to file a petition for a writ of *certiorari* with the Alabama Supreme Court, seeking review of the Court of Criminal Appeals decision.[41] *Certiorari* review is not automatic, however,

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[32] Beckworth v. State, 2005 WL 2046331 (Ala. Crim. App. Aug. 26, 2005).

[33] United States v. Young, 470 U.S. 1 (1985); *see also Beckworth*, 2005 WL 2046331, at *7; *Ex parte* Price, 725 So. 2d 1063 (Ala. 1998); Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999); Johnson v. State, 620 So. 2d 679, 701 (Ala. Crim. App. 1992), *rev'd on other grounds*, 620 So.2d 709 (Ala. 1993).

[34] Reeves v. State, 807 So. 2d 18 (Ala. Crim. App. 2000).

[35] *Beckworth*, 2005 WL 2046331, at *7; Irwin v. State, 2005 WL 1491996 (Ala. Crim. App. June 24, 2005).

[36] Harrison v. State, 869 So. 2d 509 (Ala. Crim. App. 2002).

[37] Snyder v. State. 893 So. 2d 488 (Ala. Crim. App. 2003).

[38] Thomas v. State, 824 So. 2d 1 (Ala. Crim. App. 2000).

[39] ALA. CODE § 13A-5-53(d) (2006); ALA. R. APP. P. 45.

[40] ALA. R. APP. P. 39(c)(1).

[41] ALA. R. APP. P. 39(c)(2).

and the Alabama Supreme Court may exercise its discretion in determining which cases to accept.[42] Petitions for *certiorari* will be considered from:

(1) Decisions initially holding valid or invalid a city ordinance, a state statute, or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the U.S. Constitution;
(2) Decisions that affect a class of constitutional, state, or county officers;
(3) Decisions where a material question requiring decision is one of first impression for the Supreme Court of Alabama;
(4) Decisions in conflict with prior decisions of the U.S. Supreme Court, the Alabama Supreme Court, the Alabama Court of Criminal Appeals, or the Alabama Court of Civil Appeals;
(5) Decisions where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals;[43] and
(6) Decisions failing to recognize as prejudicial any plain error or defect in the proceeding under review whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals.[44]

If the Alabama Supreme Court overturns the conviction and/or the sentence, the Court likely will remand the case to the trial court for a new trial and/or sentencing hearing.

F. Discretionary Review by the United States Supreme Court

If the Alabama Supreme Court affirms the conviction and sentence, the appellant may file a writ of *certiorari* within 90 days with the United States Supreme Court. The United States Supreme Court is under no obligation to hear particular cases and the appeal is discretionary.[45]

Alternatively, if the Alabama Supreme Court chooses not to hear the petition, the appellant may file a writ of *certiorari* within 90 days with the United States Supreme Court, asking it to review the case. Again, any appeal to the United States Supreme Court is discretionary and the Court has no obligation to hear a particular case.

If the U.S. Supreme Court does not accept petitioner's case for review, or accepts the case but does not overturn the conviction or sentence, both his/her conviction and sentence are final. In the alternative, if appellant does not file a writ of *certiorari* with the United States Supreme Court, the conviction and sentence becomes final once the time to file a writ of *certiorari* has expired – ninety days after the Alabama Supreme Court decision became final. If the appellant wishes to continue challenging the conviction and/or sentence, the appellant may file a collateral appeal.

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[42] ALA. R. APP. P. 39(a)(2).
[43] ALA. R. APP. P. 39(a)(1)(A)-(E).
[44] ALA. R. APP. P. 39(a)(2)(A).
[45] ALA. CODE § 13A-5-53(b) (2006).

II. ANALYSIS

A. 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.**

In reviewing a defendant's death sentence on direct appeal, the Alabama Court of Criminal Appeals must determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar crimes.[46] The statute does not require that every defendant involved in a crime receive the same punishment, however.[47] In addition, the Court will not look to other jurisdictions to determine whether a death sentence is excessive or disproportionate.[48]

In performing its proportionality review by comparing the "penalty imposed in similar cases considering both the crime and the defendant," the Alabama Court of Criminal Appeals should review cases in which (1) the death penalty was imposed, (2) death penalty was sought but not imposed, and (3) the death penalty could have been sought, but the Court does not conduct the expansive review required by this Recommendation. Upon a review of relevant case law, it appears that the Alabama Court of Criminal Appeals has not followed this statutory requirement in several respects. First, it has not considered cases where death was not imposed.[49] Second, it has often issued decisions with cursory and conclusory claims of proportionality, without reference to any other cases.[50] And finally, it repeatedly has failed to account for the defendants, focusing exclusively on general attributes of the crimes themselves.[51]

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[46] ALA. CODE § 13A-5-53(b) (2006).

[47] Taylor v. State, 808 So.2d 1148 (Ala. Crim. App. 2000). *But see Ex parte* Burgess, 811 So. 2d 617 (Ala. 2000) (holding that the trial court should have considered in mitigation the fact that all the other participants in the crime received immunity from prosecution).

[48] Minor v. State, 914 So. 2d 372 (Ala. Crim. App. 2004).

[49] *See, e.g.*, Barber v. State, 2005 WL 1252745 (Ala. Crim. App. May 27, 2005).

[50] *See, e.g.*, Carruth v. State, 2005 WL 2046334 (Ala. Crim. App. Aug. 26, 2005) ("We take judicial notice that similar crimes have been punished capitally throughout the state. *See, e.g.*, Lewis v. State, 889 So. 2d 623 (Ala. Crim. App. 2003), and the cases cited therein dealing with murders committed during a kidnapping; Eggers v. State, 914 So. 2d 883 (Ala. Crim. App. 2004), and the cases cited therein dealing with murders committed during a robbery; Hall v. State, 820 So. 2d 113, (Ala. Crim. App. 1999), and the cases cited therein dealing with murders committing during a burglary; and Minor v. State, 914 So. 2d 372 (Ala. Crim. App. 2004), and the cases cited therein dealing with murders of children less than 14 years of age."); Stephens v. State, 2005 WL 1925720 (Ala. Crim. App. Aug. 12, 2005) ("As required by § 13A-5-53(b)(3), Ala. Code 1975, we must determine whether Stephens's death sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. Stephens murdered two individuals pursuant to a common scheme or plan. Similar crimes have been punished by death on numerous occasions.").

[51] *See, e.g.*, *Barber*, 2005 WL 1252745, at *66.

Given that in performing its proportionality review, the Alabama Court of Criminal Appeals generally limits its review to cases where the death penalty actually was imposed in similar circumstances, the State of Alabama fails to meet the requirements of Recommendation #1.

Additionally, based on the above findings, the Alabama Death Penalty Assessment Team makes the following recommendation: the State of Alabama should establish a clearinghouse to collect data on its death penalty system. At a minimum, this clearinghouse should collect data on each judicial circuit's provisions of defense services in capital cases. Relevant information on all death-eligible cases should be made available to the Alabama Court of Criminal Appeals for use in conducting its proportionality review. While the Alabama Death Penalty Assessment Team has recommended this reform, the American Bar Association has not adopted policy on this issue.

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") have greatly limited the ability of a death row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

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

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings does not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims--even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

I. FACTUAL DISCUSSION

A. Overview of State Post-Conviction Proceedings

1. The Filing of Petitions for Relief from Conviction or Sentence

Rule 32 of the Alabama Rules of Criminal Procedure governs all state post-conviction proceedings, including those initiated by death-row inmates. Any person who has been convicted of a criminal offense may petition the trial court for relief on the following grounds:

> (1) The constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief;
> (2) The court was without jurisdiction to render judgment or to impose sentence;
> (3) The sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law;
> (4) The petitioner is being held in custody after the petitioner's sentence has expired;
> (5) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court; or
> (6) The petitioner failed to appeal within the prescribed time from the conviction or sentence itself or from the dismissal or denial of a petition previously filed pursuant to Rule 32 and that failure was without fault on the petitioner's part.[1]

The petition must be filed and decided in the Alabama Circuit Court in which the petitioner was convicted and sentenced to death.[2] The petition must be verified by the petitioner or the petitioner's attorney,[3] and should be filed by using or following the form which is included in the appendix to Rule 32.[4] The petitioner may amend his/her petition at "any stage of the proceedings prior to the entry of judgment."[5]

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[1] ALA. R. CRIM. P. 32.1.

[2] ALA. R. CRIM. P. 32.5. If a petition is filed in another court, it shall be transferred to the court where the conviction occurred. *Id.*

[3] The form petition included in the appendix to Rule 32 suggests that the verification should be signed by the petitioner's attorney, not the petitioner, if the petitioner is not proceeding pro se. *See* ALA. R. CRIM. P. 32 app. The verification should read "I swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on _____ (Date)," and include the signature of the attorney or the pro se petitioner. *Id.*

[4] ALA. R. CRIM. P. 32.6(a). If the form is not used or followed, the court must return the petition to the petitioner to be amended to comply with the form. *Id.*; *see also* McShan v. State, 608 So. 2d 449, 449 (Ala. Crim. App. 1992).

[5] ALA. R. CRIM. P. 32.7(b). "Only grounds such as actual prejudice to the opposing party, or undue delay, will support a trial court's refusal to allow, or to consider, an amendment" to a rule 32 petition for post-conviction relief. *Ex parte* Rhone, 900 So. 2d 455, 458 (Ala. 2004). A petitioner seeking to amend a petition for post-conviction relief does not have an initial burden of "showing diligence in filing the amendment or that the facts underlying the amendment were unknown to him before filing of the original petition." *Id.* at 458-59.

2. Time Limit for Filing a Post-Conviction Petition

The death-row petitioner must file his/her Rule 32 petition within one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction and sentence on appeal.[6] Petitions based on the discovery of the newly discovered material facts must be filed within one year after the Court of Criminal Appeals issued its certificate of judgment or six months after the discovery of such material facts, whichever is later.[7]

3. Contents of Petition and Pre-Hearing Matters

The petitioner must allege "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds."[8] A bare allegation that a constitutional right has been violated and mere conclusions of law are not sufficient to warrant an evidentiary hearing.[9] Furthermore, simply checking boxes on the form petition without providing any substantiating or specific facts is insufficient to satisfy the post-conviction pleading requirements.[10]

After the petition is filed, the state has 30 days to file an answer to the petition,[11] although the court may specify a different time for filing the answer.[12] Amendments to the pleadings may be made at anytime before the entry of the judgment on the post-conviction petition.[13]

In order to expedite the proceeding, the post-conviction court may hold a pre-hearing conference, by telephone or in person, at which "the court may order a showing by the petitioner of the materiality of the testimony expected to be presented by any witness subpoenaed by the petitioner, supported by affidavit where appropriate, and, upon petitioner's failure to show the requisite materiality, may order that the subpoena for such witness not be issued or be quashed."[14]

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[6] ALA. R. CRIM. P. 32.2(c).

[7] *Id.* On August 1, 2002, Rule 32 was amended to change the period within which an inmate could file a petition from two years to one year. ALA. R. CRIM. P. 32.2 cmt. On July 1, 2002, Alabama Supreme Court issued an order explaining that 1) defendants in cases in which the triggering date (date from which the time for filing a rule 32 motion begins to run) occurs on or before July 31, 2001, shall have two years from the triggering date within which to file a post-conviction petition pursuant to rule 32; 2) defendants in cases in which the triggering date occurs during the period beginning August 1, 2001, and ending July 31, 2002, shall have one year from August 1, 2002, within which to file a post-conviction petition; and 3) defendants in cases in which the triggering date occurs on or after August 1, 2002, shall have one year from the triggering date within which to file a postconviction petition. *Id.*

[8] ALA. R. CRIM. P. 32.6(b).

[9] *Id.*

[10] *See* Taylor v. State, 879 So. 2d 1210, 1212 (Ala. Crim. App. 2003) (remanding for an evidentiary hearing on other issues).

[11] ALA. R. CRIM. P. 32.7(a). The prosecutor should attach to this response portions of the certified record as appropriate to address the issues raised in the petition. *Id.*

[12] *Id.*

[13] ALA. R. CRIM. P. 32.7(b).

[14] ALA. R. CRIM. P. 32.8. The petitioner need not be present if he/she is represented by present counsel, and the conference must be recorded. *Id.*

4. Summary Disposition of a Petition and the Post-Conviction Evidentiary Hearing

The court may summarily dispose of or grant leave to amend a petition if it determines that (1) the petition is not sufficiently specific;[15] (2) the petition is precluded pursuant to Rule 32.2;[16] (3) the petition fails to state a claim; or (4) no material issue of fact or law exists which would entitle the petitioner to post-conviction relief and no purpose would be served by any further proceedings.[17] However, the court must hold an evidentiary hearing when the post-conviction petition is meritorious on its face and contains allegations which, if true, would entitle the petitioner to relief.[18] The court may grant the petition without a hearing if it is valid as a matter of law and undisputed fact.

Unless the post-conviction court summarily disposes of the petition, the petitioner will proceed to an evidentiary proceeding to determine disputed issues of material fact, with the right to subpoena material witnesses.[19] The post-conviction court, however, has the discretion to either (1) forego an actual hearing and take evidence by affidavits, written interrogatories, or depositions, or (2) take some evidence by such means and other evidence during an actual hearing.[20] The court also has the discretion to conduct the evidentiary hearing at the place of petitioner's confinement, if space is available and proper notice is given to the confinement facility.[21] The petitioner may be called to testify at the evidentiary hearing by the court or either party.[22]

5. Decisions on Petitions for Relief and from Conviction and Sentence

The court must issue an order on the petition making specific findings of fact relating to each material issue of fact presented.[23] If the court finds in favor of the petitioner, it must address in its order (1) any modification to the petitioner's conviction, sentence, or detention; (2) whether any further proceedings, including a new trial, are warranted; and (3) address any other matters that may be necessary and proper.[24]

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[15] *See supra* notes 8-10 and accompanying text.

[16] *See infra* notes 29-42 and accompanying text.

[17] ALA. R. CRIM. P. 32.7(d). *See, e.g.*, Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (holding that "[w]here a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition without requiring a response from the district attorney").

[18] *Ex parte* Land, 775 So. 2d 847, 852 (Ala. Crim. App. 2000); *see also* Benefield v. State, 583 So. 2d 1370, 1370 (Ala. Crim. App. 1991) (noting that meritorious allegations "warrant either an evidentiary hearing or an adequate explanation for their denial").

[19] ALA. R. CRIM. P. 32.9(a).

[20] *Id.* Where the post-conviction court chooses to take evidence by means other than an evidentiary hearing, the petitioner need not be present. *Id.*

[21] *Id.* The Court must give at least seven days notice to the confinement facility. *Id.*

[22] ALA. R. CRIM. P. 32.9(b).

[23] ALA. R. CRIM. P. 32.9(d).

[24] ALA. R. CRIM. P. 32.9(c).

6. Appealing Decisions on Post-Conviction Petitions

Any party may appeal the decision of the circuit court within forty-two days from date of the court's order on the post-conviction motion.[25] If the Alabama Court of Criminal Appeals affirms the denial of the petition, the petitioner must apply for a rehearing before petitioning to the Alabama Supreme Court for a writ of *certiorari*.[26] The Alabama Supreme Court is not required to review the case and will only grant review "when there are special and important" reasons for such discretionary review.[27] If the Alabama Supreme Court declines review or affirms the lower court decision, the petitioner may file a petition for a writ of *certiorari* with the United States Supreme Court.[28] If the United States Supreme Court declines review or affirms the lower court decision, the state post-conviction appeal is complete.

B. Procedural Restrictions on Post-Conviction Petitions

1. Procedural Bars

A petitioner will be precluded from relief on post-conviction claims:

(1) Which may still be raised on direct appeal or by post-trial motion;[29]
(2) Which was raised or addressed at trial;[30]
(3) Which could have been but was not raised at trial, unless the claim for relief is that the court was without jurisdiction to render judgment or to impose sentence;[31]
(4) Which was raised or addressed on appeal or in any previous collateral proceeding not dismissed as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised;[32] or

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[25] ALA. R. CRIM. P. 32.10(a); ALA. R. APP. P. 4(a)(1), (b)(1).

[26] ALA. R. APP. P. 39(c)(1). A petition for writ of certiorari to the Alabama Supreme Court must be filed within fourteen days of the decision of the Court of Appeals on the application for rehearing. ALA. R. APP. P. 39(c)(2).

[27] ALA. R. APP. P. 39(a).

[28] 28 U.S.C. § 1257 (2004).

[29] ALA. R. CRIM. P. 32.2(a)(1). This provision merely precludes claims which "still may be raised on direct appeal" and does not preclude filing a Rule 32 post-conviction petition during the pendency of a direct appeal. *See* Barnes v. State, 621 So. 2d 329, 331-32 (Ala. Crim. App. 1992).

[30] ALA. R. CRIM. P. 32.2(a)(2). *See, e.g.*, Duncan v. State, 925 So.2d 245, 280-281 (Ala. Crim. App. 2005) (holding that petitioner's claims that (1) the state did not present sufficient evidence to support his convictions for capital murder, (2) the trial court erred in not allowing argument outside of the presence of the jury regarding his objections to the state displaying photographs while examining a witness, (3) the state improperly used peremptory strikes to remove blacks from the jury, and (4) the prosecutor improperly commented on the petitioner's decision not to testify during closing arguments, were all raised and disposed of at trial and, thus, not cognizable in a Rule 32 petition).

[31] ALA. R. CRIM. P. 32.2(a)(3). *See, e.g.*, Woods v. State, 2004 WL 1909291, *11-12 (Ala. Crim. App. Aug. 27, 2004) (holding that the petitioners claim of a coerced confession was procedurally barred because he knew of it before and during the trial, failed to inform his counsel, and it could have been but was not raised at trial).

[32] ALA. R. CRIM. P. 32.2(a)(4). *See, e.g.*, Avery v. State, 832 So. 2d 664, 665 (Ala. Crim. App. 2001) (holding that because the appellate court upheld his guilty plea as voluntary and that the trial court had

(5) Which could have been but was not raised on appeal, unless the claim for relief is that the court was without jurisdiction to render judgment or to impose sentence.[33]

Furthermore, the post-conviction court must dismiss, without prejudice, any petition that challenges multiple judgments entered in more than a single trial or guilty-plea proceeding.[34] These procedural bars "apply with equal force to all cases, including those in which the death penalty has been imposed."[35]

2. Successive Petitions[36]

The post-conviction court will treat subsequent Rule 32 petitions as successive if a petitioner has previously filed a post-conviction petition that challenges any judgment arising out of that same trial or guilty-plea proceeding.[37] When applying the procedural bar against successive post-conviction petitions, the claims in a Rule 32 petition should be considered separately, and not collectively.[38] Thus, the separate consideration of claims in a successive petition includes a determination of whether a claim is one which (1) was already raised in the initial or earlier post-conviction petition; or (2) is a new and different claim not raised in the initial or earlier petition.

a. Claims Already Raised in the Initial or Earlier Petition

Petitioners may not relitigate the same or similar claims in a subsequent petition which have already been litigated and decided against them.[39] However, "a second or successive petition on the same or similar grounds cannot be deemed procedurally barred unless the same or similar grounds asserted in a prior petition were adjudicated on their merits."[40]

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correctly advised him of the statutory range of punishment upon his direct appeal, these claims were procedurally barred on post-conviction review).

[33] ALA. R. CRIM. P. 32.2(a)(5). *See, e.g.*, Jackson v. State, 889 So. 2d 49, 52 (Ala. Crim. App. 2004) (holding that the petitioner's challenge to the sufficiency of the evidence to support his conviction is precluded from review because it could have been, but was not, raised on appeal).

[34] ALA. R. CRIM. P. 32.1 (last paragraph of rule).

[35] State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

[36] Successive petitions are petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment and sentence. ALA. R. CRIM. P. 32.2(b).

[37] *Id.*

[38] Whitt v. State, 827 So. 2d 869, 875 (Ala. Crim. App. 2001).

[39] *Id. See, e.g.*, Barbour v. State, 903 So. 2d 858, 870 (Ala. Crim. App. 2004) (holding that the petitioner's post-conviction claim that the manner of execution used by the State of Alabama violates the Eighth Amendment's prohibition against cruel and unusual punishment was raised in his initial Rule 32 petition and, thus, was procedurally barred as successive).

[40] *Whitt*, 827 So. 2d at 875 (citing *Ex parte* Walker, 800 So. 2d 135 (Ala. 2000); Blount v. State, 572 So. 2d 498 (Ala. Crim. App. 1990)).

b. New Claims Not Raised in the Initial or Earlier Petition

Petitioners also generally are not entitled to relief on claims that could have been raised in their first or earlier petition.[41] Specifically, a post-conviction court will deny a successive petition raising new and different grounds than those raised in the initial or earlier petition unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence; or (2) the petitioner shows that good cause exists as to why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, *and* that the failure to entertain the petition will result in a "miscarriage of justice."[42]

3. Newly Discovered Evidence Exception to a Procedural Bar

Rule 32.1(e) allows for newly discovered evidence claims to be alleged in a post-conviction petition. However, in order for evidence to be "newly discovered," the petitioner must demonstrate that:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Alabama Rule of Criminal Procedure 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
(2) The facts are not merely cumulative to other facts that were known;
(3) The facts do not merely amount to impeachment evidence;
(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.[43]

Substantive claims of error under the Alabama or United States Constitutions, such as *Brady v. Maryland*[44] claims or juror misconduct claims, are allowable in a post-conviction motion as claims of constitutional error under Rule 32.1(a) provided that the claims are not procedurally barred and the petition itself is filed within the legal time

[41] ALA. R. CRIM. P. 32.2(b).
[42] *Id.*; *Whitt*, 827 So. 2d at 875-76 (holding that the post-conviction court correctly ruled that the petitioner's ineffective assistance of counsel claims were barred as successive because they could have been raised in his first Rule 32 petition and he made no attempt to demonstrate why they could not have been raised in his first petition or that the failure to review his claim on the merits would result in a miscarriage of justice).
[43] ALA. R. CRIM. P. 32.1(e)(1)-(5).
[44] Brady v. Maryland, 373 U.S. 83 (1963) (holding that the suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution).

limits.[45] Thus, the petitioner is not required to raise a claim of constitutional error as a newly discovered evidence claim unless his claim is untimely or would be procedurally barred.[46] Because newly discovered evidence claims may overcome valid procedural bars, they have the more onerous requirement of demonstrating that the new evidence will prove innocence,[47] whereas a normal claim of constitutional error under Rule 32.1(a) need only be timely and pass the procedural hurdle with a demonstration that the claim could not have been raised at trial or on appeal.[48]

4. Claims of Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are generally allowable as a claim of constitutional error under Rule 32.1(a).[49] However, claims of ineffective assistance of counsel must be raised at the first possible post-conviction opportunity. Thus, a post-conviction petitioner may raise a claim of ineffective assistance of trial counsel for the first time in a post-conviction proceeding where the petitioner was represented by the same trial counsel throughout the direct appeal proceedings.[50] Similarly, claims of ineffective assistance of appellate counsel cannot be raised on direct appeal and consequently are not defaulted in subsequent post-conviction proceedings.[51] Where the petitioner had different counsel at trial and on appeal, however, a claim of ineffective assistance of trial counsel must, if possible,[52] be raised in a motion for new trial filed within 30 days[53] of the judgment of conviction in order for that claim to be properly preserved for appeal.[54] Once the claim of ineffective assistance of trial counsel is properly preserved and reviewed on direct appeal, or is properly preserved but not raised on appeal, relief on such a claim will be procedurally barred in a Rule 32 post-conviction

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[45] *See Ex parte* Pierce, 851 So. 2d 606, 612-14 (Ala. 2000) (holding that a petitioner is not required to meet the requirements for newly discovered evidence if the claim of a constitutional violation, juror misconduct in this case, is timely and could not have been raised at trial or on appeal).

[46] *Id.* at 612-14; *see also Ex parte* McGahee, 885 So. 2d 230, 231 (Ala. 2004) (Johnstone, J., specially concurring); Boyd v. State, 2003 WL 22220330, *22 (Ala. Crim. App. Sept. 26, 2003) (holding that *Brady* claims are subject to the procedural bars of rule 32.2 and would be barred if they could have been raised at trial or on appeal, but were not, and were not raised as a newly discovered evidence claim in the post-conviction petition).

[47] ALA. R. CRIM. P. 32.1(e)(5).

[48] *Id.*; *see also Ex parte* Siebert, 778 So. 2d 857, 858 (Ala. 2000) (Johnstone, J., specially concurring) (noting that a "defendant is not required to prove his innocence in order to get a constitutional trial, including a fair jury, to consider his presumption of innocence") (emphasis omitted).

[49] *Ex parte* Lockett, 548 So. 2d 1045, 1048 (Ala. 1989) (holding that claims of ineffective assistance of counsel are cognizable under Alabama Rule of Criminal Procedure 20.1(a), which is the predecessor to Rule 32.1(a)).

[50] *See* Jones v. State, 484 So. 2d 554, 556 (Ala. Crim. App. 1985). Counsel could not be expected to raise his own ineffective assistance on appeal. *Id.* (noting that because the appellant was represented by different counsel at the appellate court level, an ineffective assistance claim about his trial counsel could not be raised in a subsequent petition for post-conviction relief).

[51] Brown v. State, 903 So. 2d 159, 162 (Ala. Crim. App. 2004).

[52] *See Ex parte* Ingram, 675 So. 2d 863, 865-66 (Ala. 1996) (noting that "[w]hen a defendant makes a claim of ineffective assistance of trial counsel, and that claim cannot reasonably be presented in a new trial motion filed within [] 30 days [of the judgment of conviction], the proper method for presenting that claim for appellate review is to file a Rule 32 . . . petition for post-conviction relief").

[53] ALA. R. CRIM. P. 24.1(b).

[54] *See Ex parte* Ingram, 675 So. 2d 863, 865-66 (Ala. 1996).

proceeding because the claim was either litigated during the direct appeal or could have been, but was not raised on direct appeal.[55]

In order to make a legally sufficient claim of ineffective assistance of counsel, the petitioner first must show deficient performance by demonstrating that his/her counsel's performance "fell below an objective standard of reasonableness" to such a degree that, by making such serious errors, counsel was "not functioning as the counsel guaranteed the defendant by the Sixth Amendment."[56] The petitioner next must demonstrate the prejudicial effect of that deficient performance by alleging that a reasonable probability exists that, but for the counsel's deficient performance, the result of the proceeding would have been different.[57]

Before the post-conviction court may summarily deny an ineffective assistance of counsel claim, it either must conduct an evidentiary hearing on such claims that are legally sufficient or provide adequate explanation for denial specifically addressing each of the petitioner's claims.[58] However, where the post-conviction judge also presided over the petitioner's trial and observed the conduct of the petitioner's attorneys at trial, the judge does not need to hold a hearing on the effectiveness of those attorneys if those observations are sufficient to summarily dispose of the claim.[59] This, however, does not relieve the judge of the responsibility to enter a sufficiently specific order addressing each of the petitioner's claims of ineffective assistance of trial counsel.[60]

C. Review of Error

Unlike the review conducted during direct appeal, there is no "plain error" search of the record in an appeal from the denial of a Rule 32 post-conviction petition.[61]

If a post-conviction court finds error, even in a capital case, it may still affirm the conviction or sentence on the ground that the error was harmless.[62] For errors involving a petitioner's constitutional rights, the petitioner is entitled to a new trial unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.[63] The state has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.[64] In order for non-constitutional error to be harmless, the court "must determine with 'fair assurance . . . that the judgment was not substantially swayed by the error.'"[65] In order to reverse on the grounds of non-constitutional error,

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55 ALA. R. CRIM. P. 32.2(a)(4), (5).

56 Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

57 *Id.* at 694. A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.*

58 Ray v. State, 880 So. 2d 477, 478-79 (Ala. Crim. App. 2002).

59 *Ex parte* Hill, 591 So. 2d 462, 463 (Ala. 1991).

60 *Id.*

61 *See* Boyd v. State, 913 So.2d 1113, 1122 (Ala. Crim. App. 2003); Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000), *aff'd*, 805 So.2d 763 (Ala. 2001).

62 *See* Lewis v. State, 889 So. 2d 623, 666 (Ala. Crim. App. 2003) (citing Sattari v. State, 577 So. 2d 535 (Ala. Crim. App. 1990); *Ex parte* Whisenhant, 482 So. 2d 1241 (Ala. 1983)).

63 *See id.* at 649 (citing Chapman v. California, 386 U.S. 18 (1967)).

64 *Id.* at 666.

65 *Id.* (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)).

the reviewing court must find "that the error complained of has probably injuriously affected affect substantial rights" of the defendant.[66]

D. Retroactivity of Rules

A new rule of criminal procedure applies only to those cases on direct review or not yet final, and would "not be applicable to those cases which have become final before the new rules are announced."[67] Thus, new rules of criminal procedure are not retroactively applied in collateral post-conviction proceedings unless (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;[68] or (2) the new rule is a "'watershed' rule of criminal procedure that requires the observation of procedures that are implicit in the concept of ordered liberty and whose non-application would seriously diminish the likelihood of an accurate conviction."[69]

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[66] *Id.*; ALA. R. APP. P. 45.

[67] Clemons v. State, 2003 WL 22047260, *1-2 (Ala. Crim. App. Aug. 29, 2003) (citing Teague v. Lane, 489 U.S. 288, 310 (1989)).

[68] *Id.* at *3 (holding that the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), fell within *Teague's* first exception to the general rule of non-retroactivity on collateral review because it placed a certain class of individuals, the mentally retarded, beyond the state's power to punish by death, which is analogous to a new rule placing certain conduct beyond the state's power to punish at all).

[69] *Id.* at *2 (quoting *Teague*, 489 U.S. at 307, 311, 313).

II. ANALYSIS

A. Recommendation #1

> **All postconviction 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.**

Numerous aspects of Alabama law governing post-conviction proceedings may preclude the adequate development and judicial consideration of all post-conviction claims. For example, Alabama law (1) does not require an automatic stay of execution upon filing of a post-conviction petition, (2) requires post-conviction petitions to be assigned to the sentencing judge,[70] (3) provides only a short period of time to file a post-conviction petition after one's conviction and sentence become final and an even shorter amount of time for filing following the discovery of new evidence,[71] and (4) allows the post-conviction judge to summarily deny the petition without an evidentiary hearing.[72]

Stays of Execution

Although it appears that post-conviction petitioners routinely file motions seeking a stay of execution during the pendency of their post-conviction proceedings[73] and these motions are generally not denied until the Court of Criminal Appeals affirms the denial of the post-conviction petition,[74] there is no provision in Alabama law requiring an automatic stay of execution during post-conviction proceedings. By not ruling on a stay motion until the end of post-conviction proceedings, executions are generally stayed in practice during post-conviction proceedings, but no law requires post-conviction courts to proceed in this manner.

Assignment of Sentencing Judge to Post-Conviction Proceedings

Post-conviction cases in Alabama usually are assigned to the sentencing judge.[75] Although the sentencing judge may have knowledge of relevant facts and issues, a potential for bias or the appearance of bias exists under this scenario, as post-conviction proceedings stem from a decision in which the judge presided. A judge's ability to

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[70] *See* ALA. R. CRIM. P. 32.5.
[71] *See* ALA. R. CRIM. P. 32.2(c).
[72] *See* ALA. R. CRIM. P. 32.2(a)(1)-(5), 32.6(b), 32.7(d).
[73] *See, e.g.*, Wright v. State, 766 So. 2d 213, 214 (Ala. Crim. App. 2000) (noting that the petitioner also filed a motion requesting a stay his execution).
[74] *See, e.g.*, Tarver v. State, 761 So. 2d 266 (Ala. Crim. App. 2000) (denying the petitioner's motion for stay of execution upon affirming the post-conviction court's denial of his petition).
[75] *See* ALA. R. CRIM. P. 32.5 ("Petitions filed under this rule shall be filed in and decided by the court in which the petitioner was convicted. If a petition is filed in another court, it shall be transferred to the court where the conviction occurred.").

exercise independent judgment, therefore, may be compromised and a petitioner may not be afforded adequate judicial consideration.

Filing Deadlines and Evidentiary Hearings

A death row petitioner has only one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction and sentence on appeal to file his/her Rule 32 post-conviction petition.[76] Petitions based on newly discovered material facts that are discovered outside this one-year window for filing must be filed within an even shorter period of six months after the discovery of such material facts.[77]

A post-conviction court in Alabama can summarily dispose of any petition if it determines that (1) the petition is not sufficiently specific;[78] (2) claims alleged in the petition were raised and reviewed at trial or appeal or could have been raised at trial or appeal, but were not;[79] (3) the petition is legally insufficient on its face; (4) the petition is untimely filed; or (5) no material issue of fact or law exists which would entitle the petitioner to relief and that no purpose would be served by any further proceedings.[80] Moreover, death-sentenced post-conviction petitioners have no right to counsel[81] and when the court does appoint counsel, his/her fees are capped at $1,000.[82] Given the multiple ways the court may summarily dispose of a petition without an evidentiary hearing and the lack of a right to counsel for death-sentenced inmates seeking post-conviction relief, it is imperative that post-conviction petitioners be given adequate time to fully develop their claims to avoid such disposal on procedural grounds. Although these procedures for summary disposal of post-conviction claims and no requirement that an evidentiary hearing be held inhibit full judicial consideration of all claims, it is unclear whether these time periods for filing post-conviction petitions provide adequate time for petitioners to fully develop viable claims and file legally sufficient petitions.

Although the State of Alabama provides a post-conviction framework that inhibits the full development of claims by opening numerous avenues to summarily dispose of alleged claims without an evidentiary hearing to give full judicial consideration to those claims, we were unable to determine whether the time periods for filing post-conviction petitions provide adequate time for petitioners to fully develop viable claims and file legally sufficient petitions Moreover, we were unable to ascertain with certainty whether Alabama post-conviction courts exercise their discretion to (1) if necessary, stay

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[76] ALA. R. CRIM. P. 32.2(c).

[77] *Id.* On August 1, 2002, Rule 32 was amended to shorten the period within which a defendant could file a petition from two years to one year. ALA. R. CRIM. P. 32.2 cmt.

[78] *See* ALA. R. CRIM. P. 32.6(b).

[79] *See* ALA. R. CRIM. P. 32.2(a)(1)-(5).

[80] ALA. R. CRIM. P. 32.7(d). *See, e.g.*, Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (holding that "[w]here a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition without requiring a response from the district attorney").

[81] *See* ALA. CODE § 15-12-23(a) (2005) (stating that the judge "may appoint counsel to represent and assist those [seeking post-conviction relief] if it appears to the court that the person . . . is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person").

[82] *See* ALA. CODE § 15-12-23(d) (2005).

executions to permit full and deliberate consideration of claims, and (2) use independent judgment in deciding cases when making findings of fact and conclusions of law, eventhough these courts may make verbatim adoptions of a party's proposed findings and conclusions.

Thus, we are unable to conclude whether the State of Alabama fully complies with the requirements of Recommendation #1.

B. 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.

Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

Alabama law provides that the post-conviction court, in its sole discretion, may allow the taking of depositions for discovery or for use during the post-conviction proceeding.[83] However, when ascertaining whether discovery is warranted in a Rule 32 proceeding, the post-conviction court must determine: (1) whether the petition includes "a clear and specific statement of the grounds upon which relief is sought" rather than bare and conclusory allegations;[84] and (2) whether the petitioner has shown "good cause" for disclosure of the requested materials.[85]

The "good cause" standard balances the post-conviction court's authority to order discovery with its ability to deny discovery to petitioners who appear to be using it to "fish" through official files as "a device for investigating possible claims, not vindicating actual claims."[86] The post-conviction court shall determine whether "good cause" exists by "considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources."[87] A post-conviction court's decision to grant or deny discovery will not be reversed by a reviewing court in the absence of a clear abuse of discretion.[88]

These rules provide the post-conviction judge the discretion to allow discovery and to determine its scope and time limit. Thus, a post-conviction judge not only can exercise his/her discretion to prevent "full discovery" of all evidence necessary for the petitioner to argue his/her claims, s/he can prevent *any* discovery if s/he finds a lack of "good

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[83] ALA. R. CRIM. P. 32.4.
[84] ALA. R. CRIM. P. 32.6(b).
[85] Jackson v. State, 910 So. 2d 797, 801 (Ala. Crim. App. 2005).
[86] *Ex parte* Land, 775 So. 2d 847, 852 (Ala. 2000) (citing People v. Gonzalez, 800 P.2d 1159, 1206 (Cal. 1990)).
[87] *Jackson*, 910 So. 2d at 802 (citing People *ex rel.* Daley v. Fitzgerald, 526 N.E.2d 131, 135 (Ill. 1988)).
[88] *Id*. (citing People v. Fair, 738 N.E.2d 500, 504-05 (2000)).

cause." Furthermore, even if the petitioner is granted discovery, whatever its scope, Alabama law does not provide for any specific discovery time limit.

These provisions grant the post-conviction court considerable discretion in determining the scope and length of discovery. We were unable to ascertain, however, whether in practice Alabama post-conviction courts exercise this discretion to provide full and meaningful discovery.

Thus, we are unable to conclude whether the State of Alabama fully complies with the requirements of Recommendations #2 and #3.

C. 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.**

Petitioners may appeal the denial of their post-conviction petition as a matter of right to the Alabama Court of Criminal Appeals.[89] Even though the petitioner receives an appeal of right in the Court of Criminal Appeals, the Court may affirm an order of the post-conviction court without an opinion if it determines that an opinion in the case would serve no significant precedential purpose.[90] When the Court of Criminal Appeals issues an affirmance without opinion, the court still must issue an unpublished memorandum to the parties addressing the petitioner's contentions and giving a reason for rejecting them.[91]

Despite the release of a memorandum with the court's rationale for affirmance, these memorandums are unpublished,[92] may not be relied on as precedent, may not be cited in arguments or briefs, and shall not be used by any Alabama court, except for the purpose of "establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."[93] Thus, although the petitioner will receive notice of the rationale for appellate court's affirmance, the petitioner may not challenge the rationale expressed in the memorandum in any subsequent appeals or post-conviction proceedings while the state retains the right to use the unpublished memorandum as the basis to bar further proceedings through such doctrines as res judicata, collateral estoppel, and law of the case.

The State of Alabama, therefore, partially meets the requirements of Recommendation #4.

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[89] ALA. R. CRIM. P. 32.10(a); ALA. R. APP. P. 4(a)(1), (b)(1).
[90] ALA. R. APP. P. 54(a).
[91] ALA. R. APP. P. 54(b).
[92] ALA. R. APP. P. 54(c). Cases for which no opinion has been issued are listed in a table in the official case reporter. *Id.* However, when a judge issues an opinion dissenting from or specially concurring with the affirmance without opinion, it should be regularly published in the official case reporter. *Id.*
[93] ALA. R. APP. P. 54(d).

D. 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.

Recommendation #6

When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

Alabama post-conviction courts, including the circuit court hearing the petition and the Court of Criminal Appeals hearing an appeal from the denial of the petition, do not use the "knowing, understanding, and voluntary" standard for overcoming procedural default of constitutional errors properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction petition could have been, but was not raised at trial,[94] or could have been, but was not raised on appeal,[95] the claim of error is waived.

Furthermore, Alabama does not apply any "plain error" review in post-conviction proceedings.[96]

Because the State of Alabama does not apply the "knowing, understanding, and voluntary" standard for constitutional error not properly preserved at trial or raised on appeal or plain error review for errors of state law in a post-conviction proceeding, it fails to meet the requirements of Recommendations #5 and #6.

E. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

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[94] ALA. R. CRIM. P. 32.2(a)(3). *See, e.g.*, Woods v. State, 2004 WL 1909291, *11 (Ala. Crim. App. Aug. 27, 2004) (holding that the petitioners claim of a coerced confession was procedurally barred because he knew of it before and during the trial, failed to inform his counsel, and it could have been but was not raised at trial).

[95] ALA. R. CRIM. P. 32.2(a)(5). *See, e.g.*, Jackson v. State, 889 So. 2d 49, 52 (Ala. Crim. App. 2004) (holding that the petitioner's challenge to the sufficiency of the evidence to support his conviction is precluded from review because it could have been, but was not, raised on appeal).

[96] *See* Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000), *aff'd*, 805 So.2d 763 (Ala. 2000).

Recommendation #8

For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

The State of Alabama has not established post-conviction defense organizations to represent capital defendants in state post-conviction, federal habeas corpus, or clemency proceedings. In fact, Alabama statutory law does not provide a right to post-conviction counsel for death-sentenced inmates and leaves the appointment of post-conviction counsel to the discretion of the post-conviction judge.[97] Although counsel required in death cases at trial must have five years of experience in the criminal law, no such requirement exists for counsel appointed in a post-conviction proceeding.[98] In fact, more than a dozen death–sentenced inmates currently seeking post-conviction relief do not have any counsel, let alone counsel trained in death penalty post-conviction representation, to help them properly prepare their petition to avoid summary disposition.[99]

We note that there are a number of individuals and organizations that provide pro bono representation to death sentenced-inmates during state post-conviction proceedings. For example, the Equal Justice Initiative of Alabama ("EJI"), which is a private, non-profit organization,[100] represents inmates petitioning for state post-conviction relief and provides resource assistance in state post-conviction cases.[101] However, EJI's staff is composed of only five attorneys and clinical law students, who at any given time "represent dozens of the condemned [persons] currently facing execution in the state of Alabama."[102] EJI also recruits pro-bono attorneys who are willing to represent death row inmates and is assisted by graduate fellows from New York University School of Law.[103] Due to the limited resources of organizations like EJI, it is impossible for them to provide representation for all indigent death sentenced inmates, leaving some without representation.[104]

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[97] ALA. CODE § 15-12-23(a) (2005) (stating that the judge "may appoint counsel to represent and assist those [seeking post-conviction relief] if it appears to the court that the person . . . is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person").

[98] *Compare* ALA. CODE § 13A-5-54 (2005) (requiring that appointed trial counsel in a death case must have five years of criminal law experience), *with* ALA. CODE § 15-12-23 (2005) (having no such explicit experience requirement for counsel appointed in post-conviction proceedings).

[99] *When Death is on the Line*, BIRMINGHAM NEWS, Nov. 8, 2005.

[100] *See* Equal Justice Initiative of Alabama, Home Page, *at* http://www.eji.org/ (last visited on May 23, 2006).

[101] *Id.*

[102] Representation of Death Row Prisoners, Equal Justice Initiative of Alabama, *at* http://www.eji.org/representation.html (last visited on May 23, 2006).

[103] *Id.*

[104] *See* Crystal Nix Hines, *Lack of Lawyers Blocking Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, *available at* http://www.deathpenaltyinfo.org/article.php?scid=17&did=305 (last visited on May 23, 2006) (interviewing Bryan Stevenson, Executive Director of EJI, and noting that in Alabama in 2001, "about 40 of the approximately 185 death row inmates—some within five months of filing deadlines for state

If the post-conviction court does appoint counsel, s/he only is entitled to $60 per hour for in-court work and $40 per hour for out-of-court work, with funding not to exceed $1,000.[105] These funding restrictions are inadequate to allow the provision of high quality legal representation because, contrary to the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, they put a cap on compensation and do not link hourly rates to the prevailing rates for retained counsel in the jurisdiction.[106] Additionally, a death-sentenced inmate does not have a right to funds for investigators or experts after direct review.[107] Indigent death sentenced inmates, therefore, are left to obtain either under-paid appointed counsel, subject to the court's discretion, or pro bono attorneys, neither of which appear to be required by the State of Alabama to possess any specific qualifications to handle state post-conviction cases. Based on this information, the State of Alabama is not in compliance with Recommendations #7 and #8.

F. 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.**

Post-conviction courts in Alabama give full retroactive effect to changes in the law announced by the U.S. Supreme Court, but only in limited circumstances. Specifically, post-conviction courts will give retroactive effect to new rules of criminal procedure in collateral post-conviction proceedings when (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;[108] or (2) the new rule is a "'watershed' rule of criminal procedure that requires the observation of procedures that are implicit in the concept of ordered liberty and whose non-application would seriously diminish the likelihood of an accurate conviction."[109] All other new

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appeal—[did] not have counsel," and EJI's five-lawyer staff "had taken on more than 100 death penalty cases, 'which is way more than we should [have been] involved in'").

[105] ALA. CODE § 15-12-23(d) (2005).

[106] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 5.1, *in* 31 HOFSTRA L. REV. 913, 981 (2003)

[107] Before and during trial, an indigent defendant may ask the court to appoint experts and they may be appointed at the trial judge's discretion. ALA. R. CRIM. P. 11.3(e); ALA. CODE § 15-12-21(d) (2005). Defense counsel can be reimbursed for "reasonable fees and expenses," such as fees for obtaining experts, approved in advance by the court. ALA. R. CRIM. P. 11.3(e); ALA. CODE § 15-12-21(d) (2005). Funds are available to indigent defendants for expert witnesses, and this is not limited to psychiatric experts. Dubose v. State, 662 So. 2d 1156, 1178-79. A showing of need and fundamental fairness is required, however, to receive these funds. *Id*. at 1178-81. No analogous appointment procedures exist for post-conviction proceedings. *Compare* ALA. CODE § 15-12-21(d) (2005), *with* ALA. CODE § 15-12-23 (2005).

[108] Clemons v. State, 2003 WL 22047260, *3 (Ala. Crim. App. Aug. 29, 2003) (citing Teague v. Lane, 489 U.S. 288, 310 (1989), and holding that the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), fell within *Teague's* first exception to the general rule of non-retroactivity on collateral review because it placed a certain class of individuals, people with mental retardation, beyond the state's power to punish by death. This is analogous to a new rule placing certain conduct beyond the state's power to punish at all).

[109] *Id.* at *1-2.

rules of criminal procedure, including those announced by the U.S. Supreme Court, will be applied retroactively only to cases still within the direct appeal pipeline.[110]

Because Alabama law only gives retroactive effect to changes in the law announced by the U.S. Supreme Court in limited circumstances, the State of Alabama partially meets the requirements of Recommendation #9.

G. Recommendation #10

> **State courts should permit second and successive postconviction 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.**

Alabama law generally prohibits the filing of successive post-conviction petitions which (1) attempt to relitigate claims decided on the merits in a previous petition or (2) raise new claims that could have been raised in the initial petition.[111] A post-conviction court, however, may allow a successive petition raising new and different grounds than those raised in the initial petition when (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence, or (2) the petitioner shows that good cause exists as to why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.[112]

Both exceptions to the bar against successive petitions required by this Recommendation— some deficiency or omission by post-conviction counsel or an intervening court decision that changed the law subsequent to the first petition, resulting in a meritorious claim not being raised and litigated in the first petition—could be construed as "good cause" for why successive claims were not alleged in the initial post-conviction petition, and that failure to entertain the petition will result in a miscarriage of justice. However, a review of Alabama case law does not reveal these exceptions being used by Alabama petitioners to overcome the bar against successive petitions.

We are unable to ascertain, therefore, whether he State of Alabama meets the requirements of Recommendation #10.

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[110] *Id.*

[111] ALA. R. CRIM. P. 32.2(b).

[112] *Id.*; Whitt v. State, 827 So. 2d 869, 875-76 (Ala. Crim. App. 2001) (holding that the post-conviction court correctly ruled that the petitioner's ineffective assistance of counsel claims were barred as successive because they could have been raised in his first rule 32 petition and he made no attempt to demonstrate why they could not have been raised in his first petition and that the failure to review his claim on the merits would result in a miscarriage of justice).

H. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the United States Supreme Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[113] The burden to show that the error was harmless falls on the "beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."[114] Alabama courts follow this pronouncement in *Chapman* by requiring the same burden of proof for errors involving a petitioner's constitutional rights—the petitioner is entitled to a new trial unless the state proves and the post-conviction court finds that the error is harmless beyond a reasonable doubt.[115]

The State of Alabama, therefore, meets Recommendation #11.

I. 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.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the State of Alabama at this time.

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[113] 386 U.S. 18, 24 (1967).
[114] *Id.*
[115] *See* Lewis v. State, 889 So. 2d 623, 649, 666 (Ala. Crim. App. 2003).

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. This process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[1]

Since 1972, when the U.S. Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through April 2006, clemency has been granted on humanitarian grounds 229 times in 19 of the 38 death penalty states and the federal government.[2] One hundred sixty seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's only opportunity to prevent miscarriages of justice, even in cases involving actual innocence. A clemency decision maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision making. Yet as the capital punishment process currently functions, meaningful review

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[1] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

[2] *See* Death Penalty Information Center, Clemency, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited on May 11, 2006).

frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION

A. Clemency Decision Makers-the Governor of Alabama

The Alabama Constitution gives the Governor the exclusive authority to grant reprieves and commutations to those under sentence of death.[3] The Attorney General of Alabama has stated that the Governor may commute a death sentence to any sentence, even one less than life without the possibility of parole.[4] While Alabama does have a Board of Pardons and Paroles (Board) that is charged with granting pardons, the Board plays no role in the clemency process for individuals sentenced to death.[5]

B. Clemency Petitions

Any condemned individual may file a clemency petition.[6] There is no exact procedure for initiating the clemency process and individual governors have the discretion to determine the method of requesting clemency and the materials that may be filed in support of a clemency petition.[7] Under the procedures used by current Governor Bob Riley, the contents of the petition are determined by the petitioner and may include any information useful to the clemency decision,[8] including testimonials from family, friends, or prison personnel, and even family photographs.[9] Although there is no deadline for filing a clemency petition, death-row petitioners generally file after the date of execution is set and as late as the day of the execution.[10]

C. Clemency Investigations and Hearings

1. Investigations

Current Governor Bob Riley personally reviews all clemency petitions filed by death-row inmates.[11] The Governor has the discretion to determine the extent of any investigation; the scope of such an investigation would depend on the allegations made by the petitioner and the time remaining between the time the petition was filed and the date of execution.[12] The Governor will not reinvestigate issues that were previously litigated on

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[3] ALA. CONST. art. V, § 124; Liddell v. State, 251 So.2d 601, 606 (Ala. 1971). The Governor, however, does not have the power to grant commutations in cases where a person has been sentenced to something less than death. *See* Jones v. Hooks, 850 So. 2d 1228, 1229 (Ala. 2002).

[4] Op. Ala. Att'y Gen. 1999-122 (Feb. 25, 1999), *available at* http://www.ago.alabama.gov/pdfopinions/99-00122.pdf (last visited on May 23, 2006).

[5] ALA. CODE § 15-22-36(a) (2005).

[6] Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

[7] Interview with Beth Hughes, Capital Litigation Division, Alabama Attorney General's Office (on file with author).

[8] Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

[9] *Id.* Governor Riley prefers to give capital petitioners "as much latitude as possible" in regards to what materials they may file with their clemency petition. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

the merits, without the existence of new evidence.[13] However, the Governor may choose to investigate claims that were not previously litigated on the merits.[14]

2. Hearings

The petitioner is not guaranteed a hearing on the merits of his/her petition, but it has been the practice of current Governor Bob Riley to grant a hearing to death-row petitioners, if requested.[15] Unless the petitioner requests otherwise, s/he will be present at a non-public hearing.[16] The Governor is not required to attend, but Governor Riley does attend these hearings and is very much involved in all such reviews.[17]

The hearing has no formal structure, is not an official judicial proceeding, and the rules of evidence do not apply.[18] Thus, the petitioner may present any evidence s/he wishes including testimony from family and friends.[19] Although not a requirement, Governor Riley generally excludes representatives of the victim's family from the hearing and limits the evidence to that presented by the petitioner and his/her witnesses.[20]

The district attorney must attend all clemency hearings before the Governor concerning cases that arose in their judicial district and must provide the Governor with all pertinent information in their possession concerning the petitioner.[21] In the single proceeding resulting in a grant of clemency, however, then-Attorney General William Pryor issued a statement indicating that his office had not been consulted by Governor Fob James regarding the clemency petition[22] and the trial court, deciding the petitioner's parole eligibility after commutation, noted that the Governor acted without notice to the state, the victim's family or the public, and without explanation."[23]

D. Clemency Decisions

Following the review of the petition and clemency hearing, if one is held, the Governor will make his/her decision regarding the clemency petition. There is no required procedure for making a decision about a clemency petition and the Governor may weigh any factors in favor of or against clemency.[24] There is no required time limit for the Governor to make his/her decision regarding the clemency petition and the Governor is constrained only by the date of the execution.[25]

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13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 ALA. CODE. 12-17-184(16) (2005).
22 News Releases, Statement of Attorney General William Pryor regarding Commutation of Neelley Death Sentence (Jan. 15, 1999).
23 News Releases, Attorney General Bill Pryor (July 23, 2002).
24 Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005).
25 *Id.*

There are no requirements regarding how the Governor must communicate his/her decision to the petitioner and it is usually done in whatever way the petitioner requests, usually through his/her counsel.[26] The Governor is not required to give the petitioner or the public a reason for his/her clemency decision.[27]

E. Other Issues

There is no right to counsel, experts or investigators during clemency proceedings.[28]

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[26] *Id.*
[27] *Id.*
[28] *Id.*

II. ANALYSIS

A. 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.**

The State of Alabama does not require the Governor to consider any specific facts, evidence, or circumstances, or perform any specific procedures when making his/her decision regarding a clemency petition.[29]

Current Governor Bob Riley personally reviews all clemency petitions from death-row petitioners and, depending on the amount of time before the scheduled date of execution, will investigate the claims raised in the petition.[30] When Governor Riley performs an investigation, he generally will investigate claims that were not previously litigated on the merits.[31] He will not, however, reinvestigate issues that were previously litigated on the merits, without the existence of new evidence.[32] While it is encouraging that Governor Riley is willing to independently consider at least some issues that bear on the petitioner's death sentence that may or may not have been previously litigated on the merits, this practice is not required of all governors and is a practice personal to the Riley administration.

Because we are unable to determine whether Alabama governors consistently make clemency decisions based upon an independent consideration of facts and circumstances, we cannot state whether the State of Alabama is in compliance with Recommendation #1.

B. 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**.

Recommendation #2 requires clemency decision makers to consider "all factors" that might lead the decision maker to conclude that death is not the appropriate punishment. "All factors" include, but are not limited to, the following:

(1) Constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;

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[29] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).
[30] *Id.*
[31] *Id.*
[32] *Id.*

(2) Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
(3) Lingering doubts of guilt (as discussed in Recommendation #4);
(4) Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
(5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
(6) Inmates' mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
(7) Inmates' age at the time of the offense (as discussed in Recommendation #4).[33]

As discussed under Recommendation #1, the State of Alabama does not require the Governor to obtain and consider any specific facts, evidence, or circumstances, or perform any specific procedures when making his/her decision regarding a clemency petition.[34] Thus, the Governor may consider any or all of the factors above.

Because the State of Alabama does not require the Governor to consider any particular factors and the Governor is not required to explain the reasons for the clemency decision to either the petitioner or the public, we reviewed the one capital commutation that has been granted since the reinstatement of the death penalty.[35] At the time of the commutation, Governor Fob James did not give a reason for his decision,[36] but in 2002, former Governor James explained that he commuted Judith Ann Neelley's sentence because the death penalty had been imposed by judicial override of the capital jury's recommended sentence of life without the possibility of parole and Neelley was seventeen years old at the time of the murder.[37]

We also reviewed press releases by Governor Bob Riley addressing his choice not to intervene in the execution of three separate death-row inmates for clues as to the factors he considered in coming to his decision, but these press releases were of limited value due to the fact that there were no clemency petitions filed in any of these three cases.[38]

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[33] AMERICAN BAR ASSOCIATION, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002).

[34] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

[35] *Id*. On Jan. 16, 1999, then-Governor Fob James commuted the death sentence of Judith Ann Neelley to a sentence of life with the possibility of parole. Death Penalty Information Center, Clemency, *available at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#list (last visited on May 23, 2006).

[36] *Id.*

[37] Kristin Latty & Scott Wright, *Former Gov. Fob James Explains Decision to Commute Death Sentence of Judith Ann Neelley*, THE POST (Cherokee County, Ala.), July 19, 2002.

[38] State of Alabama, Office of the Governor, Statement on Scheduled Execution of Convicted Killer, *available at* http://www.governorpress.alabama.gov/pr/pr-2004-08-05-02-hubbard.asp (last visited on May 23, 2006) (discussing the execution of James Barney Hubbard who was executed on August 5, 2004); State of Alabama, Office of the Governor, Statement on Scheduled Execution, *available at* http://www.governorpress.alabama.gov/pr/pr-2004-09-30-01-execution.asp (last visited on May 23, 2006) (discussing the execution of David Kevin Hocker who was executed on September 30, 2004); State of Alabama, Office of the Governor, Statement on Scheduled Execution of Mario Centobie, *available at*

In one separate instance, where a death-row petitioner asked the Governor for a six-month stay of execution, Governor Riley denied the request because there was "no new evidence that would justify such a delay."[39]

Because governors have provided only limited information about their clemency decisions, it is clear only that one Governor has previously considered at least one factor recommended by Recommendation #2 (age of the petitioner). Because we do not know whether Governors have considered "all factors" recommended by the ABA, however, we do not have sufficient information to determine whether the State of Alabama is in compliance with Recommendation #2.

C. Recommendation #3

> **Clemency decision makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.**

Recommendation #4

> **Clemency decision makers should consider as factors in their deliberations 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 relating to a lingering doubt about the inmate's guilt.**

Recommendation #5

> **Clemency decision makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.**

As discussed in Recommendation #2, the Governor may consider any factor in making his/her decision regarding a clemency petition and it is unclear what factors governors have actually considered because the rationales for clemency decisions need not be explained to the petitioner or the public. While we were unable to identify any instances of the Governor considering racial or geographical disparity (Recommendation #3), it appears that the Governor has considered some of the information in Recommendations #4 and #5 when assessing inmates' petitions for clemency. For example, former Governor James considered the petitioner's age (Recommendation #4) in granting a commutation to Judith Ann Neelley, noting in a later statement that she was only seventeen years old at the time of the murder.[40] Additionally, while an interview with Governor Riley's legal counsel indicates that some petitioners choose to emphasize their

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http://www.governorpress.alabama.gov/pr/pr-2005-04-28-02-centobie.asp (last visited on May 23, 2006) (discussing the execution of Mario Centobie who was executed on April 28, 2005).

[39] State of Alabama, Office of the Governor, Governor Riley Denies Convicted Killer's Request for Execution Delay, *available at* http://www.governorpress.alabama.gov/pr/pr-2005-08-04-02-execution.asp (last visited May 23, 2006) (discussing the fact that Governor Riley denied George Sibley's request a six-month stay of his execution).

[40] *See* Latty & Wright, *supra* note 37.

rehabilitation while on death row (Recommendation #5),[41] it is unclear whether Governor Riley or any other former governor has consistently considered this factor in determining whether to grant clemency.

Although the Governor has previously considered issues relevant to Recommendation #4, the governors of Alabama are not required to consider the factors addressed in Recommendations #3-5. Thus, the State of Alabama is not in compliance with Recommendations #3-5.

D. Recommendation #6

> **In clemency proceedings, the death row inmates should be represented by counsel and such counsel should have qualifications consistent with the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.**

The United States Constitution does not require states to appoint counsel for inmates, including death-row inmates, for any proceeding after the conclusion of their direct appeal of right[42] and the State of Alabama does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency. According to Governor Riley's office, death-row inmates with an execution date set generally have had counsel available to represent them during a clemency proceeding,[43] although it is unclear whether this is a formal policy, whether such inmates always have this counsel appointed and, if so, who appoints counsel. The State of Alabama does not require attorneys representing inmates petitioning for clemency to possess qualifications consistent with the American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

Based on this information, the State of Alabama fails to comply with the requirements of Recommendation #6. Not only does it fail to provide for the appointment of counsel to inmates petitioning for clemency, but it also fails to require attorneys representing inmates throughout the clemency process to possess qualifications consistent with the recommendations in the *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

E. Recommendation #7

> **Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.**

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[41] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

[42] Coleman v. Thompson, 501 U.S. 722, 755-56 (1991).

[43] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

The State of Alabama does not have any laws, rules, procedures, standards, or guidelines entitling death-row inmates' clemency counsel to compensation (see analysis under Recommendation #6) or access to investigative and expert resources.

Although death-row inmates' clemency counsel are not entitled to compensation or resources, it does appear that they have sufficient time to develop the basis for any factors upon which clemency might be granted that previously were not developed, as there are no filing deadlines for clemency petitions. Additionally, Governor Riley allows death-row petitioners to present any evidence at the clemency hearing.[44] Thus, because the district attorney must attend all clemency hearings before the Governor concerning cases arising in their judicial district,[45] Governor Riley would presumably provide the petitioner and his/her counsel an opportunity to rebut any evidence that the district attorney presents in opposition to clemency. However, the practice of granting all death-row clemency petitioners a hearing is not required by law, and is only the practice of the Riley administration.

Based on this information, the State of Alabama is only in partial compliance with Recommendation #7.

F. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

The State of Alabama does not have any laws, rules, procedures, standards, or guidelines requiring the Governor to hold and preside over public interviews, meetings, or hearings on the merits of inmates' requests for clemency.[46] According to Governor Riley's legal counsel, however, Governor Riley personally reviews every clemency petition from a death-row inmate and generally holds and presides over a hearing on an inmate's request for clemency, if such a hearing is requested.[47] The hearing is not public and representatives of the victim are generally not present.[48] Not only are the hearings not open to the public, if and when they are held, but all other parts of the clemency process are private. Although governors do sometimes release their rationale for clemency decisions,[49] the Governor is not required to release to the public the evidence s/he considered during the clemency process or his/her reasons for granting or denying an inmate's clemency petition.[50]

Because the Governor is not required to hold hearings on inmates' requests for clemency and, if and when a hearing is held, the Governor is not required to hold the hearing in

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[44] *Id.*

[45] ALA. CODE. 12-17-184(16) (2005).

[46] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

[47] *Id.*

[48] *Id.*

[49] *See supra* notes 36-39 and accompanying text.

[50] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

public, nor is s/he required to make public the factors s/he considered or the rationale for the decision, the State of Alabama fails to meet the requirements of Recommendation #8.

G. 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 clemency petitioners.**

We note that, as discussed under Recommendation #8, Governor Riley will hold a hearing, if requested, on a death-row inmate's request for clemency, and the Governor will personally meet with the inmate. This, however, appears only to be a practice of Governor Riley and future governors are not required to hold a hearing or to meet with the petitioner personally.

Because the Governor of Alabama has sole responsibility for granting clemency in death penalty cases, however, Recommendation #9 is not applicable.

H. Recommendation #10

> **Clemency decision makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.**

The State of Alabama does not have any laws, rules, procedures, standards, or guidelines requiring the Governor to be fully educated, or to encourage the education of the public, about the nature of clemency powers or the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency. We do not have the information necessary to determine whether the Governor is fully educated and consequently, cannot determine whether the State of Alabama is in compliance with Recommendation #10.

I. Recommendation #11

> **To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.**

In the State of Alabama, the Governor possesses the exclusive authority to make clemency determinations in death penalty cases.[51] The Governor is not required to release to the public the evidence s/he considered during the clemency process or to explain any of his/her clemency decisions.[52] Thus, the responsibility for and criticism associated with any particular clemency decision is placed solely on the Governor. Because the Governor is an elected official, s/he may take political considerations or impacts into consideration when making a clemency decision.

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[51] ALA. CONST. art. V, § 124

[52] *See* Interview with Vernon Barnett, Legal Counsel to the Governor of Alabama (Sept. 20, 2005) (on file with author).

Because the Governor, an elected official, is solely responsible for clemency determinations in capital cases, the clemency process is inherently not insulated from political considerations or impacts. Consequently, the State of Alabama fails to meet Recommendation #11.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.[1] Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision making. Often, however, jury instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

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

It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his or her life. Such jurors may vote to impose a death sentence because they erroneously believe that otherwise, the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment. Unfortunately, jurors often believe that mitigation is the same as aggravation, or that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

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[1] Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. The Jury Selection Process

The process of jury selection in Alabama is often referred to as "striking the jury." It begins when the trial court assembles a venire. First it compiles a "strike list" or lists from the names appearing on the "master strike list."[2] The strike list is comprised of at least 36 people unless the parties agree to a smaller number. The jurors whose names appear on the "strike list" are brought into open court and questioned[3] in an effort to assess their qualifications and overall fitness to serve.[4] This process is known as *voir dire*. The parties will select twelve jurors and two or more alternate jurors from this group.[5]

1. Structure and Scope of *Voir Dire*

The trial court has great discretion in determining how *voir dire* is to be conducted,[6] including the nature, variety, and extent of the questions asked of prospective jurors,[7] although its scope must be broad enough to allow for a "reasonable examination of prospective jurors"[8] to "expose bias or prejudice"[9] and to determine prospective jurors' views regarding the death penalty.[10] In addition, questions must be limited to inquiries designed to determine whether a prospective juror can and will render a fair and impartial verdict.[11]

The court may allow some or all of the potential jurors to be examined away from the other prospective jurors.[12] The court's discretion on this issue is limited only by the requirements of due process.[13]

a. Proper Questioning During *Voir Dire*

During *voir dire*, both the prosecution and defense are allowed to examine the prospective jurors. The court also is allowed to participate in questioning potential jurors.[14] The state and/or defense examination of potential jurors must be "reasonable"[15]

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[2] ALA. CODE § 12-16-100(a) (2006). A strike list is a randomly compiled list containing the names of all petit jurors. Petit jurors are all persons appearing who are qualified for jury service and are not excused or whose service is not postponed. *See* ALA. CODE § 12-16-74 (2006).

[3] ALA. CODE § 12-16-100(a) (2006).

[4] ALA. CODE § 12-16-100(b) (2006).

[5] *Id.*

[6] Boyd v. State, 715 So. 2d 825, 848-49 (Ala. Crim. App. 1997).

[7] State v. Smith, 797 So. 2d 503, 518-19 (Ala. Crim. App. 2000) (quoting Peoples v. State, 375 So. 2d 561 (Ala. Crim. App. 1979)).

[8] ALA. R. CRIM. P. 18.4.

[9] Nodd v. State, 549 So. 2d 139, 146 (Ala. Crim. App. 1989) (quoting United States v. Robinson, 475 F.2d 376, 380-81 (D.C. Cir. 1973)).

[10] ALA. CODE § 12-16-152 (2006); *see also* Duke v. State, 889 So. 2d 1, 25-26 (Ala. Crim. App. 2002).

[11] ALA. R. CRIM. P. 18.4(d).

[12] ALA. R. CRIM. P. 18.4(c).

[13] Walker v. State, 2004 WL 2201197, *13 (Ala. Crim. App. Oct. 1, 2004).

[14] ALA. R. CRIM. P. 18.4(c).

[15] *Id.*

and the parties may ask questions regarding potential jurors' ability to render a "fair and impartial" verdict.[16] Prospective jurors may be disqualified from jury service for "probable prejudice."[17] "Probable prejudice" includes, but is not limited to, potential jurors' opposition to or support of the death penalty, racial bias,[18] exposure to pre-trial publicity,[19] and personal knowledge of the case or connections to law enforcement with knowledge of the case.[20]

Voir dire questioning must address prospective jurors' opposition to ("*Witherspoon* questions")[21] and support of ("reverse-*Witherspoon* questions")[22] the death penalty. The defense must have the opportunity to "determine whether a prospective juror would under no circumstances recommend mercy in the event the defendant is found guilt of the capital crime charged"[23] and the prosecution has the opportunity to determine whether a prospective juror would refuse to impose the death penalty regardless of the evidence produced.[24]

b. Improper Questioning During *Voir Dire*

Voir dire questioning must be limited to inquiries designed to determine whether a prospective juror can or will render a fair and impartial verdict and is limited to inquiries directed to bases for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their peremptory strikes.[25] Additionally, a court may, but is not required to, disallow *voir dire* questions that present legal arguments.[26]

After the judge, state, and defense have examined the prospective jurors on *voir dire*, the court will proceed to juror selection.[27]

2. Juror Selection

a. Challenges for Cause

A challenge for cause is "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons."[28]

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16 ALA. R. CRIM. P. 18.4(d).

17 *Ex parte* Dailey, 828 So. 2d 340, 342 (Ala. 2001).

18 Turner v. Murray, 476 U.S. 28, 36-37 (1986) ("[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."); *see also* Dobyne v. State, 805 So. 2d 733, 751 (Ala. Crim. App. 2000).

19 *See, e.g.*, Carruth v. State, 2005 WL 2046334 (Ala. Crim. App. Aug. 26, 2005).

20 *Ex parte* Ellington, 580 So. 2d 1367 (Ala. 1990).

21 *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

22 *See* Morgan v. Illinois, 504 U.S. 719 (1992).

23 Bracewell v. State, 506 So. 2d 354, 358 (Ala. Crim. App. 1986) (quoting 47 AM. JUR. 2D *Jury* § 290 (1969)).

24 ALA. CODE § 12-16-152 (2006).

25 ALA. R. CRIM. P. 18.4(d).

26 Slinker v. State, 344 So. 2d 1264 (Ala. Crim. App. 1977).

27 ALA. R. CRIM. P. 18.4.

There are two types of challenges for cause: (1) challenges based on a prospective juror's qualifications to serve as a juror pursuant to Ala. Code § 12-16-150; and (2) challenges based upon the reasonable appearance "that the prospective juror cannot or will not render a fair and impartial verdict."[29]

Ala. Code § 12-16-150 provides that the state or defense may challenge a juror in a criminal case for the following reasons:

(1) That the person has not been a resident householder or freeholder of the county for the last preceding six months;
(2) That s/he is not a citizen of Alabama;
(3) That s/he has been indicted within the last 12 months for felony or an offense of the same character as that with which the defendant is charged;
(4) That s/he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured;
(5) That s/he has been convicted of a felony;
(6) That s/he has given an interest in the conviction or acquittal of the defendant or has made any promise or given any assurance that s/he will convict or acquit the defendant;
(7) That s/he has a fixed opinion as to the guilt or innocence of the defendant which would bias his or her verdict;
(8) That s/he is under 19 years of age;
(9) That s/he is of unsound mind; and
(10) That s/he is a witness for the other party.[30]

The statutorily enumerated reasons listed above are not exhaustive. A potential juror may be challenged for cause on a ground not specifically enumerated by statute, but recognized at common law.[31] For example, either party may challenge a potential juror for cause if that potential juror is not "qualified."[32] Under Ala. Code § 12-16-60, a qualified juror is one who is "generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment." In addition, a qualified juror must be a United States citizen, a resident of the county for more than twelve months, over nineteen years of age, able to read, speak, and understand English, physically and mentally healthy enough to serve on a jury, and not have lost the right to vote by conviction for an offense involving "moral turpitude."[33]

The state and/or defense also may challenge a juror for cause based upon his/her views and opinions on the death penalty or other views and opinions relevant to the case. The state may challenge for cause if a potential juror would refuse to impose the death penalty regardless of the evidence produced, has a fixed opinion against penitentiary punishment,

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[28] BLACK'S LAW DICTIONARY 157 (6th ed. 1991).
[29] ALA. R. CRIM. P. 18.4(e).
[30] ALA. CODE § 12-16-150 (2006).
[31] *Ex parte* Poole, 497 So. 2d 537, 543 (Ala. 1986).
[32] *Id.*; *see also* Giles v. State, 906 So. 2d 963, 980 (Ala. Crim. App. 2004).
[33] ALA. CODE § 12-16-60 (1975).

or thinks that a conviction should not be based on circumstantial evidence.[34] The defense is entitled to challenge for cause those potential jurors who would automatically impose a sentence of death upon finding the defendant guilty of capital murder.[35]

The standard for determining whether a juror should be disqualified based upon his/her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his[/her] duties as a juror in accordance with his[/her] instructions and his/her oath.'"[36] "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment."[37] Consequently, if a prospective juror expresses a conscientious opposition to capital punishment, s/he cannot be automatically disqualified,[38] but if s/he states unambiguously that s/he would automatically vote against the imposition of capital punishment, notwithstanding the evidence introduced by the parties or the law charged by the judge, s/he can be excluded from serving on the jury.[39] Likewise, if a potential juror states that s/he would automatically vote for the death penalty if the defendant was found guilty of the capital offense, the trial judge should excuse the juror for cause.[40]

Similarly, the test used to disqualify a juror based upon other opinions or views is whether "the juror can eliminate the influence of his scruples and render a verdict according to the evidence."[41] "Thus, where a juror states that he has opinions but that he would try the case fairly and impartially according to the law and the evidence and that he would not allow his opinion to influence his decision, it is not error for a trial judge to deny a challenge for cause."[42]

b. Peremptory Challenges

After *voir dire* has been completed and the parties have exercised their challenges for cause, the court will compile a list of at least 36 prospective jurors who are competent to try the defendant, unless the parties consent to a lesser number.[43] The omission of any qualified prospective jurors from the list must be made on a nondiscriminatory basis.[44] If more than two alternate jurors are required, the number of names on the list must increase by two for each additional alternate juror needed.[45] In cases where two or more capital

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[34] ALA. CODE § 12-16-152 (2006).

[35] Morgan v. Illinois, 504 U.S. 719, 729 (1992); s*ee also* Duke v. State, 889 So. 2d 1, 20 (Ala. Crim. App. 2002).

[36] Wainwright v. Witt, 469 U.S. 412 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)); *see also* Perkins v. State, 808 So. 2d 1041, 1071-73 (Ala. Crim. App. 1999).

[37] Wilson v. State, 777 So. 2d 856, 827-28 (Ala. Crim. App. 1999) (quoting Dutton v. Brown, 812 F.2d 593, 595 (10th Cir.)).

[38] Witherspoon v. Illinois, 391 U.S. 510, 541 (1968) (finding that it is unconstitutional to excuse a juror simply because s/he is conscientiously opposed to capital punishment).

[39] U.S. CONST. amends. VI, XIV; Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981).

[40] Bracewell v. State, 506 So. 2d 354 (Ala. Crim. App. 1986).

[41] Perkins v. State, 808 So. 2d 1041, 1073-74 (Ala. Crim. App. 1999).

[42] *Perkins*, 808 So. 2d at 1074.

[43] ALA. R. CRIM. P. 18.4(f)(1).

[44] *Id.*

[45] ALA. R. CRIM. P. 18.4(g)(2).

defendants are tried jointly for a capital offense, twelve names must be added to the potential jury list for every additional defendant.[46]

A peremptory challenge is "a request from a party that a judge not allow a certain prospective juror to be a member of the jury."[47] After the court has compiled the list of prospective jurors, the district attorney and defense will alternate striking potential jurors from the jury pool until the appropriate number of jurors and alternate jurors remain, with the prosecution striking first.[48] If more than one defendant is being tried jointly, the district attorney will strike first, followed by one defendant. The district attorney then strikes again, followed by the second defendant.[49] If any defendant fails or refuses to exercise his/her strike, the presiding judge will exercise the defendant's strike on his/her behalf.[50]

The scope of juror questioning is left to the trial court's discretion,[51] but the court must give attorneys sufficient latitude for the intelligent exercise of peremptory challenges.[52] Neither side is allowed to use its peremptory challenges in a discriminatory manner:[53] "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status."[54] If the state or defense believes that jurors are being struck based on their race, color, religion, sex, national origin, or economic status, the party may oppose the strike and challenge the use of the peremptory challenge.[55] In order to block the strike, the opposing party must establish a *prima facie* case of discrimination.[56] A *prima facie* case is established when the opponent of the strike produces "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[57] "The court is to consider 'all relevant circumstances' which could lead to an inference of discrimination."[58] While not exhaustive, the following list is illustrative of the types of evidence that can be used to raise the inference of discrimination:

(1) "Evidence that the 'jurors in question share[d] only this one characteristic —their membership in the group—and that in all other respects they [were] as heterogeneous as the community as a whole'";
(2) "A pattern of strikes against black jurors on the particular venire";

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46 ALA. R. CRIM. P. 18.4(f)(2).
47 BLACK'S LAW DICTIONARY 157 (6th ed. 1991).
48 ALA. R. CRIM. P. 18.4(f)(1).
49 ALA. R. CRIM. P. 18.4(f)(2).
50 ALA. R. CRIM. P. 18. (f)(3).
51 Smith v. State, 292 So. 2d 109 (Ala. 1974); Redus v. State, 9 So. 2d 914 (Ala. 1942); Massey v. State, 272 So. 2d 271 (Ala. Crim. App. 1972).
52 Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981); Stone v. State, 241 So. 2d 855 (Ala. Crim. App. 1970).
53 ALA. CODE §§ 12-16-55, -56 (2006); *see also Ex parte* Branch, 526 So. 2d 609 (Ala. 1987); *Ex parte* Jackson, 516 So. 2d 768 (Ala. 1986).
54 ALA. CODE § 12-16-56 (2006).
55 Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the prosecution may not engage in race discrimination); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that the defendant may not engage in racial discrimination).
56 *Batson*, 476 U.S. at 89.
57 Johnson v. California, 125 S. Ct. 2410, 2417 (2005).
58 *Batson*, 476 U.S. at 93 (citing Washington v. Davis, 426 U.S. 229, 239-42 (1976)).

(3) "The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire";
(4) "The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire";
(5) "The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions";
(6) "Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner";
(7) "Disparate examination of members of the venire";
(8) "Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury"; and
(9) "The state used peremptory challenges to dismiss all or most black jurors."[59]

If the opposing party establishes a *prima facie* case, then the other party must provide a "clear, specific, and legitimate" race and/or gender-neutral explanation for the exercise of the challenge.[60] The "burden of production, which shifts to the State once a prima facie case has been presented, increases in proportion to the strength of the defendant's prima facie case."[61] A prosecutor's mere assertion of good faith is insufficient to rebut a *prima facie* case of discrimination,[62] as are "vague,"[63] "whimsical or fanciful"[64] explanations. While not exhaustive, the following list is illustrative of the types of evidence that may be used to overcome the presumption of discrimination:

(1) "The state challenged non-black jurors with the same or similar characteristics as the black jurors who were struck"; and
(2) "There is no evidence of a pattern of strikes used to challenge black jurors."[65]

Once the prosecutor has articulated a nondiscriminatory reason for challenging the juror(s) in question, the defense may offer evidence to demonstrate that the explanation is merely a sham or pretext. While not an exhaustive list, the following are illustrative of the types of evidence that can be used to demonstrate sham or pretext:

(1) The reasons given are not related to the facts of the case;
(2) There was a lack of questioning to the challenged juror, or a lack of meaningful questions;
(3) Disparate treatment – persons with the same or similar characteristics as the challenged juror were not struck;
(4) Disparate examination of members of the venire;

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59 *Ex parte* Branch, 526 So. 2d 609, 622-23 (Ala. 1987) (citations and footnotes omitted).
60 *Batson*, 476 U.S. at 97; *see also Ex parte* Bird, 594 So. 2d 676 (Ala. 1991).
61 *Bird*, 594 So. 2d at 676.
62 Bui v. Haley, 321 F.3d 1304 (11th Cir. 2003).
63 *Bui*, at 1316.
64 *Ex parte* Jackson, 516 So. 2d 768, 772 (Ala. 1987).
65 *Ex parte* Branch, 526 So. 2d 609, 623 (Ala. 1987).

(5) The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire; and

(6) "'[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.'"[66]

The judge then must determine whether the explanations are "sufficient to overcome the presumption of bias."[67]

3. Appellate Review of Jury Selection

Trial courts are vested with great discretion in making decisions about *voir dire* and jury selection, including challenges for cause[68] and peremptory challenges, and generally will not be overturned unless the appellate court finds that the trial court abused its discretion.[69]

B. The Pattern Jury Instructions and Case Law Interpretation of the Instructions

When charging the jury, the court may state the law of the case and disputed evidence, but it is not allowed to discuss the effect of the testimony, unless required to do so by one of the parties.[70]

Upon the conclusion of evidence, or at any other time during the trial as the court reasonably directs, either or both parties may file written requests that the court instruct the jury on the law as set forth in those requests.[71] In the sentencing phase of a capital trial, the court may choose to instruct the jury at the beginning of the proceeding.[72] According to the Alabama Rules of Criminal Procedure, the court may, but is not required to, instruct the jury again after the arguments are complete.[73] In *Frazier v. State*, however, the Alabama Court of Criminal Appeals held that "[h]owever helpful preliminary instructions may be . . . they cannot serve as a substitute for a complete jury charge . . . after counsel have completed their arguments."[74]

The Alabama Bar Institute for Continuing Legal Education published the "Alabama Pattern Jury Instructions—Criminal"[75] and the "Proposed Pattern Jury Instructions for Use in the Sentence Phase of Capital Cases Tried Under Act No. 81-178"[76] for use in the guilt and sentencing phases of capital trials. The Alabama Supreme Court has been clear

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66 *Id.* at 624.
67 *Id.*
68 Adams v. State, 2003 WL 22026043, *9 (Ala. Crim. App. Aug. 29, 2003).
69 Boyd v. State, 715 So. 2d 825 (Ala. Crim. App. 1997); U.S. v. Romero, 780 F.2d 981, 984 (11th Cir. 1986).
70 ALA. CODE § 12-16-11 (2006).
71 ALA. R. CRIM. P. 21.1.
72 *Id.*
73 *Id.*
74 Frazier v. State, 758 So. 2d 577, 609 (Ala. Crim. App. 1999).
75 ALABAMA PATTERN JURY INSTRUCTIONS – CRIMINAL (3d ed. 1994).
76 PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT. NO. 81-178 (1982).

that "each case is somewhat different,"[77] however, and that the pattern instructions are "to be considered patterns only" and "should be altered or changed as circumstances indicate."[78]

As a result, the Alabama Rules of Criminal Procedure permit the state and defense to help the judge tailor the pattern instructions or design new instructions for a particular case by requesting in writing that the judge instruct the jury on certain aspects of the law.[79] The written requests must be submitted to the judge "upon the conclusion of evidence, or at any other time during the trial as the court reasonably directs," and copies of the requests must be given to opposing counsel.[80] The judge has total discretion to grant or deny any written requests for specific jury instructions; therefore, s/he decides the content of the actual instructions charged to the jury—both orally and in writing.[81]

According to the section 12-16-13 of the Alabama Code and Alabama Rule of Criminal Procedure 21.1, the judge must write "given" or "refused" on each of the parties' jury instruction requests.[82] The court will read to the jury each request marked "given" without referencing which party requested the instruction. The jury generally will not be provided with a written list of charges pending against the defendant or the "given" jury instructions, but the court may submit the written charges to the jury in a "complex" case.[83] Every oral charge to the jury must be recorded.

The court's refusal to give a requested jury instruction is not cause for reversal, even if the requested instruction is a correct statement of the law, so long as it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in other charges given at the request of the parties. Additional explanatory jury instructions are not required,[84] but if the court requests them, the instructions should be submitted to the jury in writing. [85] Additional explanatory jury instructions taken from the "Alabama Pattern Jury Instructions – Criminal" are an exception to this general rule.[86]

Once the court has instructed the jury, the jurors will retire to determine the defendant's guilt and/or punishment.

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[77] ALABAMA PATTERN JURY INSTRUCTIONS – CRIMINAL, at i-ii (3rd ed. 1994) (preface).

[78] Order of the Supreme Court of Alabama Approving Use of Alabama Pattern Jury Instructions (1982); *see also Ex parte* Hagood, 777 So. 2d 214, 219 (Ala. 1999) (concluding that past precedent holding that "no reversible error will be found when the trial court follows . . . pattern jury instructions[s]" was "overly broad"); *Ex parte* Wood, 715 So. 2d 819, 824 (Ala. 1998) (encouraging courts to "deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case" where use of the pattern instructions would be "misleading or erroneous").

[79] ALA. R. CRIM. P. 21.1.

[80] *Id.*

[81] *Id.*; *see also* U.S. v. Williams, 875 F.2d 846 (11th Cir. 1989).

[82] ALA. CODE § 12-16-13 (2006); ALA. R. CRIM. P. 21.1.

[83] ALA. R. CRIM. P. 21.1; Gaddy v. State, 698 So. 2d 1100, 1147 (Ala. Crim. App. 1995) ("Rule 21.1 . . . superseded the portion of § 12-16-13 . . . . Therefore, if the appellant's assumption from a silent record that the instructions did not go with the jury into its deliberations at guilt phase was correct, no error occurred.")

[84] ALA. R. CRIM. P. 21.1.

[85] ALA. R. CRIM. P. 21.2.

[86] *Id.*

If the court fails to give a written instruction or gives an erroneous, misleading, incomplete, or improper oral instruction, the aggrieved party should state his or her objection and its grounds before the jury retires to deliberate.[87]

The following sections will provide an overview of the current pattern jury instructions. This overview will be followed by an in-depth description of certain portions of the pattern jury instructions combined with a discussion of the interpretation and application of the jury instructions.

1. The Application of the Pattern Jury Instructions

While the 1994 version of the "Pattern Jury Instructions – Criminal" does not include an introductory discussion, the 1982 Proposed Pattern Jury Instructions begin by explaining the bifurcated nature of a capital trial—guilt/innocence phase and the penalty phase—and describe the jury's role during each phase.[88] The pattern instructions suggest that the trial judge should consider giving an instruction at the beginning of the guilt stage trial or at some place during the oral charge to the jury at the end of the guilt stage, or both, to explain that the jury's only concern is to determine "whether the state has proven beyond a reasonable doubt that the defendant is guilty of the capital offense." "[I]f a defendant is convicted of a capital offense additional proceedings will be held to determine whether his punishment is to be life imprisonment without parole or death."[89]

The Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried under Act. No. 81-178 goes on to instruct the sentencing jury that "in making your recommendation concerning what the punishment should be, you must determine whether any aggravating circumstance exists, and if so, you must determine whether any mitigating circumstance or circumstances exist."[90] The instructions direct the jury to "consider [when assessing the defendant's punishment] the evidence presented at this sentencing hearing" and "any evidence that was presented during the guilt phase of the trial that is relevant to the existence of any aggravating or mitigating circumstance."[91] The instructions list, and in two cases explain, eight of the ten statutory aggravating circumstances that the jury may consider.[92]

The instructions provide for the imposition of a sentence of death only if the jury finds beyond a reasonable doubt the existence of one or more aggravating circumstances.[93] The instructions also explain that if the jury finds that the aggravating circumstance has not been proven beyond a reasonable doubt, it *must* recommend a sentence of life imprisonment without parole.[94]

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87 ALA. R. CRIM. P. 21.3.

88 PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE GUILT STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982).

89 *Id.* at 6-7.

90 PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982).

91 *Id.* at 82.

92 *Id.* at 83-86.

93 *Id.* at 86.

94 *Id.* at 87.

If the jury finds that the state has proved one or more aggravating circumstances beyond a reasonable doubt, the jury must "consider and determine the mitigating circumstances."[95] The instructions list, and in one case explain, the statutory mitigating circumstances.[96]

The instructions inform the jury that it may return a verdict of life imprisonment without parole or death.[97] The instructions require that at least ten of the twelve jurors must vote for death before a verdict recommending a sentence of death may be returned.[98] A concurrence of at least seven jurors is required to return a verdict recommending a sentence of life imprisonment without parole.[99] The verdict form must contain the numerical sentencing vote and be signed by the jury foreperson.[100]

2. Aggravating Circumstances

a. Pattern Jury Instructions

The instructions direct the jury that the punishment to "be imposed upon the defendant depends on whether any aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances."[101] The instructions describe an "aggravating circumstance" as "a circumstance specified by law which indicates, or tends to indicate, that the defendant should be sentenced to death."[102]

The jury instructions list eight of the ten statutory aggravating circumstances for the offense of capital murder. The statutory aggravating circumstances listed in the instructions are as follows:

(1) The capital offense was committed by a person under sentence of imprisonment (Ala. Code § 13A-5-49(1));
(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person (Ala. Code § 13A-5-49(2));
(3) The defendant knowingly created a great risk of death to many persons (Ala. Code § 13A-5-49(3));
(4) The capital offense was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping (Ala. Code § 13A-5-49(4));
(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (Ala. Code § 13A-5-49(5));

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95 *Id.*
96 *Id.* at 87-89.
97 *Id.* at 91-93.
98 *Id.* at 91-92.
99 *Id.* at 92.
100 *Id.* at 93-94.
101 *Id.* at 81-82.
102 *Id.* at 82.

(6) The capital offense was committed for pecuniary gain (Ala. Code § 13A-5-49(6));
(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (Ala. Code § 13A-5-49(7)); and
(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses (Ala. Code § 13A-5-49(8)).[103]

The pattern jury instructions do not include the following two statutory aggravating circumstances because they were added as aggravating circumstances after the pattern jury instructions were drafted, but they are included in the statute listing aggravating factors:

(9) The defendant intentionally causes the death or two or more persons by one act or pursuant to one scheme or course of conduct (Ala. Code § 13A-5-49(9)); and
(10) The capital offense was one of a series of intentional killings committed by the defendant (Ala. Code § 13A-5-49(10)).[104]

The jury may not consider nonstatutory aggravating factors.[105]

b. Interpretation of the Aggravating Circumstances

i. Aggravating Circumstance #1: The capital offense was committed by a person under sentence of imprisonment

The pattern jury instructions define "under sentence of imprisonment" as "serving a term of imprisonment while under a suspended sentence, while on probation or parole or while on work release, furlough, escape or any other type of release or freedom while or after serving a term of imprisonment, other than unconditioned release and freedom after expiration of term of sentence."[106]

Misdemeanor convictions may be used to find this aggravating circumstance, although they may lessen the weight the factfinder affords the aggravating circumstance.[107]

ii. Aggravating Circumstance #2: The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person

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[103] *Id.* at 84-85.
[104] ALA. CODE § 13A-5-49(9), (10) (2006).
[105] *Ex parte* Stewart, 659 So. 2d 122, 128 (Ala. 1993); s*ee also* Ponder v. State, 688 So. 2d 280, 284 (Ala. Crim. App. 1996); Tomlin v. State, 443 So. 2d 47, 58 (Ala. Crim. App. 1979).
[106] ALA. CODE § 13A-5-39(7) (2006); PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 84.
[107] *Ex parte* Burgess, 723 So. 2d 770, 772 (Ala. 1998); *see also* Stallworth v. State, 868 So. 2d 1128, 1174 (Ala. Crim. App. 2001).

Section 13A-5-39(6) of the Alabama Code defines the terms "previously convicted" as a conviction "occurring before the date of the sentencing hearing."[108] The previous capital offense or felony must have involved the use or threat of violence to the person.[109] The "potential for violence" is not enough to justify the finding of this aggravating circumstance.[110] Some of the crimes Alabama courts have found to uphold a finding of this aggravating circumstance include robbery, capital murder, manslaughter, murder, and criminal assault.[111]

A plea of nolo contendere to a prior felony is not enough to find that this aggravating circumstance exists,[112] nor are juvenile adjudications.[113] A prior conviction when the defendant did not have the benefit of counsel also cannot be used in finding this aggravating circumstance.[114]

There is no time limitation on when the prior felony occurred.[115]

iii. Aggravating Circumstance #3: The defendant knowingly created a great risk of death to many persons

The term "many" has not been defined statutorily or in case law, but Alabama courts have held that "the intended meaning of the phrase at issue is clear on its face."[116] At a minimum, more than two people must have been at great risk of death in order to find the existence of this aggravating circumstance.[117] In addition to capital murder victims, intended, but surviving victims may be used to determine whether the "defendant knowingly created a great risk of death to many persons."[118]

The "great risk of death to many persons" must have been "certainly foreseeable."[119]

iv. Aggravating Circumstance #4: The capital offense was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping

The prosecution may use an aggravating circumstance charged in the capital indictment as the aggravating circumstance of that charge, i.e., if a defendant is charged with the capital crime of murder during a robbery, the robbery also may be used to find the

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[108] ALA. CODE § 13A-5-39(6) (2006); s*ee also Ex parte* McWilliams, 640 So. 2d 1015, 1023 (Ala. Crim. App. 1993).
[109] Knight v. State, 907 So. 2d 470, 486 (Ala. Crim. App. 2004).
[110] Hadley v. State, 575 So. 2d 145, 157 (Ala. Crim. App. 1990).
[111] *Id.* at 156-57.
[112] Turner v. State, 924 So. 2d 737, at 790-91 (Ala. Crim. App. 2002).
[113] Baldwin v. State, 456 So. 2d 117, 125 (Ala. Crim. App. 1983).
[114] *See, e.g.*, Gavin v. State, 891 So. 2d 907, 951-52 (Ala. Crim. App. 2003).
[115] Smith v. State, 698 So. 2d 189, 212 (Ala. Crim. App. 1996).
[116] Williams v. State, 710 So. 2d 1276, 1341 (Ala. Crim. App. 1996); *see also* Wilson v. State, 777 So. 2d 856, 922 (Ala. Crim. App. 2000).
[117] Ashlock v. State, 367 So. 2d 560, 561 (Ala. Crim. App. 1979).
[118] Smith v. State, 2000 WL 1868419 (Ala. Crim. App. Dec. 22, 2000), *rev'd in part on other ground*s, 2003 WL 1145475 (Ala. 2003).
[119] McGahee v. State, 554 So. 2d 454, 470 (Ala. Crim. App. 1989).

existence of this aggravating factor.[120] In addition, this aggravating circumstance may be applied more than once in a given case if there is more than one underlying enumerated felony;[121] in this circumstance, the jury may give this aggravating circumstance additional weight.[122]

The court should provide the jury with the statutory definitions of the underlying felony or felonies involved (rape, robbery, burglary, or kidnapping).[123] The court does not need to define felonies that are not involved in the case.[124]

The Supreme Court of Alabama has held that this aggravating circumstance does not need to be proven beyond a reasonable doubt at the sentencing phase of the capital trial, so long as the capital defendant was found guilty beyond a reasonable doubt of a capital offense that overlaps with the aggravating circumstance.[125]

v. Aggravating Circumstance #5: The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody

The jury may find this aggravating circumstance when the defendant commits a capital offense for the purpose of helping another person (1) avoid or prevent a lawful arrest or (2) effect an escape from custody.[126] In *Murray v. State*, the Alabama Court of Criminal Appeals found that testimony from a police officer that the murder occurred while he and his partner were trying to arrest the defendant is sufficient to support a finding of this aggravating circumstance.[127]

Being adjudicated guilty of the capital murder of a police officer does not automatically mean that this aggravating circumstance exists.[128]

vi. Aggravating Circumstance #6: The capital offense was committed for pecuniary gain

This aggravating circumstance applies to a variety of crimes "committed with the hope of financial benefit, ranging from 'murder for hire' to an heir killing his benefactor to gain his inheritance."[129] The term "pecuniary gain" can include anything that results in economic gain and encompasses more than just money.[130] Because Aggravating Circumstance #4 ("the capital offense was committed while the defendant was engaged in

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[120] Kennedy v. State, 472 So. 2d 1092, 1104 (Ala. Crim. App. 1984).
[121] Stewart v. State, 730 So. 2d 1203, 1212 (Ala. Crim. App. 1997).
[122] Powell v. State, 631 So. 2d 289, 294 (Ala. Crim. App. 1993).
[123] Duren v. State, 507 So. 2d 111, 115 (Ala. Crim. App. 1986).
[124] Grayson v. State, 675 So. 2d 516, 528 (Ala. Crim. App. 1996).
[125] Waldrop v. State, 859 So. 2d 1181, 1188 (Ala. 2002).
[126] Crowe v. State, 485 So. 2d 351, 367 (Ala. Crim. App. 1984), *rev'd on other grounds*, 485 So. 2d 373 (Ala. 1985).
[127] Murray v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), *rev'd on other grounds*, 455 So.2d 72 (Ala. 1984).
[128] McNabb v. State, 887 So. 2d 929, 995 (Ala. Crim. App. 2001).
[129] Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1978).
[130] Henderson v. State, 584 So. 2d 841, 859 (Ala. Crim. App. 1988).

or was an accomplice in the commission of or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping") includes robbery, the Alabama Court of Criminal Appeals has held that murder in the commission of a robbery cannot be used as the basis of this aggravating circumstance, however.[131]

In a "murder for hire" situation, this aggravating circumstance may apply to the hirer or the hiree.[132] In addition, this aggravating circumstance is considered to be proven automatically if the defendant is found guilty of the capital offense of murder for hire.[133]

vii. Aggravating Circumstance #7: The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws

Being adjudicated guilty of the capital murder of a police officer does not mean that this aggravating circumstance automatically exists.[134]

viii. Aggravating Circumstance #8: The capital offense was especially heinous, atrocious or cruel compared to other capital offenses

The pattern jury instructions define "heinous" as "extremely wicked or shockingly evil;" "atrocious" as "outrageously wicked and violent;" and "cruel" as "designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." The instructions further explain this aggravating circumstance by noting that:

> [w]hat is intended to be included in the aggravating circumstance is those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be a conscienceless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by the aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a capital offense is committed.[135]

Because there is nothing inherent in the words "especially heinous, atrocious or cruel" to place any restraint on the arbitrary and capricious imposition of the death penalty, the Supreme Court of Alabama has held that this aggravating circumstance applies only to

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[131] *Id.*
[132] Haney v. State, 603 So. 2d 368, 380 (Ala. Crim. App. 1991).
[133] *Id.*
[134] McNabb v. State, 887 So. 2d 929, 995 (Ala. Crim. App. 2001).
[135] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 85-86.

"those conscienceless or pitiless homicides which are unnecessarily torturous to the victim."[136]

The jury must be instructed on the meaning of this aggravating circumstance; the language in *Ex parte Kyzer* explaining that this aggravator applies only to "those conscienceless or pitiless homicides which are unnecessarily torturous to the victim" is adequate[137] to give this aggravator a "consistent and narrow interpretation."[138] The Court of Criminal Appeals has found in at least one instance, however, that the trial court's failure to define the terms "heinous, atrocious or cruel" or to state the *Ex parte Kyzer* limitation was adequate, even though the instructions could have been "more thorough."[139] Furthermore, despite the statutory language mandating comparison of the crime to other capital offenses, the trial court is not required to "inform the jury of other capital offenses where the death penalty was based on a finding of the existence of the aggravating circumstance."[140] The Alabama Supreme Court has explained that "[a]lthough a very narrow and literal reading of [§ 13A-5-49(8)] may suggest that such a comparison [between the capital offense at issue and other capital offenses] is required, it would be virtually impossible for the court to implement. Charging the jury on pertinent facts of 'other capital cases' would unduly burden the court. It would be unworkable for the court and would thoroughly confuse the jury."[141]

One factor that is indicative of an "especially heinous, atrocious or cruel" capital murder is the infliction of violence beyond what is needed to cause death.[142] This can be an additional injury of a nature different from what caused death or by the repeated infliction of injuries of the same nature that caused death.[143] In addition, the "injurious acts" must have taken enough time to cause "prolonged suffering" and "the victim must be conscious or aware when at least some of the additional or repeated violence is inflicted."[144] In *Ex parte Clark*, the Supreme Court of Alabama held that not only must the victim have been alive, but s/he must have been conscious and "aware of what was happening to them."[145]

In *Ex parte Bankhead*, the Supreme Court of Alabama held that this aggravating circumstance is focused not on the defendant's level of participation in the crime, but instead is focused on the manner on the killing.[146]

The murder of two or more victims is not, by definition, "especially heinous, atrocious, or cruel."[147]

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[136] *Ex parte* Kyzer, 399 So. 2d 330, 333-34 (Ala. 1981).
[137] Bui v. State, 551 So. 2d 1094, 1119 (Ala. Crim. App. 1988); *see also* Lindsey v. Thigpen, 875 F.2d 1509, 1514 (11th Cir. 1989).
[138] Norris v. State, 793 So. 2d 847, 853 (Ala. Crim. App. 1999).
[139] Ziegler v. State, 886 So. 2d 127, 145-46 (Ala. Crim. App. 2003).
[140] *Ex parte* Key, 891 So.2d 384, 389 (Ala. 2004).
[141] *Id.* (quoting *Ex parte* Bankhead, 585 So.2d 112 (Ala.1991)).
[142] Norris v. State, 793 So.2d 847, 854 (Ala. Crim. App. 1999).
[143] *Id.*
[144] *Id.* at 854.
[145] *Ex parte* Clark, 728 So. 2d 1126, 1139 (Ala. 1998).
[146] *Ex parte* Bankhead, 585 So. 2d 112, 125 (Ala. 1991), *overruled on other grounds*, 625 So. 2d 1146 (Ala. 1993).

Lastly, certain "execution style" murders can be "especially heinous, atrocious or cruel."[148]

ix. Aggravating Circumstance #9: The defendant intentionally causes the death or two or more persons by one act or pursuant to one scheme or course of conduct

A thorough and exhaustive review of the relevant published Alabama case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

x. Aggravating Circumstance #10: The capital offense was one of a series of intentional killings committed by the defendant

A thorough and exhaustive review of the relevant published Alabama case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

c. The Burden of Proof and Unanimity of Findings as to Aggravating Circumstances

In order to recommend a sentence of death, the pattern jury instructions require the jury to find "beyond a reasonable doubt" at least one or more statutory aggravating circumstance(s).[149] In addition, the pattern jury instructions include a discussion of the necessity for unanimity, stating that "before you can even consider recommending that the defendant's punishment be death, *each and every one of you* must be convinced beyond a reasonable doubt based on the evidence that at least one or more of the aggravating circumstances exist."[150]

3. Mitigating Circumstances

a. Pattern Jury Instructions

The instructions advise the jury that if it finds that the prosecution proved that one or more aggravating circumstances exist beyond a reasonable doubt, the jury "must proceed to consider and determine the mitigating circumstances."[151] The instructions define the term "mitigating circumstance" as "any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without parole instead of death."[152] The pattern jury instructions provide a list, and in one case an explanation, of the statutory mitigating circumstances.

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[147] *Ex parte* Kyzer, 399 So. 2d 330, 333 (Ala. 1981); s*ee also Norris*, 793 So. 2d at 854 (finding that three murders are not automatically "heinous, atrocious or cruel").
[148] *See, e.g.*, Rieber v. State, 663 So. 2d 985, 992-93 (Ala. Crim. App. 1994).
[149] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 82-84.
[150] *Id.* at 86 (emphasis added).
[151] *Id.* at 87.
[152] *Id.* at 82.

The statutory mitigating circumstances are:

(1) The defendant has no significant history of prior criminal activity (Ala. Code § 13A-5-51(1));
(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (Ala. Code. § 13A-5-51(2));
(3) The victim was a participant in the defendant's conduct or consented to the act (Ala. Code. § 13A-5-51(3));
(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor (Ala. Code. § 13A-5-51(4));
(5) The defendant acted under extreme duress or under the substantial domination of another person (Ala. Code. § 13A-5-51(5));
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (Ala. Code. § 13A-5-51(6)); and
(7) The age of the defendant at the time of the crime (Ala. Code. § 13A-5-51(7)).[153]

All of the statutory mitigating circumstances are provided without explanatory comment, except for mitigating circumstance #6 ("the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"). The pattern instructions define this mitigating circumstance by stating that:

> A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know right from wrong generally, or to know what he is doing at a given time, or to know what he is doing is wrong. A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist the defendant's capacity to appreciate does not have to have been totally obliterated. It is enough that it was substantially lessened or substantially diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired, since a person may appreciate that his actions are wrong and still lack the capacity to refrain from doing them.[154]

[153] *Id.* at 87-89.
[154] *Id.* at 88-89.

The pattern instructions go on to explain that a mitigating circumstance does not have to be included in the statutory list to be considered by the jury: "In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death."[155]

b. Interpretation of the Identification and Consideration of Specific Mitigating Circumstances

Capital defendants may introduce any relevant mitigating evidence.[156] In addition to the statutorily specified mitigating circumstances, mitigating circumstances may include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant chooses to offer as a basis for a sentence of life imprisonment without parole instead of death.[157] "The sentencer may determine the weight to be given relevant mitigating evidence. But (he) may not give it no weight by excluding such evidence from (his) consideration."[158] Whether evidence is found to be mitigating in fact is in the discretion of the sentencing authority.[159]

There is no requirement that the judge read the entire list of statutory mitigating circumstances to the jury where no evidence supports a circumstance,[160] but the judge may choose to read the entire list, even when the defendant fails to present evidence in support of one or more of them.[161]

The failure of a trial judge to "specifically refer to the non-statutory mitigating factors," however, "does not evidence his failure or refusal to consider them." "The trial court's failure to specifically mention non-statutory mitigating circumstances may be interpreted merely as a conclusion on the judge's part that non-statutory mitigating circumstances were insufficient to outweigh the aggravating circumstances."[162]

i. Mitigating Circumstance #1: The defendant has no significant history of prior criminal activity

This mitigating circumstance may be present, regardless of whether a defendant has a history of prior criminal activity, so long as it is not a *significant* history.[163] As the Alabama Supreme Court explained, "The key word in this provision is Significant. . . .

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[155] *Id.* at 89.

[156] Haney v. State, 603 So. 2d 368, 389 (Ala. Crim. App. 1991); Clisby v. State, 456 So. 2d 99, 101 (Ala. Crim. App. 1983).

[157] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 89.

[158] *Clisby*, 456 So. 2d at 102 (quoting Eddings v. Oklahoma, 455 U.S. 104, (1982)).

[159] Ferguson v. State, 814 So. 2d 925, 960 (Ala. Crim. App. 2000); Burgess v. State, 723 So. 2d 742, 768 (Ala. Crim. App. 1997).

[160] *Burgess*, 723 So. 2d at 768.

[161] Perkins v. State, 808 So. 2d 1041, 1134 (Ala. Crim. App. 1999), *aff'd*, 808 So.2d 1143 (Ala. 2001), *vacated on other grounds by* Perkins v. Alabama, 536 U.S. 953 (2002).

[162] Dobard v. State, 435 So. 2d 1338, 1346 (Ala. Crim. App. 1982).

[163] Cook v. State, 369 So. 2d 1251, 1257 (Ala. 1978).

The legislature has indicated that lack of a Significant criminal history should operate in a convicted individual's favor. A court cannot qualify this provision by relying on prior criminal activity which does not rise to the level established by the legislature."[164]

Only criminal convictions can be used to negate the statutory mitigating circumstance of no significant history of criminal activity.[165] Prior bad acts, prior criminal activity,[166] prior arrests,[167] and juvenile adjudications[168] cannot be used to negate the existence of this mitigating circumstance, but they may be considered to diminish the weight that the factfinder accords it.[169] Prior misdemeanor convictions involving violence may be used by the state to rebut this mitigating circumstance,[170] although non-violent misdemeanors may not.[171]

ii. Mitigating Circumstance #2: The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance

The existence of a serious mental disorder on the date of the crime can be enough to demonstrate the existence of this mitigating circumstance.[172] Evidence of a personality disorder that causes "mood swings" and that might lead to "possible problems" is not enough to demonstrate that the defendant was under the influence of extreme mental or emotional disturbance, however.[173]

iii. Mitigating Circumstance #3: The victim was a participant in the defendant's conduct or consented to the act

Alabama courts have interpreted this mitigating circumstance as applying only "to instances where the individual killed is an active participant in the crime underlying the killing."[174]

iv. Mitigating Circumstance #4: The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor

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[164] *Id.*

[165] Hallford v. State, 548 So. 2d 526, 544 (Ala. Crim. App. 1988); *see also* Smith v. State, 727 So. 2d 147 (Ala. Crim. App. 1998), *aff'd*, 727 So. 2d 173 (Ala. 1999); Parker v. State, 587 So. 2d 1072, 1098 (Ala. Crim. App. 1991).

[166] Gamble v. State, 791 So. 2d 409,448 (Ala. Crim. App. 2000).

[167] Turner v. State, 924 So. 2d 737, 791 (Ala. Crim. App. 2002).

[168] *See, e.g.*, Freeman v. State, 651 So. 2d 576, 597-98 (Ala. Crim. App. 1994); *Ex parte* Davis, 718 So. 2d 1166, 1177-78 (Ala. 1998); Hodges v. State, 856 So. 2d 875, 892 (Ala. Crim. App. 2001).

[169] *Ex parte* Burgess, 811 So. 2d 617, 622-23 (Ala. 2000); McGriff v. State, 908 So. 2d 961, 1006 (Ala. Crim. App. 2000), *rev'd on other grounds*, 908 So. 2d 1024 (Ala. 2004).

[170] *See, e.g.*, Apicella v. State, 809 So. 2d 841, 862 (Ala. Crim. App. 2000); Williams v. State, 601 So. 2d 1062, 1084 (Ala. Crim. App. 1992); Stallworth v. State, 868 So. 2d 1128, 1173 (Ala. Crim. App. 2001).

[171] *Stallworth*, 868 So. 2d at 1173 (Ala. Crim. App. 2001); *Ex parte* Cook, 369 So. 2d 1251, 1257 (Ala. 1978).

[172] Magood v. Smith, 791 F.2d 1438, 1449-50 (11th Cir. 1986).

[173] Ferguson v. State, 814 So. 2d 925, 964 (Ala. Crim. App. 2000).

[174] *See, e.g.*, Jenkins v. State, 627 So. 2d 1034, 1052 (Ala. Crim. App. 1992); Tyson v. State, 784 So. 2d 328, 352-53 (Ala. Crim. App. 2000).

According to the Court of Criminal Appeals, this mitigating circumstance can apply to participants who had more than a minor role in the offense, so long as they were not the person who killed the victim(s).[175] In other circumstances, however, courts have found that this mitigating circumstance does not apply when the defendant did not "pull the trigger," but was substantially involved in the crime.[176]

v. Mitigating Circumstance #5: The defendant acted under extreme duress or under the substantial domination of another person

A thorough and exhaustive review of the relevant published Alabama case law has not revealed a judicial interpretation of this mitigating circumstance at the time of the release of this report.

vi. Mitigating Circumstance #6: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

A defendant attempting to prove this mitigating circumstance has a substantially smaller burden of proof than that which is required to prove that s/he is not guilty by reason of mental disease or defect during the guilt phase of a capital trial.[177]

Evidence that the defendant suffered from "some form of serious mental disorder" on the date of the crime is enough to find the existence of this mitigating circumstance.[178] Evidence of a personality disorder that causes "mood swings" and that might lead to "possible problems" is not enough to demonstrate that the defendant's ability to appreciate the criminality of his/her conduct or conform his/her conduct to the requirements of the law was substantially impaired.[179]

Voluntary intoxication will not constitute grounds for this mitigating circumstance, except where the defendant demonstrates that s/he was so intoxicated that s/he was rendered incapable of appreciating the criminality of his or her conduct.[180] Drug addition, however, may form the basis for this mitigating circumstance.[181]

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[175] Sneed v. State, 783 So. 2d 841, 845 n.1 (Ala. Crim. App. 1999) ("Although the trial court found that Sneed was *not* a minor participant in the offense, the court specifically found this circumstance to apply to Sneed, because he was not the gunman."), *rev'd on other grounds*, 783 So. 2d 863 (Ala. 2000).

[176] Harris v. State, 632 So. 2d 503, 542 (Ala. Crim. App. 1992) (noting that "[w]hile there were others involved and this defendant did not pull the trigger, her participation was such that, but for her, there probably would never have been a killing"); s*ee also* Johnson v. State, 521 So. 2d 1006, 1017 (Ala. Crim. App. 1987) ("Whether the defendant actually fired a fatal shot or not, his participation cannot be considered relatively minor. His participation was substantial and critical.").

[177] Ivery v. State, 686 So. 2d 495, 503 (Ala. Crim. App. 1996).

[178] Magwood v. Smith, 791 F.2d 1438, 1549-50 (11th Cir. 1986).

[179] Ferguson v. State, 814 So. 2d 925, 964 (Ala. Crim. App. 2000).

[180] Williams v. State, 710 So. 2d 1276, 1346 (Ala. Crim. App. 1996); s*ee also* Ferguson, 814 So. 2d at 964.

[181] McNair v. Campbell, 307 F. Supp. 2d 1277, 1314-15 (S.D. Ala. 2004), *rev'd in part*, 416 F.3d 1291 (11th Cir. 2005).

The decision-maker may reject this mitigating circumstance when the state demonstrates that the defendant was taking actions to avoid apprehension.[182]

vii. Mitigating Circumstance #7: The age of the defendant at the time of the crime

Juvenile adjudications may diminish the weight that juroors accord to this mitigating circumstance, but jurors "may not use the juvenile record as the basis for giving little or no weight to such mitigating circumstances."[183]

c. Burden of Proving Mitigating Circumstances

According to the pattern jury instructions, mitigating circumstances should be based on the evidence presented and when:

> the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the existence of that circumstance by a preponderance of the evidence. The burden of disproving it by a PREPONDERANCE OF THE EVIDENCE means that you are to consider that the mitigating circumstance does exist unless, taking the evidence as a whole, it is more likely than not that the mitigating circumstance does not exist. Therefore, if there is a factual dispute over the existence of a mitigating circumstance, then you should find and consider that mitigating circumstance unless you find the evidence is such that it is more likely than not that that mitigating circumstance does not exist. [184]

Despite this, in at least one case, Alabama courts have found that it is permissible to place the burden of proving mitigating circumstances on the defendant.[185]

d. Residual Doubt as a Mitigating Factor

Judges are not required to and may reject any request by the defendant to issue jury instructions on residual doubt.[186] "[A] defendant who has been found to be guilty of a capital crime beyond a reasonable doubt" does not have the "constitutional right to

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[182] Parker v. State, 587 So. 2d 1072, 1099 (Ala. Crim. App. 1991).

[183] *Ex parte* Burgess, 811 So. 2d 617, 624 (Ala. 2000).

[184] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 89; *see also* Thomas v. State, 824 So. 2d 1, 74-75 (Ala. Crim. App. 1999), *overruled on other grounds*, *Ex parte* Carter, 889 So.2d 528 (Ala. 2004); Hooks v. State, 534 So. 2d 329, 363 (Ala. Crim. App. 1987) (finding it permissible to place the burden of "interjecting the existence of the mitigating circumstances into evidence" on a defendant); Dill v. State, 600 So. 2d 343, 362 (Ala. Crim. App. 1991) (once the defendant interjects the mitigating circumstance, the state has the burden of disproving its factual existence by a preponderance of the evidence).

[185] Haney v. State, 603 So. 2d 368, 391 (Ala. Crim. App. 1991).

[186] Benjamin v. State, 2005 WL 2402513, *9-10 (Ala. Crim. App. Sept. 30, 2005); Melson v. State, 775 So. 2d 857, 898-99 (Ala. Crim. App. 1999); Rieber v. State, 663 So. 2d 985, 995 (Ala. Crim. App. 1994); Carroll v. State, 599 So. 2d 1253, 1271 (1992); Myers v. State, 699 So. 2d 1281, 1283-84 (Ala. Crim. App. 1996).

reconsideration by the sentencing body of lingering doubts about his guilt."[187] "Decisions mandating jury consideration of mitigating circumstances provide no support for [a mandatory residual doubt jury instruction] because 'residual doubt' about guilt is not a mitigating circumstance."[188] Instead, it is "a lingering uncertainly about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolutely certainty.'"[189]

e. Mercy Instructions

"Mercy is a proper consideration in the sentencing phase of an Alabama case" and has "its proper place in capital sentencing under Alabama law."[190] Capital defendants are not automatically entitled to a jury instruction on mercy,[191] however, and the jury may not recommend mercy without reason.[192]

A defendant is not entitled to a jury instruction that the jury has "unbridled discretion" to recommend a sentence of life imprisonment without parole regardless of the "calculus as to aggravators and mitigators."[193] The jury cannot "arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence."[194] In other words, the jury "does not have an 'unfettered option' to recommend a sentence of life without parole unless after weighing the aggravating and mitigating circumstances it finds that life without parole is warranted."[195]

4. Weighing of Aggravating and Mitigating Circumstances

The pattern jury instructions state that:

> The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number to the total number of mitigating circumstances.
>
> The law of this state recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a

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[187] *Myers*, 699 So. 2d at 1284.
[188] *Id.*
[189] *Id.*
[190] Nelson v. Nagle, 995 F.2d 1549, 1557 (11th Cir. 1993).
[191] *See, e.g.*, Boyd v. State, 715 So. 2d 825, 846 (Ala. Crim. App. 1997); Taylor v. State, 666 So. 2d 36, 69 (Ala. Crim. App. 1994); Rieber, 663 So. 2d at 995-96; Kuenzel v. State, 577 So. 2d 474, 495 (Ala. Crim. App. 1990).
[192] Williams v. State, 710 So. 2d 1276, 1342 (Ala. Crim. App. 1996) (quoting Williams v. State, 601 So. 2d 1062, 1081 (Ala. Crim. App. 1991)).
[193] *Kuenzel*, 577 So. 2d at 520-21; *see also Williams*, 710 So. 2d at 1342; *Smith*, 581 So. 2d 497, 520 (Ala. Crim. App. 1990); Morrison v. State, 500 So. 2d 36, 44 (Ala. Crim. App. 1985).
[194] Melson v. State, 775 So. 2d 857, 897 (Ala. Crim. App. 1999) (quoting Beck v. State, 396 So.2d 645, 663 (Ala. 1992)).
[195] *Id.*

> larger number of mitigating circumstances. The law of this state also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you the jury are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this area. You must do that in the process of weighing the aggravating circumstance(s) against the mitigating circumstances.[196]

While the court is not required to use the pattern jury instructions, it must provide the jury guidance about the weighing process and instruct that aggravating circumstances are required to outweigh mitigating circumstances before death may be imposed.[197]

The "weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable formula."[198] Nonetheless, the jury may not recommend the death penalty unless it finds that the aggravating circumstances outweigh the mitigating circumstances.[199] For example, a defendant is entitled to a jury recommendation of life imprisonment without parole, if the aggravating and mitigating circumstances are at least equal, i.e., the aggravating circumstances do not outweigh the mitigating circumstances.[200]

5. Interpretation of Whether Aggravating and Mitigating Circumstances Exist Must Be Set Forth In Writing

The pattern jury instructions require the jury to set forth in writing the sentencing recommendation and the number of votes for each sentencing option. The pattern jury instructions do not require that the jury set forth the aggravating and mitigating circumstance(s) it found to exist.[201]

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[196] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 90-91; *see also* ALA. CODE § 13A-5-48 (2006) ("The process . . . of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshaled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.").

[197] Stewart v. State, 730 So. 2d 1203, 1208-09 (Ala. Crim. App. 1996).

[198] *Ex parte* Waldrop, 859 So. 2d 1181, 1189-90 (Ala. 2002).

[199] *Ex parte* Bryant, 2002 WL 1353362 (Ala. July 21, 2002) (noting that it was error to give a penalty phase jury instruction which implied that a jury could not recommend a sentence of life without parole unless the mitigating circumstances outweighed, rather just least equaled, the aggravatingt circumstances).

[200] *Id.*; *see also Ex parte* McNabb, 887 So. 2d 998, 1002-04 (Ala. 2004).

[201] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 93-94; *see also* Bush v. State, 431 So. 2d 555, 559 (Ala. Crim. App. 1982).

While the jury is not required to set forth its decision as to the existence of aggravating and mitigating circumstances in writing, the trial court ultimately must enter "specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52."[202]

6. Availability and Definitions of the Sentencing Options

The pattern jury instructions explain the specific circumstances under which the jury may impose either of the two sentencing options—death or life imprisonment without parole— but it does not define "life imprisonment without parole."

The pattern jury instructions state that "if you should find that no aggravating circumstance has been proven beyond a reasonable doubt to exist in this case, then you must return a verdict recommending that the defendant's punishment be life imprisonment without parole."[203] The instructions also explain that after weighing the aggravating and mitigating circumstances, at least ten jurors must agree in order to return a recommendation of death and at least seven jurors must agree in order to recommend a sentence of life imprisonment without parole.[204]

7. Victim Impact Evidence

a. The Use and Purpose of Victim Impact Evidence

Alabama Constitutional Amendment 557, providing for the "basic rights for crime victims," was ratified in 1995.[205] The amendment provides that, among other things, crime victims (including the next of kin of homicide victims) are entitled "to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime."[206] Additionally, in 1995, the Alabama General Assembly adopted section 15-23-74 of the Alabama Code providing that "the victim has the right to present evidence, an impact statement, or information that concerns the criminal offense or the sentence during any pre-sentencing, sentencing, or restitution proceeding."[207]

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[202] ALA. CODE § 13A-5-47(d) (2006); *see also Whisenhant*, 482 So. 2d at 1239. Despite the fact that the Alabama Court of Criminal Appeals held that the Unites States Supreme Court decision in *Ring v. Arizona* (holding that any aggravating circumstance that increased a sentence to death must be proved to a jury beyond a reasonable doubt) does not require Alabama juries to specify which aggravating factor it found to exist beyond a reasonable doubt, at least one court has instructed the jury to complete special interrogatory forms detailing whether it had unanimously found the existence of one or more aggravating circumstances. *See* Irvin v. State, 2005 WL 1491996, *29 (Ala. Crim. App. June 24, 2005); Stephens v. State, 2005 WL 1925720, *22 (Ala. Crim. App. Aug. 12, 2005).

[203] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 87.

[204] *Id.* at 91-92.

[205] ALA. CONST. art. I, § 6.01.

[206] *Id.*

[207] ALA. CODE § 15-23-74 (2006).

Victim impact testimony is intended to offer the jury a "quick glimpse" of the uniqueness of the victim's life.[208] The State of Alabama has concluded that "evidence about the victim and about the impact of murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[209]

b. The Admissibility of Victim Impact Evidence

Victim impact evidence is admissible during the penalty phase of a capital trial.[210] Testimony is allowed regarding the character of the victim(s) and the impact of the victim's death on family, friends, and community.[211]

It is a violation of a capital defendant's constitutional right against cruel and unusual punishment for a victim's family member to give his or her opinion of the capital defendant, the crime, or the appropriate punishment.[212] It also is inadmissible victim impact testimony if these forms of testimony are contained in the pre-sentence report or in letters to the judge.[213]

In addition, it is not appropriate for victim impact testimony to put before the jury comments on facts that are not in evidence, ask the jury to imagine itself in the place of the victim's family, comment on the "probability or possibility" of what might happen with a particular sentence in the future, make a comment on the defendant's exercise of his/her right to remain silent, or make a comment that the defendant's plea of not guilty and the defense's requiring the state to meet its burden of proof is evidence of a lack of remorse.[214]

8. Instructions to Jury about Awesome Power to Decide Between Life and Death

The pattern jury instructions state that:

> in determining what to recommend that the punishment in this case should be, you must avoid any influence of passion, prejudice or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence you have seen and heard and the law on which I have instructed you. There is no room for the influence of passion, prejudice or any other arbitrary factors. While it is your duty to follow the instructions which the Court has given you, no statement, question, ruling, remark or other

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[208] Miller v. State, 913 So. 2d 1148, 1164 (Ala. Crim. App. 2004) (quoting Payne v. Tennessee, 501 U.S. 808 (1991)).
[209] Boyd v. State, 746 So. 2d 364, 383 (Ala. Crim. App. 1999) (quoting *Payne*, 501 U.S. at 808).
[210] *See* Williams v. State, 795 So. 2d 753, 782 (Ala. Crim. App. 1999); Smith v. State, 797 So. 2d 503, 544-45 (Ala. Crim. App. 2000); Hyde v. State, 778 So. 2d 199, 213 (Ala. Crim. App. 1998).
[211] Maxwell v. State, 828 So. 2d 347, 364 (Ala. Crim. App. 2000); s*ee also Ex parte* Rieber, 663 So. 2d 999, 1007 (Ala. 1995).
[212] *Ex parte* McWilliams, 640 So. 2d 1015, 1016-17 (Ala. 1993); Wimberly v. State, 759 So. 2d 568, 572-74 (Ala. Crim. App. 1999).
[213] *See* Taylor v. State, 808 So. 2d 1148, 1167 (Ala. Crim. App. 2000); Haney v. State, 603 So. 2d 368, 381-82 (Ala. Crim. App. 1991); Pierce v. State, 576 So. 2d 236, 253-54 (Ala. Crim. App. 1990).
[214] *Wimberly*, 759 So. 2d at 572-74.

> expression that I have made at any time during this trial, either during the guilt phase or during this sentence hearing is intended to indicate any opinion of what the facts are or what the punishment should be. It is your responsibility to determine the facts and recommend the punishment and, in doing so, you should not be influenced in any way by what you may imagine to be my views on such subject.[215]

The pattern jury instructions go on to explain that the jury should not "act hastily or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. *Before you vote you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and you should bring to bear your best judgment on the sole issue which is before you*."[216]

The Alabama Supreme Court has held that the court should not tell the jury should that its decision is "advisory" or "recommending."[217]

9. Instructions after Jury Deliberations Have Begun

a. Juror Questions

The Alabama Rules of Criminal Procedure state that if jurors request to have any testimony repeated or additional instructions, the court may recall the jurors to the courtroom and order the testimony read or give appropriate additional instructions. In addition, the court may, but is not required to, order other testimony read or give other instructions to ensure that undue prominence is not given to the particular testimony or instructions requested.[218] Regardless of whether the jury requests additional instructions, the court may recall the jury and give additional instructions to correct an erroneous instruction, to clarify an ambiguous instruction, or to inform the jury of a pertinent point of law which should have been, but was not, covered in the original instructions.[219]

Additional instructions generally will not be given if the request concerns matters not in evidence, questions of law not pertinent to the case, or requires the judge to express an opinion on a factual matter. The court may choose to review the original instructions if they are adequate. [220]

The Alabama Court of Criminal Appeals has indicated that while the trial judge has discretion in deciding whether to grant a jury's request for additional instructions or reinstruction, "the better practice would be for the trial court to accede to such a request."[221] The court has an obligation to make a reasonable effort to answer juror questions and, in making this response, is not bound by the pattern jury instructions.[222]

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[215] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 90-91.
[216] *Id.* at 92-93 (emphasis added).
[217] *Ex parte* McGriff, 908 So. 2d 1024, 1038 (Ala. 2004).
[218] ALA. R. CRIM. P. 22.2.
[219] ALA. R. CRIM. P. 22.2 cmt.
[220] Deutcsh v. State, 610 So. 2d 1212, 1217 (Ala. Crim. App. 1992).
[221] *Id.* at 1217.
[222] *Id.* at 1218.

"Where the jury raises an explicit question on a point of law arising from facts over which there is doubt or confusion, the court should attempt to clarify the issue in the minds of the jury members. . . . This is true even though the jury was initially given proper instructions."[223] The judge is under no obligation to repeat any other part of his or her jury instructions when answering a specific jury question.[224]

b. Additional Instructions when the Jury Cannot Reach a Verdict

In *Allen v. United States*,[225] the United States Supreme Court authorized judges to provide additional instructions to jurors after judges have rendered the main charge to the jury and jury deliberations have begun.[226] The Court upheld for that purpose the following instruction, which is known as the *Allen* charge:

> in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[227]

Alabama has approved the use of an "*Allen* charge," also known as a "dynamite charge," in the guilt/innocence portion of a capital trial, so long as the charge is not coercive or threatening.[228] In determining whether a particular dynamite charge is coercive or threatening, the court must consider the "whole context of the case."[229]

The pattern jury instructions present the following *Allen* instruction:

> Members of the jury, I am sorry to hear that you are unable to reach a verdict. The Court cannot release you at this time. You should make

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[223] *Id*. (quoting People v. Sanders, 469 N.E.2d 287, 290 (Ill. App. Ct. 1984)).

[224] *Id.* at 1217 (quoting Davis v. State, 440 So.2d 1191, 1195 (Ala. Crim. App. 1983)); s*ee also* Lewis v. State, 889 So. 2d 623, 686 (Ala. Crim. App. 2003).

[225] 164 U.S. 492, 501 (1896).

[226] *Id.*

[227] *Id.* at 501.

[228] Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000). *But see* Unites States v. Rey, 811 F.2d 1453, 1460 (11th Cir. 1987) ("As we see it, the Allen charge interferes with the jurors when they are performing their most important role: determining guilt or innocence in a close case. It unjustifiably increases the risk that an *innocent* person will be convicted as a result of the juror abandoning his honestly-held beliefs.").

[229] *Maxwell*, 828 So. 2d at 365 (quoting Miller v. State, 645 So. 2d 363, 366 (Ala. Crim. App. 1994)).

> further efforts to arrive at a verdict. Each juror is entitled to his or her opinion of the evidence, but I know you do not wish to put the State to the expense of another trial if it can be avoided. If you cannot agree a mistrial would be declared and this case would have to be tried again. There is no reason to believe that another jury would have better or clearer evidence than has been presented to you.
>
> That does not mean that you should surrender an honest conviction as to the weight or the effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision. But you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If possible, you should resolve any differences and come to a common conclusion so that the case may be completed.
>
> I would be happy to give you any explanatory charge on the law. It is natural that differences of opinion will arise. When they do, each juror should not only express his opinion but the facts and reasons upon which he bases that opinion. By reasoning the matter out, it may be possible for all jurors to agree. What I have said to you must not be taken as an attempt on the part of the Court to require or force you to surrender your honest and reasonable convictions founded upon the law and the evidence in this case. My sole purpose is to impress upon you your duty and the desirability and importance of reaching a verdict if you can conscientiously do so.[230]

The Alabama Supreme Court has held that there is no reversible error if the trial court follows the pattern jury instruction regarding the *Allen* charge.[231]

10. Form of Instructions

The Alabama Rules of Criminal Procedure state that the judge generally is not to provide the jury with a copy of the charges against the defendant or the "given" written jury instructions.[232] In a "complex" case, however, the court has the discretion to give the jury a copy of the "given" written instructions.[233]

The jury must take the applicable verdict forms with them to use during deliberations. In addition, the court may allow jurors to take exhibits, writings, and documents with them during deliberations.[234]

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[230] ALABAMA PATTERN JURY INSTRUCTIONS I.12, at I-16 (3d 1994) (hung jury instruction).

[231] *Ex parte* Trawick, 698 So. 2d 162, 173 (Ala. 1997); Daily v. State, 828 So. 2d 344, 346-47 (Ala. Crim. App. 2002). *But see Ex parte* Wood, 715 So. 2d 819, 824 (Ala. 1998) (clarifying *Ex parte* Trawick and explaining that while it is unlikely that a pattern jury instruction will result in plain error, it is possible).

[232] ALA. R. CRIM. P. 21.1.

[233] *Id.*

[234] ALA. R. CRIM. P. 22.1.

11. The Role of the Jury and the Judge in Sentencing: Advisory Verdicts and Judge Override

Once the jury has provided its sentencing recommendation, the trial judge is required to enter specific written findings concerning the existence or nonexistence of each statutory aggravating and mitigating factor, along with any additional nonstatutory mitigating factors. In addition, the court will enter written findings of facts that summarize the crime and the defendant's participation in that crime.[235]

The judge also must independently weigh the aggravating and mitigating circumstances. In this weighing process, the court should not simply tally the number of aggravators as compared with the number of mitigators. Instead, the aggravators and mitigators should be considered in an organized fashion to determine the proper sentence in light of all of the relevant circumstances.[236]

In issuing its verdict, the judge may disregard the jury's sentencing recommendation. Alabama courts repeatedly have found that this practice—called "judge override"—does not violate the state constitution.[237] When weighing the evidence, the court should consider the jury's advisory verdict, but it generally is not binding.[238] If the jury determines that no aggravating circumstance exists, however, the jury's advisory verdict of life without parole is binding on the court.[239]

A jury recommendation of a life without parole sentence must be treated as a mitigating circumstance.[240] The weight of this mitigating circumstance depends on the number of jurors recommending life without parole, as well as the strength of the factual basis for the recommendation. The factual basis for the recommendation consists of the information known to the jury, including but not limited to conflicting evidence concerning the identity of the "triggerman" or a recommendation of leniency from the victim's family. The trial court may override the jury's recommendation of life without parole based on information that is known to the trial court, but not the jury, when the information can be used to undermine a mitigating circumstance.[241] The judge must state specific reasons for giving the jury's recommendation the consideration s/he did.[242]

Section 13A-5-46(g) of the Alabama Code provides that if the jury is unable to reach an advisory verdict recommending a sentence, the court may declare a mistrial of the sentencing hearing. Such a mistrial does not affect the underlying conviction.[243] The sentencing hearing then would be re-conducted before a different jury. After one or more mistrials, the parties may waive the right to have an advisory verdict from a jury. In that

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[235] ALA. CODE § 13A-5-47(d) (2006).
[236] ALA. CODE § 13A-5-48 (2006).
[237] *See, e.g.*, Flowers v. State, 2005 WL 435113, *19 (Ala. Crim. App. Feb. 25, 2005).
[238] ALA. CODE § 13A-5-47(e) (2006).
[239] *Ex parte* McGriff, 908 So. 2d 1024, 1038 (Ala. 2004).
[240] *Ex parte* Carroll, 852 So. 2d 833, 836 (Ala. 2002).
[241] *Id.*
[242] Taylor v. State, 808 So. 2d 1215, 1219 (Ala. 2001).
[243] ALA. CODE § 13A-5-46(g) (2006).

situation, the judge will determine the sentence without guidance from an advisory verdict.[244]

[244] *Id.*

II. ANALYSIS

A. Recommendation #1

> **Alabama should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.**

Although the Alabama Supreme Court has a task force currently working to revise the capital pattern jury instructions, it is made up entirely of attorneys and judges and, to the best of our knowledge, is not working with linguists, social scientists, psychologists, or jurors to: (1) evaluate the extent to which jurors' understand the "Pattern Jury Instructions—Criminal" and the "Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried under Act No. 81-178" (pattern jury instructions) or the actual instructions used in capital cases; (2) monitor the extent to which jurors' understand the pattern jury instructions.[245]

The State of Alabama, therefore, is not in compliance with Recommendation #1.

B. Recommendation #2

> **Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.**

Recommendation # 2 is supported by a number of studies finding that jurors provided with written court instructions ask fewer questions about the instructions during deliberations, make fewer comments about being confused about the instructions, waste less time trying to ascertain the meaning of the instructions, and spend less time inappropriately applying the law.[246] Written instructions, therefore, result in more efficient and worthwhile deliberations.[247]

Despite these findings, the Alabama Code, rules, and case law do not require judges to distribute written copies of the judge's entire oral charge to jurors at any time during the guilt/innocence or sentencing phases of a capital trial. In fact, the Alabama Rules of Criminal Procedure state that the judge generally is *not to provide* the jury with a copy of the charges against the defendant or the "given" written jury instructions.[248] In a "complex" case, however, the court has discretion to give the jury a copy of the "given" written instructions.[249]

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[245] Electronic Interview with Bryan Stevenson, Executive Director, Equal Justice Initiative of Alabama. (Oct. 31, 2005).

[246] The Honorable B. Michael Dann, *'Lessons Learned' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1259 (1993).

[247] *Id.* at 1259.

[248] ALA. R. CRIM. P. 21.1.

[249] *Id.*

Because Alabama judges are not required to provide capital jurors with written copies of the entire oral charge while charging the jury and during juror deliberations, the State of Alabama fails to meet Recommendation #2.

C. 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.**

Capital jurors commonly have difficulty understanding jury instructions.[250] This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.[251] Given that jurors have difficulty understanding jury instructions, judges should respond meaningfully to jurors' requests for clarification of the instructions to ensure juror comprehension of the applicable law.

Based on this information, it is no surprise that approximately 54.7% of interviewed capital jurors in Alabama did not understand that they could consider any evidence in mitigation[252] and that 53.8% believed that the defense had to prove mitigating factors beyond a reasonable doubt.[253] Similarly, 55.8% of interviewed capital jurors in Alabama did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed.[254] Alabama capital jurors are not only confused about the scope of mitigation evidence that they may consider, but also with the applicable burden of proof and the unanimity of finding required for mitigating factors.

Capital jurors in Alabama also have had difficulty understanding the requirements associated with finding the existence of statutory aggravating factors. A full 40% of surveyed capital jurors in Alabama do not understand that they must find that one or more statutory aggravating circumstances exist beyond a reasonable doubt.[255] In addition, although a sentence of death is not required upon a finding of one or more

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[250] Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

[251] Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (1995) (discussing jurors' understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

[252] William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003).

[253] *Id.*

[254] *Id.*

[255] *Id.*

aggravating circumstances, 56.3% of interviewed Alabaman capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt.[256] Similarly, 52.1% of interviewed Alabaman capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, [257] despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

These figures illustrate the confusion among capital jurors regarding the jury instructions and highlight the importance of the manner in which judges respond to jurors' requests for clarification of the instructions. The State of Alabama provides trial courts with discretion as to whether they will respond to juror questions,[258] although the United Supreme Court has held that "[a] trial judge has some obligation to make reasonable efforts to answer a question from the jury"[259] and the Alabama Court of Criminal Appeals has held that when "the jury raises an explicit question on a point of law arising from facts over which there is doubt or confusion, the court should attempt to clarify the issue in the minds of the jury members."[260]

Although the standard jury instructions appear to explain the relevant mitigating and aggravating circumstances, capital jurors in Alabama still appear to have difficulties understanding mitigating and aggravating circumstances—an understanding which is absolutely necessary to properly recommend a sentence in a capital case. Additionally, despite data showing a severe misunderstanding of the jury instructions regarding mitigating and aggravating circumstances, only 15 percent of the Alabama capital jurors interviewed admitted to having difficulty understanding the jury instructions and 42.3 percent asked the judge to clarify the instructions.[261]

One study posits that this misunderstanding of jury instructions is caused by juries in "judicial override" states, like Alabama, paying less attention to jury instructions because they are only required to make an advisory sentence and the ultimate sentencing decision is left to the judge.[262] In essence, the practice of "judicial override" makes jurors feel less personally responsible for the sentencing decision, resulting in shorter juror sentencing deliberations and with less disagreement among jurors.[263] In response to questions regarding their sentencing responsibility, interviewed Alabama capital jurors felt they had secondary responsibility for sentencing the defendant. One juror stated that the fact that

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[256] *Id*. at 72.
[257] *Id.*
[258] ALA. R. CRIM. P. 22.2.
[259] Bollenbach v. United States, 326 U.S. 607 (1946).
[260] Deutcsh v. State, 610 So. 2d 1212, 1217-18 (Ala. Crim. App. 1992) (quoting People v. Sanders, 469 N.E.2d 287, 290 (Ill. App. Ct. 1984).
[261] William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. (forthcoming Dec. 2006).
[262] *Id.*
[263] *Id.* (noting that 37.7 percent of Alabama capital jurors deliberated for less than an hour; only 37.7 percent deliberated for three hours or more; 26.5 percent reported the jury sentence being decided on only one vote; 78.7% reported that no juror was undecided on the first vote; and only 21.6 percent reported asking for additional review of testimony or transcripts).

the judge could override the jury's recommendation meant that "technically [they] weren't responsible" and "the burden didn't lie on [them]." Another juror was "relieved that [her] decision won't give her the death penalty."[264] One Alabama capital juror even went so far as to say s/he felt "felt an out by what the judge said by over riding it."[265] Based on this data, while certain states have chosen to institute "judicial override" as a way to protect against arbitrary sentencing by juries, the practice of "judicial override" has had the opposite effect in Alabama.

Despite the clear requirements for trial courts to make efforts to clarify juror confusion, we have been unable to determine whether courts are responding meaningfully to juror questions in practice. Consequently, we are unable to determine whether the State of Alabama meets Recommendation #3.

Additionally, based on the above findings, the Alabama Death Penalty Assessment Team, with the exception of Arthur Green, makes the following recommendation: The State of Alabama should give jurors the final decision-making authority in capital sentencing proceedings by eliminating judicial override. While the Alabama Death Penalty Assessment Team recommends this reform, the American Bar Association has not adopted policy on this issue.

D. Recommendation #4

> **Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request. Because Alabama does not provide life with parole as a sentencing option for capital murder, only the first of these is relevant.

Sections 13A-5-46(e) and 13A-5-49 of the Alabama Code provide for two punishments for capital murder convictions: death or life imprisonment without parole. The pattern jury instructions explain the specific circumstances under which the jury may impose the two sentencing options, but do not define "life imprisonment without parole.[267] Nor is the court required to give the definition of "life imprisonment without parole" when requested by one or both of the parties. In *Williams v. State*, the defense requested a jury charge that stated, in part, that the jury was "to presume that if you sentence Danny Ray Williams to life imprisonment without parole he will spend the rest of his life in

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[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982), at 91-92.

prison."[268] The Court of Criminal Appeals held that the trial court properly refused to give this instruction because it was "factually and legally erroneous," in so far as it "ignores the sentence reduction power of the trial judge, the sentence review power of the appellate courts, and the commutation power of the governor."[269] More generally, Alabama courts have held that the jury should "impose such sentence as [seems] just, with no regard to what might happen to the sentence in the future" and that, consequently, a discussion of parole practices is not allowed. [270]

Studies consistently have shown that capital jurors underestimate the total number of years defendants convicted of capital murder, but not sentenced to death spend in prison.[271] Studies also revealed that jurors' perceptions of the amount of time capital murders not sentenced to death usually served in prison did not vary widely among states that had "life without parole" and those that did not.[272] In fact, both capital jurors in states with and those without "life without parole" greatly underestimated the amount of time defendants convicted of capital murder, but not sentenced to death spend in prison before they become eligible for parole.[273]

Even though Alabama includes "life without parole" as the only sentencing option besides death, Alabama capital juries remain vulnerable to underestimating the total number of years a capital murderer sentenced to life without parole serves in prison and making their sentencing decisions based on inaccurate beliefs as to the state's parole practices. In interviews with capital jurors in Alabama, the median estimate of the amount of time served in prison by capital murderers not sentenced to death was fifteen years, despite Alabama's mandatory life without parole minimum sentence.[275] This figure underscores the importance of allowing judges to define the available alternative punishments and the need to provide juries with accurate information regarding a life without parole sentence. In order to enable capital juries to make informed sentencing decisions, the State of Alabama should consider adding a pattern jury instruction defining life imprisonment without parole.

Based on the foregoing, the State of Alabama is not in compliance with Recommendation #4.

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[268] Williams v. State, 461 So. 2d 834, 846 (Ala. Crim. App. 1983) (internal citations omitted), *rev'd on other grounds*, 461 So. 2d 852 (Ala. 1984).

[269] *Id.* at 846-47 (internal citations omitted). *But see* Eaton v. State, 177 So. 2d 444, 447-48 (1965) (holding that comments about the probability or possibility of what might happen under a particular sentence are improper).

[270] Robinson v. State, 335 So. 2d 420, 425 (Ala. Crim. App. 1976) (quoting Lawley v. State, 87 So. 2d 433 (Ala. 1956)).

[271] *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 645 (1999); Bowers & Foglia, *supra* note 252, at 80; William J. Bowers, *The Capital Jury: Is it Titled Toward Death*, 79 JUDICATURE 220, 221-22 (1996).

[272] *See* Bowers & Steiner, *supra* note 271, at 645; Bowers & Foglia, *supra* note 252, at 80; Bowers, *supra* note 271, at 221-22.

[273] *See* Bowers & Steiner, *supra* note 271, at 648.

[274] *Id.*

[275] Bowers and Foglia, *supra* note 252, at 82.

E. 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.

Alabama does not allow the jury to recommend life imprisonment unless (1) it fails to unanimously agree on the existence of one or more aggravating circumstances or (2) the jury unanimously agrees that one or more aggravating circumstances have been proven beyond a reasonable doubt, but at least seven jurors believe that the aggravating circumstances do not outweigh the mitigating circumstances.[276] Alabama law does not allow the jury to recommend life imprisonment if the aggravating circumstances outweigh the mitigating circumstance.[277] Nor does Alabama provide for the appropriate burden of proof that jurors should use in weighing the aggravating and mitigating circumstances.

The State of Alabama, therefore, is not in compliance with Recommendation #5.

Furthermore, because the State of Alabama permits non-unamimous jury recommendations for death, the Alabama Death Penalty Assessment Team makes the following recommendation: the State of Alabama should require that the jury be unanimous before it may recommend a sentence of death. While the Alabama Death Penalty Assessment Team recommends this reform, the American Bar Association has not adopted policy on this issue.

F. Recommendation #6

Alabama should have trial courts instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, Alabama should implement the provision of Model Penal Code Section 210.6(1)(f),1 under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.[278]

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[276] ALA. CODE § 13A-5-46(e) (2006).
[277] ALA. CODE § 13A-5-46(e)(3) (2006).
[278] Section 210.6(1) of the Model Penal Code states as follows:

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:
- (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
- (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
- (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
- (d) the defendant was under 18 years of age at the time of the commission of the crime; or

Alabama does not require a sentence less than death in cases where residual doubt concerning the defendant's guilt is present. Not only does the State of Alabama fail to require judges -- and allows judges to reject requests by defendants -- to instruct jurors that residual doubt concerning the defendant's guilt is a mitigating circumstance,[279] but the Alabama Court of Criminal Appeals has held that residual doubt about guilt affirmatively *is not* a mitigating circumstance.[280] Instead, it is "a lingering uncertainly about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolutely certainty.'"[283]

The state of Alabama is therefore not in compliance with Recommendation #6.

G. Recommendation #7

> **In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.**

The pattern jury instructions state that:

> The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number to the total number of mitigating circumstances.
>
> The law of this state recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this state also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances. In other words, the law contemplates that

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(e) the defendant's physical or mental condition calls for leniency; or
(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See MODEL PENAL CODE § 210.6(1); *see also* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-313 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

[279] Benjamin v. State, 2005 WL 2402513, *9 (Ala. Crim. App. Sept. 30, 2005); Melson v. State, 775 So. 2d 857, 898-99 (Ala. Crim. App. 1999); Rieber v. State, 663 So. 2d 985, 995-96 (Ala. Crim. App. 1994); Carroll v. State, 599 So. 2d 1253, 1271 (Ala. Crim. App. 1992); Myers v. State, 699 So. 2d 1281, 1284 (Ala. Crim. App. 1996).

[280] *Myers*, 699 So. 2d at 1284.

[281] *Benjamin*, 2005 WL 2402513; *Melson*, 775 So. 2d at 898-99; *Rieber*, 663 So. 2d at 985; *Carroll*, 599 So. 2d at 1271; *Myers*, 699 So. 2d at 1281.

[282] *Myers*, 699 So. 2d at 1281.

> different circumstances may be given different weights or values in determining the sentence in a case, and you the jury are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this area. You must do that in the process of weighing the aggravating circumstance(s) against the mitigating circumstances.[284]

Because Alabama's pattern jury instructions make clear that the weighing process for considering aggravating and mitigating factors cannot be satisfied by counting the number of aggravating and mitigating factors present in a case, it is in compliance with Recommendation #7.

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[283] *Id.*

[284] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE STAGE OF CAPITAL CASES TRIED UNDER ACT NO. 81-178 (1982) at 90-91; *see also* ALA CODE § 13A-5-48 (2006) ("The process . . . of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshaled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."). The advisability of the portion of the above instruction that stating "it is possible, in at least some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances" may be in doubt after *Ex part Bryant*, 2002 WL 1353362 (Ala. June 21, 2002), and *McNabb*, 887 So. 2d 998 (Ala. 2004), because the charge insinuates that the existing mitigators must outweight existing aggravators to impose a life sentence, whereas, the existing mitigators could weight equally with the aggravating circumstances, prohibiting the recommendation of a death sentence. *Ex parte* McNabb, 887 So. 2d 998, 1002-04 (Ala. 2004).

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION

A. Selection of Judges

In the State of Alabama, judges are all selected through a partisan election process.[1] Circuit court, district court, and probate court judges are elected every six years. Judges on the two intermediate appellate courts (one civil and one criminal) and the Alabama Supreme Court also are elected for staggered six-year terms.[2]

If a judicial vacancy arises before the term of office has expired, the Governor of Alabama may appoint a replacement. The replacement judge must run for election in the first general election that occurs after s/he has spent one year in office.[3] In Baldwin, Jefferson, Madison, Mobile, Talladega, and Tuscaloosa counties, gubernatorial appointments for circuit court judges are made from lists of candidates submitted by judicial nominating commissions.[4] Each of these six counties individually determines the size, composition, and procedures for its nominating commission.[5]

B. Conduct of Judicial Candidates and Judges

The Judicial Inquiry Commission (JIC), created by constitutional amendment, is charged with conducting investigations and receiving or initiating complaints concerning any judge of an Alabama court.[6] The Court of the Judiciary, also created by Constitutional Amendment, may be convened to hear complaints filed by the JIC and may (1) remove from office, suspend without pay, or censure a judge, or apply any other legal sanction, for a Canon of Judicial Ethics violation, misconduct in office, failure to perform his or her duties, or (2) suspend a judge with or without pay, or retire a judge who is physically or mentally unable to perform his or her duties.[7] Decisions of the Court of the Judiciary may be appealed to the Alabama Supreme Court.[8]

The Alabama Supreme Court, charged with adopting rules of procedure for the JIC and the Court of the Judiciary,[9] adopted the Rules of Procedure of the Judicial Inquiry Commission[10] and the Alabama Court of the Judiciary.[11]

The JIC consists of nine members, including: one appellate-level judge who is not a state Supreme Court Justice, two circuit court judges appointed by the Circuit Judges'

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1 ALA. CODE § 17-2-7 (2006); *see also* American Judicature Society, Judicial Selection in the States, Alabama, *at* http://www.ajs.org/js/AL_methods.htm (last visited on May 24, 2006).

2 ALA. CODE § 17-2-6, -7 (2006); *see also* ALA. CODE § 12-3-2 (2006) (regarding elections and terms of offices for the judges of the Court of Criminal Appeals); ALA. CODE § 12-3-3 (2006) (regarding elections and terms of offices for the judges of the Court of Civil Appeals).

3 ALA. CONST. art. VI, § 153.

4 *See* American Judicature Society, Judicial Selection in the States, Alabama, *at* http://www.ajs.org/js/AL_methods.htm (last visited on May 24, 2006).

5 *Id.*

6 ALA. CONST. amend. 581, § 6.17(b).

7 ALA. CONST. amend. 581, § 6.18.

8 ALA. CONST. amend. 581, § 6.18(b).

9 ALA. CONST. amend. 581, §§ 6.17(c), 6.18(c).

10 ALA. R. JUD. INQUIRY COMM'N.

11 ALA. R. CT. OF THE JUD.

Association, three non-lawyers and one district judge appointed by the Governor and subject to Senate confirmation, and two members of the state bar appointed by the governing body of the Alabama State Bar Association.[12] The JIC may select a Chair from among its members.[13] In addition to a Chair, the JIC may elect one or more vice-chairs, an executive secretary, and any other officers, agents, and examiners.[14] The JIC also may appoint an executive committee consisting of the chair and two other members to advise the chair on matters arising between meetings of the JIC in which action is considered to be desirable.[15] Members of the JIC serve four-year terms and vacancies are filled for a full term in the manner the original appointment was made.[16] Officer elections are held every two years in June. If an officer resigns or his/her term expires, a special election will be held. [17]

The Court of the Judiciary also consists of nine members, including: one judge of an appellate-level court that is not the Supreme Court, selected by the Supreme Court, two circuit court judges selected by the Circuit Judges' Association, one district judge selected by the District Judges' Association, two members of the state bar, selected by the governing body of the Alabama State Bar Association, and three non-lawyers appointed by the Governor and subject to Senate confirmation.[18] In the event of a member's disqualification or inability to serve, his or her replacement will be selected. The Supreme Court of Alabama will select an alternate appellate court judge; the Circuit Judges' Association will select two alternates from the circuit judges of the state; and the governing body of the Alabama State Bar Association will select two alternates from the membership of the state bar.[19]

In addition to complaints to the JIC, Justices of the Alabama Supreme Court and Judges of the Courts of Appeals (criminal and civil) may be impeached for "willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics, … or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith."[20]

Impeachment hearings are conducted by the Alabama Senate on "articles or charges" identified by the Alabama House of Representatives.[21] Impeachment proceedings may be initiated with the verification, under oath, of at least 12 members of the House of Representatives as to the factual basis of the charge.[22] An article of impeachment cannot pass with less than a two-thirds majority of the House of Representatives and a conviction of impeachment cannot pass with less than a two-thirds majority of the Senate.[23]

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12 ALA. CONST. amend. 581, § 6.17(a).
13 *Id.*
14 ALA. R. JUD. INQUIRY COMM'N 11.
15 ALA. R. JUD. INQUIRY COMM'N 12.
16 ALA. CONST. amend. 581, § 6.17(a).
17 ALA. R. JUD. INQUIRY COMM'N 11.
18 ALA. CONST. amend. 581, § 6.18 (a).
19 ALA. R. CT. OF THE JUD. 26.
20 ALA. CONST. art. VI, § 158; ALA. CONST. art. VII, § 173.
21 ALA. CONST. art. VII, § 173.
22 ALA. CONST. art. VI, § 158.
23 *Id.*

No impeachment proceedings may be started or proceed while the JIC or Court of the Judiciary considers the same charge or subject matter.[24] If the JIC or the Court of the Judiciary finds a lack of probable cause or terminates proceedings without a finding of wrongdoing, this constitutes a complete defense to impeachment hearings and bars further proceedings on the matter.[25] A judge who has been tried before the Court of the Judiciary is not subject to impeachment on the same charge or subject matter, regardless of outcome. Dissatisfaction with a judge's ruling is not grounds for impeachment.[26]

1. Conduct of and Complaints against Judicial Candidates during Campaigns

Just as with every other alleged violation of the Canons of Judicial Ethics, the JIC may investigate, receive, or initiate complaints concerning any judge and judicial candidate violating the Judicial Canon requiring them to refrain from political activity inappropriate to judicial office.[27]

Canon 7 requires all judicial candidates, including incumbent judges, to maintain a certain standard of conduct during their campaigns.[28] Canon 7(A) requires a judicial candidate to "endeavor at all times to refrain from political activities inappropriate to the judicial office that he or she holds or seeks."[29] Such activities include, but are not limited to, participating in the "internal workings of political organizations," engaging in "campaign activities in connection with a political candidate other than a candidate for a judicial office," and being involved "in political fund solicitations other than for himself or herself."[30] Canon 7 acknowledges that a judicial candidate will be involved in his or her own campaign activities, but indicates that s/he must at all times "conduct himself or herself in such a manner as to prevent any political considerations, entanglements, or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process."[31] The Canon also requires a judge to resign his or her office when s/he becomes a candidate for non-judicial office, but allows a judge to engage in activity on behalf of measures to improve the law, the legal system, or the administration of justice.[32]

Specifically, Canon 7(B) requires that judicial candidates do the following during judicial campaigns:

(1) "Maintain the dignity appropriate to judicial office";[33]
(2) "Not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing";[34]

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24 *Id.*
25 *Id.*
26 *Id.*
27 ALA. CONST. amend. 581, § 6.17(a); ALA. CANON JUD. ETHICS 7.
28 ALA. CANON JUD. OF ETHICS 7.
29 ALA. CANON JUD. OF ETHICS 7(A)(1).
30 *Id.*
31 ALA. CANON JUD. OF ETHICS 7(A)(1).
32 ALA. CANON JUD. OF ETHICS 7(A)(2), (3).
33 ALA. CANON JUD. OF ETHICS 7(B)(1)(a).
34 ALA. CANON JUD. OF ETHICS 7(B)(1)(b).

(3) "Not make any promise of conduct in office other than the faithful and impartial performance of the duties of the office"; "not announce in advance the candidate's conclusions of law on pending litigation"; and "not knowingly misrepresent his or her identity, qualification, present position, or other fact";[35]

(4) "Not use or permit the use of campaign contributions for the private benefit of the candidate";[36]

(5) Not "post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether that information is false";[37]

(6) "Be responsible for the content of any statement communicated in any medium by his or her campaign committee and for compliance by his or her campaign committee with the limitations on campaign solicitations, contributions, and expenditures contained in this Canon and with the laws of this state if the candidate knew, or should have known through the exercise of due and reasonable diligence, of the statement, solicitation, contribution, or expenditure."[38]

In addition, candidates are "strongly discouraged from personally soliciting campaign contributions."[39] Instead, candidates should "establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy."[40] Candidates may not solicit or accept campaign contributions more than one year prior to the election or more than 120 days after the election.[41] Candidates must file reports as required by the Alabama Fair Campaign Practices Act.[42]

If the JIC or the Alabama State Bar (State Bar) receives a complaint during the course of a campaign alleging a violation of Canon 7, the JIC or the State Bar must give the complaint priority and make every effort to "render a decision on the complaint during the course of the election campaign."[43]

2. Conduct of and Complaints against Judges

a. Conduct of Judges

The Alabama Code and the Alabama Canons of Judicial Ethics include a number of important standards of conduct that judges are required to adhere to while serving on the bench. This discussion, however, will focus on the standards of conduct pertaining to

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35 ALA. CANON JUD. OF ETHICS 7(B)(1)(c).
36 ALA. CANON JUD. OF ETHICS 7(B)(1)(d).
37 ALA. CANON JUD. OF ETHICS 7(B)(2).
38 ALA. CANON JUD. OF ETHICS 7(B)(3).
39 ALA. CANON JUD. OF ETHICS 7(B)(4)(a).
40 *Id.*
41 ALA. CANON JUD. OF ETHICS 7(B)(4)(b).
42 ALA. CANON JUD. OF ETHICS 7(B)(4)(c).
43 ALA. CANON JUD. OF ETHICS 7(C)(2).

three issues: (1) judicial impartiality; (2) public comment on cases; and (3) the conduct of prosecutors and defense attorneys.

i. Judicial Impartiality

A judge is required to participate in "establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."[44] In Commentary, the Alabama Supreme Court explains that:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences when deciding cases. Although judges should be independent, they must comply with the law, including the provision of these Canons. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of the Canons diminishes public confidence in the judiciary and thereby does injury to the system of government under the law.[45]

A judge is specifically required to "respect and comply with the law" and to "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[46] A judge also is required to "maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute."[47] "A judge should not allow his family, social, political, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness at any hearing before any court, or judicial or governmental commission."[48]

A judge should be "faithful to the law and maintain professional competence in it." Additionally, a judge should be "unswayed by partisan interests, public clamor, or fear of criticism."[49]

ii. Public Comment on Cases

A judge must "abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to

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[44] ALA. CANON JUD. OF ETHICS 1.
[45] ALA. CANON JUD. OF ETHICS 1 cmt.
[46] ALA. CANON JUD. OF ETHICS 2(A).
[47] ALA. CANON JUD. OF ETHICS 2(B).
[48] ALA. CANON JUD. OF ETHICS 2(C).
[49] ALA. CANON JUD. OF ETHICS 3(A)(1).

his direction and control," except for public statements "in the course of their official duties" or when "explaining for public information the procedures of the court." [50]

iii. Conduct of Prosecutors and Defense Attorneys

The Canons provide that judges "should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge has personal knowledge."[51] This may include reporting a lawyer's conduct to the Alabama State Bar Association,[52] holding the lawyer in contempt,[53] and/or granting a new trial on ineffective assistance of counsel or prosecutorial misconduct grounds.[54]

b. Complaints against Judges

An individual wishing to file a complaint against a judge may file a complaint with the JIC or the State Bar. Once a complaint has been filed, and on the affirmative vote of a majority of all JIC members, the JIC may begin an investigation.[55] The JIC must vote within 42 days of the complaint being filed. If more than 42 days pass without a vote or if less than a majority of commissioners vote to investigate the complaint, the complaint becomes null and void.[56]

The JIC must serve the judge who is the subject of the complaint copies of the complaint and any and all materials that constitute, support, or accompany the complaint within ten days of the complaint being filed.[57] Also within ten days of beginning an investigation, the JIC must serve on the judge (1) a full description of the conduct to be investigated and all information tending to establish or refute that the conduct occurred or that the investigation is appropriate and (2) any materials that tend to prove or disprove the occurrence of the conduct being investigated or the appropriateness of the investigation.[58] Failure to serve disclosures, statements, or materials upon the judge bars the continuation of the investigation and any prosecution for the conduct.[59] Every four weeks, the JIC must serve on the judge any additional materials and a full statement of whether the JIC intends to continue the investigation.[60] If the JIC fails to serve the judge and the judge moves the JIC to supply the overdue information, the JIC must serve them within seven days or the investigation and any prosecution for the conduct is barred.[61]

A judge being charged or investigated may demand at any time up to ten days before trial, and the JIC must conduct, a hearing to discuss the charge or suspected conduct and to attempt to resolve the charge or investigation on terms to be presented by joint motion

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[50] ALA. CANON JUD. OF ETHICS 3(A)(6).
[51] ALA. CANON JUD. OF ETHICS 3(B)(3).
[52] ALA. CANON JUD. OF ETHICS 3(B)(3) cmt.
[53] ALA. CODE § 12-11-30(5) (2006).
[54] ALA. R. CRIM. P. 24.1(c)(2).
[55] ALA. R. JUD. INQUIRY COMM'N 6(A).
[56] ALA. R. JUD. INQUIRY COMM'N 6(B).
[57] ALA. R. JUD. INQUIRY COMM'N 6(C).
[58] ALA. R. JUD. INQUIRY COMM'N 6(D).
[59] ALA. R. JUD. INQUIRY COMM'N 6(F).
[60] ALA. R. JUD. INQUIRY COMM'N 6(E).
[61] ALA. R. JUD. INQUIRY COMM'N 6(G).

to the Court of the Judiciary.[62] A majority of the JIC may reach a binding resolution. Any written resolution that is signed by the judge and a majority of the JIC is binding unless the proposed resolution is rejected by the Court of the Judiciary.[63] All statements made by or for the judge in these hearings are privileged and are inadmissible as substantive or impeachment evidence against the judge.[64]

Judges may not continue to act as judges while there is pending (1) an indictment or information charging him or her with a crime punishable as a felony under state or federal law or (2) a complaint against him or her filed by the JIC with the Court of the Judiciary.[65] A violation of this prohibition constitutes misconduct in office and the Court of the Judiciary may apply to the Supreme Court of Alabama for a writ or writs as may be appropriate.[66]

The Attorney General of Alabama will prosecute cases filed by the JIC with the Court of the Judiciary, except where, in the opinion of the JIC, there is a conflict of interest, one could arise, or the interests of justice would not be served. In those situations, the JIC may employ counsel to prosecute the charges.[67]

Any judge who is the subject of investigation, charge, or prosecution by the JIC and who claims to be aggrieved by any violation of these rules may petition the Supreme Court of Alabama for relief.[68]

Formal proceedings against a judge are initiated by filing a complaint with the Clerk of the Court of Civil Appeals of Alabama. The complaint will specify the charges against the judge and the allegations of fact upon which the charges are based.[69] The judge may file responsive pleadings as provided in the Alabama Rules of Civil Procedure.[70] No Court of the Judiciary member may participate in any proceedings involving his or her own conduct or involving a matter in which s/he is interested or involved.[71]

Hearings will be public before all qualified members of the court, although the judge may agree to be tried by more than a quorum, but fewer than all qualified members. The chief judge will decide all preliminary motions and all procedural and evidentiary questions.[72] The allegations in the complaint must be proved by clear and convincing evidence. No judge may be compelled to give evidence against him or herself, but a judge who chooses to testify on his or her own behalf is subject to cross-examination.[73] The court may appoint counsel to represent any person who may be materially affected

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62 ALA. R. JUD. INQUIRY COMM'N 10(A).
63 *Id.*
64 ALA. R. JUD. INQUIRY COMM'N 10(B).
65 ALA. R. JUD. INQUIRY COMM'N 14.
66 *Id.*
67 ALA. R. JUD. INQUIRY COMM'N 15.
68 ALA. R. JUD. INQUIRY COMM'N 18.
69 ALA. R. CT. OF THE JUD. 3.
70 ALA. R. CT. OF THE JUD. 5.
71 ALA. R. CT. OF THE JUD. 6.
72 ALA. R. CT. OF THE JUD. 9.
73 ALA. R. CT. OF THE JUD. 10.

by the proceedings[74] and on request, the court also may allow any person who may be materially affected by the hearing to be designated as an interested party who is entitled to be represented by counsel at all of the hearings, to cross-examine witnesses, and to adduce pertinent evidence.[75]

At the conclusion of the hearing, the court must enter an appropriate order or dismiss the complaint. For any punishment other than removal, the court may convict with the concurrence of at least six of its nine members, but the court must be unanimous to remove a judge from office. Failure to convict within 10 days of the hearing's conclusion constitutes an acquittal.[76]

A judge may file an appeal of a decision of the Court of the Judiciary within 30 days of judgment to the Supreme Court of Alabama.[77]

If a judge has a question about whether certain actions constitute a violation of the Canons of Judicial Ethics, s/he may write to the JIC to request an opinion and the JIC may, in its discretion, provide the judge with a written opinion. Any opinion by the JIC that certain specified conduct by the judge would not constitute a violation of the Canons of Judicial Ethics will be admissible on behalf of the judge in any disciplinary proceeding involving the propriety of such conduct.[78]

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[74] ALA. R. CT. OF THE JUD. 12.
[75] ALA. R. CT. OF THE JUD. 13.
[76] ALA. R. CT. OF THE JUD. 16.
[77] ALA. R. CT. OF THE JUD. APP.
[78] ALA. R. JUD. INQUIRY COMM'N 17.

II. ANALYSIS

A. Recommendation # 1

> **The State should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.**

To the best of our knowledge, the State of Alabama currently is not examining the fairness of the judicial selection process, nor is it undertaking a public education effort about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

The fairness of the judicial selection process in Alabama, however, has been called into question. Alabama elects its judges in partisan elections.[79] Unfortunately, partisan judicial elections create significant questions about both the fairness of judicial selection and the independence of judges selected to serve. Partisan judicial elections operate in tension with core principles of an independent judiciary: that a judge ought to behave with "probity, fairness, honesty, uprightness, and soundness of character"[80] and without regard to "inappropriate outside influences."[81]

First, judicial elections create problematic financial pressures. Alabama judicial campaigns unquestionably are expensive and getting more so. In 1994, major party candidates for four Supreme Court seats spent over $6.5 million; in 1996, two candidates for one seat spent approximately $4.5 million; in 1998, seven candidates for three seats spent $7 million; and in 2000, thirteen candidates for five seats spent over $13 million, raising more than judicial candidates in any other state.[82] In 2004, candidates raised $7,438,818 for Alabama Supreme Court elections.[83] To finance these elections, judicial candidates must solicit contributions from individuals and organizations, some of whom may have an interest in the cases the candidates will decide as judges.[84] Between 1994 and 1998, approximately 63 percent of the cases heard by the Alabama Supreme Court involved campaign contributors who had given to a judge hearing their case.[85]

Second, the cost of running judicial campaigns limits the pool of viable candidates to those with financial means and/or access to contributors.[86] This has a potentially

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[79] *See* ALA. CONST. art. VI, § 158; *see also* American Judicature Society, Judicial Selection in the States, Alabama, *at* http://www.ajs.org/js/AL_methods.htm (last visited on May 24, 2006).

[80] ALA. CANON JUD. ETHICS 1 cmt.

[81] *Id.*

[82] American Judicature Society, Judicial Selection in the States, Alabama, Judicial Campaigns and Elections, *available at* http://www.ajs.org/js/AL_elections.htm (last visited on May 24, 2006).

[83] DEBORAH GOLDBERG ET. AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 14 (2005).

[84] A.B.A. COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 70 (2003).

[85] LAURA STAFFORD & SAMANTHA SANCHEZ, INSTITUTE ON MONEY IN STATE POLITICS, CAMPAIGN CONTRIBUTIONS AND THE ALABAMA SUPREME COURT (2003).

[86] JUSTICE IN JEOPARDY, *supra* note 84, at 70.

troubling impact on the diversity of the judiciary.[87] The American Bar Association Standing Committee on Judicial Independence reports that of the 159 Alabama general jurisdiction judgeships, only 10 of them, or 6.2 percent, are filled by people of color.[88] Furthermore, none of these judges are Asian, Latina/o, or Native American.[89] Only two African-Americans have won statewide contested elections[90] and currently, none of the nineteen appellate court judges in Alabama are racial or ethnic minorities.[91]

Third, the prospect of soliciting contributions from special interests and being publicly pressured to take positions on issues they must later decide as judges threatens to discourage many people from seeking judicial office.[92] Between 1994 and 1998, political parties were the largest source of campaign funds for judicial candidates, contributing $6.3 million, or 34 percent of all contributions.[93] In addition to political parties, attorneys, law firms, and legal political action committees contributed nearly $4 million, approximately 22 percent of the total raised.[94] Other business interests contributed approximately $5.86 million, or 32 percent.[95]

Partisan judicial elections create special risks. Judges are responsible for upholding the law, regardless of political party. Partisan elections make party affiliation the "single most salient feature of a judge's candidacy by including it as the only information about the candidate on the ballot itself."[96] This works to "further blur, if not obliterate, the distinction between judges and other elected officials in the public's mind by conveying the impression that the decision making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law."[97]

In addition to requiring that judges be elected in partisan elections, the Governor has the sole authority to fill judicial vacancies that arise at any time prior to the expiration of the term of office.[98] While judicial appointments generally are preferred to judicial elections, the process of filling judicial vacancies by appointment in a system that requires retention elections results in the judge having the advantage of running for reelection as an incumbent.

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87 *Id.*

88 American Bar Association Standing Committee on Judicial Independence, National Database on Judicial Diversity in State Courts, Alabama, *at* http://www.abanet.org/judind/diversity/alabama.html (last visited May 24, 2006).

89 *Id.*

90 EQUAL JUSTICE INITIATIVE OF ALABAMA, CRIMINAL JUSTICE REFORM IN ALABAMA – PART TWO, at 16 (2006).

91 *Id.* at 4.

92 JUSTICE IN JEOPARDY, *supra* note 84, at 71.

93 STAFFORD & SANCHEZ, *supra* note 85.

94 *Id.*

95 *Id.*

96 JUSTICE IN JEOPARDY, *supra* note 84, at 76-77.

97 *Id.*

98 *See* ALA. CONST. art. VI, § 153.

Regardless of whether a candidate is running for election or reelection, however, judicial campaigns in the State of Alabama have become increasingly politicized[99] and this politicization sometimes involves the death penalty. Some examples of this include:

- The day after overriding the jury's recommendation for a life without parole sentence and sentencing George Martin to death for the murder of his wife, Judge Ferrill McRae's campaign advertisements "touted McRae's record on sentencing defendants to death" and mentioned George Martin by name.[100] In a separate campaign, Judge McRae ran TV ads to highlight his support for capital punishment, one of which shows him on the bench while an announcer notes that the judge has "presided over more than 9,000 cases, including some of the most heinous murder trials in our history," while at the same time, the names of notorious convicted murderers whom Judge McRae sentenced to death were put on the screen.[101]
- In 1988, Bob Austin, a lower court judge who was a candidate for circuit court in Alabama, was appointed to preside at a capital trial that began just two weeks before he stood for election.[102] Austin refused to continue the case even though the defense lawyer sought a continuance because he was suffering from a serious infection that was a complication of polio.[103] In addition, the defense sought to disqualify Austin because he was running a "law and order" campaign for judge and would appear on the ballot in just two weeks.[104] Austin denied both motions.[105] The denial of the continuance was front-page news in the two local newspapers the weekend before trial began.[106] The denial of a motion to recuse Austin and the denial of a change of venue were front- page news the following week as jury selection began.[107] Austin presided over the trial, and the jury convicted and recommended the death penalty before the election. One of Austin's newspaper advertisements quoted Alabama Governor Guy Hunt as saying, "Elect judges on their qualifications ... It makes no difference whether a judge called upon to hand down a death sentence to a murderer is a Republican or a Democrat."[108] Austin won the election, and, after being sworn in as circuit judge, followed the jury's recommendation and imposed the death penalty.[109]

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[99] *See* DANIEL BECKER & MALIA REDDICK, AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES 11 (2003).

[100] Taylor Bright, *When a Jury's Choice Doesn't Matter*, BIRMINGHAM POST-HERALD.

[101] Ken Silverstein, *The Judge as Lynch Mob*, AMERICAN PROSPECT, May 7, 2001.

[102] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Captial Cases*, 73 BOSTON UNIV. L. REV. 759, 792 (1995).

[103] Adkins v. State, 600 So. 2d 1054, 1060 (Ala. Crim. App. 1990); *see also* Bright & Keenan, *supra* note 102, at 792.

[104] *Adkins*, 600 So. 2d at 1061- 62; *see also* Bright & Keenan, *supra* note 102, at 795.

[105] *See Adkins*, 600 So. 2d at 1060-63 (affirming the denial of the motions). During jury selection, defense counsel pointed out to Judge Austin that he had excused jurors who had less serious health problems than defense counsel. *Id.*; *see also* Bright & Keenan, *supra* note 102, at 795.

[106] Bright & Keenan, *supra* note 102, at 795.

[107] *Id.*

[108] *Id.*

[109] *Id.*

- In 1996, Kenneth Ingram, an incumbent candidate for the Alabama Supreme Court, ran a TV ad that opened with footage from inside a convenience store where, 20 years earlier, a teenager had murdered the owner. The ad's narrator stated that "a 68-year-old woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die." The victim's daughter then appeared on screen to give her personal endorsement: "It was my mother who was killed, and Judge Ingram gave us justice. Thank heaven Judge Ingram is on the Supreme Court."[110]
- In May 2000, the Alabama Supreme Court decided to abolish automatic review of death sentences, a decision The Huntsville Times labeled "cheap politicking." According to the editorial, "With the chief justice's seat and four others up for grabs – and four sitting justices seeking votes – the court just couldn't resist making a tough-on-crime stand so close to the voting. . . . This is a very complex issue that won't be solved by posturing. The justices, of all people, should know that. If they don't they shouldn't be serving on the state's highest court."[111]
- An Alabama Court of Criminal Appeals judge, who was also a candidate for the state's supreme court, accused the Alabama Supreme Court of being "too left and too liberal" in capital cases and challenged the court to set execution dates in twenty-seven cases that were pending in the federal courts on habeas corpus review.[112]

Judicial campaigns became increasingly expensive and contentious through the 1980s and 1990s.[113] After particularly nasty judicial elections in 1994 and 1996, the Alabama Supreme Court revised the Canons of Judicial Ethics to prevent candidates from personally soliciting campaign contributions and to make candidates responsible for the content of their campaign statements. In addition, the Supreme Court authorized the formation of a judicial campaign oversight committee for the 1998 and 2000 elections to act as a resource for candidates who have questions about campaign conduct. The committee met with candidates, reviewed the Canons of Judicial Ethics, and convinced most judicial candidates to sign a pledge agreeing to comply with the ethical standards and goals of the committee. In 1998, the committee handled more than 350 formal candidate inquiries regarding permissible conduct and many more informal requests for advice about the ethics of campaigning. The committee had no formal disciplinary power, but it could refer violations to the JIC or the State Bar. It could issue general public statements about instances of appropriate and inappropriate campaign conduct. It is generally thought that the committee's 1998 and 2000 work was successful in preventing the negativity of previous elections. The Supreme Court did not form similar committees for the 2002 or 2004 judicial elections.[114]

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[110] Silverstein, *supra* note 101.

[111] *The Politics of Death*, HUNTSVILLE TIMES (Ala.), May 25, 2000.

[112] Tom Hughes, *Montiel Challenges Court to Schedule Executions*, MONTGOMERY ADVERTISER (Ala.), May 19, 1994, at 3B.

[113] *See* BECKER AND REDDICK, *supra* note 99.

[114] *Id*. at 11-12.

Further complicating Alabama's partisan election process is the fact that Alabama also allows for judicial override of sentences, imposing life or death over a jury's recommendation to the contrary. Alabama is one of four states that allow for judicial override and the only state that has both partisan judicial elections and judicial override.[115] This combination can introduce improper political pressure and the potential for (or appearance of) bias. For example, in Delaware, where judges are appointed, override is most often used to override recommendations of death sentences in favor of a lesser sentence while in Alabama, 90% of overrides impose sentences of death.[116] Judges in Alabama "'run for re-election on that basis, because the popular opinion in the state is, Let's hang 'em.'"[117] Moreover, a study of judicial override in Alabama found that trial judges use life to death overrides more than twice as often in the twelve months before a judicial election than in the years between elections.[118] According to William Bowen, former presiding judge of the Alabama Court of Criminal Appeals, most judges would prefer that judicial override be eliminated, because it increases the pressure to impose death.[119]

Because the State of Alabama is not currently examining the fairness of the judicial appointment/election process or undertaking a public education effort to inform the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary, it fails to meet the requirements of Recommendation # 1.

Because judges may feel pressured by an imminent judicial election to use the practice of "judicial override" as a tool to bolster their political standing with the public, the Alabama Death Penalty Assessment Team reiterates its recommendation that the State of Alabama should give jurors the final decision-making authority in capital sentencing proceedings by eliminating judicial override.[120]

B. Recommendation # 2

> **A judge who has made any promise—public or private—regarding his prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

The Code of Judicial Conduct prohibits judicial candidates and judges from making statements that may impact current and/or future decisions. Canon 7 states that "it is imperative that he or she at all times conduct himself or herself in such a manner as to prevent any political considerations, entanglements, or influences from ever becoming

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[115] EQUAL JUSTICE INITIATIVE OF ALABAMA, *supra* note 90.

[116] *Id.*

[117] David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. TIMES, June 16, 2001.

[118] Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039-44 (1999).

[119] Firestone, *supra* note 117 (noting that "[j]udicial politics has gotten so dirty in this state that your opponent in an election simply has to say that you're soft on crime because you haven't imposed the death penalty enough").

[120] For a discussion fo the effects of judicial override on capital jurors' understanding of their role in sentencing, see Chapter 10 of this report, Capital Jury Instructions, *supra*, at 207-09.

involved in or from ever appearing to be involved in any judicial decision or in the judicial process."[121] Further, "a candidate for judicial office … shall not make any promise of conduct in office other than the faithful and impartial performance of the duties of the office; shall not announce in advance the candidate's conclusions of law on pending litigation; and shall not knowingly misrepresent his or her identity, qualification, present position, or other fact."[122] Similarly, Canon 3 states that judges must refrain from "public comment about a pending or impending proceeding in any court."[123]

Despite Canons 3 and 7, judicial candidates continue to campaign on explicit and implicit promises to impose particular sentencing (namely, death) in future cases (as illustrated in Recommendation #1) without any apparent ramifications. Since the JIC was created in 1976, it does not appear that there have been any ethics proceedings against judges as a result of conduct in a capital case,[124] although the JIC has issued approximately 15 advisory opinions in which judges sought advice on appropriate conduct in capital cases.[125] All JIC proceedings are confidential except a complaint filed with the Court of the Judiciary,[126] meaning that complaints could have been filed with the JIC, but not discussed publicly.

More generally, between 1973 and 2004, 4,351 complaints against judges were filed with the JIC. No ethical violation findings were made on 1,929 complaints, no jurisdiction findings were made on 1,858, 514 complaints were found to include allegations that presented no reasonable basis or insufficient basis to file charges, 179 were resolved through meeting or other communication with the judge, 22 were withdrawn or cancelled, 20 were resolved when the judge left office, 16 were resolved in court action, five were dismissed for lack of a verified complaint, and 13 were "otherwise resolved."[127] The JIC has filed 33 complaints with the Court of the Judiciary on charges ranging from various forms of dereliction of duty, personal and fiduciary financial improprieties, sexual misconduct, *ex parte* communications, misrepresentations to the JIC, presiding over cases in which they were disqualified, criminal activity, perjury and subornation of perjury, improper relationships with litigants, improper use of judicial prestige and influence, ruling in bad faith, and willfully failing to comply with a binding court order.[128] Four judges have been removed from office, 11 judges resigned while charges were pending, and the JIC dismissed two cases upon resignation of the judge.[129] The JIC tends to receive more complaints in years in which judicial elections are held than in non-election years.[130]

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[121] ALA. CANON OF JUD. ETHICS 7(A)(1).
[122] ALA. CANON OF JUD. ETHICS 7(B)(1)(c).
[123] ALA. CANON OF JUD. ETHICS 3(A)(6).
[124] Telephone Interview with Margaret Childers, Executive Director of the Alabama Judicial Inquiry Commission.
[125] *Id.* The opinions deal with issues ranging from whether a judge must recuse him or herself to whether a judge may write a book about a capital case before the inmate has been executed. *See* State of Alabama, Judicial Inquiry Commission, *at* http://www.alalinc.net/jic (last visited on May 24, 2006).
[126] ALA. CONST. amend. 581, § 6.17(b).
[127] ALA. JUD. INQUIRY COMM'N ANN. REP. 27-28 (2004)
[128] *Id.*
[129] *Id.*
[130] *Id*. at 29.

Alabama Supreme Court Justice Tom Parker provides a recent example of a judge making comments regarding his prospective decisions in capital cases with no known repercussions. On Jan. 1, 2006, Justice Parker authored an opinion piece in the *Birmingham News* encouraging the Alabama Supreme Court to disregard United States Supreme Court precedent banning the execution of juvenile offenders and, instead, and to uphold death sentences for juvenile offenders.[131] As he explained:

> I am not surprised the liberal activists on the U.S. Supreme Court go to such lengths to usurp more political power. I am also not surprised they use such ridiculous reasoning to try to force foreign legal fads on America. After all, this is the same court that has declared state displays of the Ten Commandments unconstitutional.
>
> But I am surprised, and dismayed, that my colleagues on the Alabama Supreme Court not only gave in to this unconstitutional activism without a word of protest but also became accomplices to it by citing Roper as the basis for their decision to free Adams from death row.
>
> The proper response to such blatant judicial tyranny would have been for the Alabama Supreme Court to decline to follow Roper in the Adams case.

Based on this information, it is unclear whether the State of Alabama is taking sufficient steps to preclude judges, who make promises regarding their prospective decisions in capital cases that amount to prejudgment, from presiding over capital cases or from reviewing any death penalty decision in the jurisdiction.

C. Recommendation # 3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not "technicalities" and that judges and lawyers are bound to protect those rights for all defendants.

b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.

c. Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.

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[131] Tom Parker, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2006.

We did not obtain sufficient information to appropriately assess the role of bar associations and community leaders in fulfilling the requirements of Recommendation #3a. Because state court judges are elected in Alabama, Recommendations #3b & c are not applicable.

We note, however, that the State Bar has been interested in judicial independence issues and working toward improving the fairness of the appellate judicial selection process for over fifty years. In 1966, with the help of the American Judicature Society, it convened the first of three citizen's conferences on Alabama's state courts. The conference made a number of recommendations, including merit selection of judges.[132] The second citizen's conference on Alabama state courts was convened in 1973 and recommended, among other things, a state nominating commission for the appointment of judges to fill vacancies.[133] The third citizen's conference was held in 1995 and recommended changes to the Canons of Judicial Ethics, again recommended merit selection for state judges to fill vacancies, and recommended nonpartisan elections for new terms.[134]

In addition, during the 1990s, the Alabama State Bar created a task force to study the increase in judicial election campaign expenditures and the appearance of bias associated with campaign contributions, and a task force on judicial elections to make recommendations on judicial campaign conduct.[135]

Most recently, the Board of Bar Commissioners of the Alabama State Bar Association in 2004 endorsed a proposed bill to amend the Alabama Constitution to create a merit selection process for appellate judges.[136] Under the proposed system there would be a statewide judicial nominating commission which would submit names of the three most qualified candidates to the Governor who would then make the appointment.[137] The appellate judge would then serve for six years after which he or she may qualify for retention by filing a notice with the Secretary of State. The bill also would establish a judicial evaluation committee which would develop and implement techniques and procedures for evaluating appellate judges.[138] The committee would prepare a narrative profile and make a recommendation to retain, not retain, or no opinion. There would then be a retention election. The appellate judge is retained if he or she receives an

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[132] *See* American Judicature Society, Judicial Selection in the States, Alabama, History of Juridical Selection Reform, *at* http://www.ajs.org/js/AL_history.htm (last visited on May 24, 2006).

[133] *Id.*

[134] *Id.*

[135] *See* American Judicature Society, Judicial Selection in the States, Alabama, History of Juridical Selection Reform, *at* http://www.ajs.org/js/AL_history.htm (last visited on May 24, 2006).

[136] State Bar of Ala., *Resolution Supporting Constitutional Amendment for Merit Selection of Appellate Judicial Candidates*, *at* http://www.alabar.org/media/attachments/merit_selection_amendment.pdf (last visited May 25, 2006). While this proposed amendment applies only to appellate judges, six of the Alabama Judicial Circuits already have judicial nominating committees which act when there is a judicial vacancy for a circuit or district judge position within that circuit. These committees are appointed by the local bar associations. When there is a vacancy, they receive resumes from lawyers in the circuit who are interested in serving as a judge, and recommend the three that the committee deems to be most qualified to the Governor, who appoints one to fill the vacant judgship. Two of the four present Supreme Court Justices were initially selected as Circuit judges by this process.

[137] *Id.*

[138] *Id.*

affirmative vote of the majority of the people voting in the retention election.[139] Plans are underway to try to present this bill during the 2007 Legislative session.[140]

Because of the lack of information, we were not able to determine whether the State of Alabama is in compliance with Recommendation #3a. As stated previously, because state judges are elected in Alabama, Recommendations #3b and #3c are not applicable.

D. 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 that the defendant receives a proper defense.**

Recommendation # 5

> **A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.**

The Alabama Canons of Judicial Ethics Canon 3B(3) requires that a judge "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge has personal knowledge."[141] Disciplinary measures may include reporting a lawyer's misconduct to the State Bar,[142] holding the lawyer in contempt,[143] and/or granting a new trial on ineffective assistance of counsel or prosecutorial misconduct grounds.[144]

We have not been able to find any documented instances of judges taking measures to remedy the harm caused by "ineffective lawyering" by defense counsel or "prosecutorial misconduct" or to prevent harm from occurring in the future.

Consequently, we were unable to determine whether the State of Alabama is in compliance with Recommendations #4 and #5.

E. Recommendation # 6

> **Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.**

Neither the Alabama Code nor the Canons of Judicial Ethics explicitly requires judges to ensure that defendants are provided with full discovery in all capital cases, but Canon 3 requires judges to be "faithful to the law" and perform their judicial duties fairly,[145]

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139 *Id.*
140 *Judicial Selection Debate Vital for State*, MONTGOMERY ADVERTISER, Mar. 1, 2006, at 4A.
141 ALA. CANON OF JUD. ETHICS 3(B)(3).
142 ALA. CANON OF JUD. ETHICS 3(B)(3) cmt.
143 ALA. CODE § 12-11-30(5) (2006).
144 ALA. R. CRIM. P. 24.1(c)(2).
145 ALA. CANON OF JUD. ETHICS 3 cmt.

which one could argue would include enforcing existing discovery laws and ensuring that defendants are provided with full discovery in capital cases.

The Alabama Supreme Court has held that capital cases, by their very nature, are "sufficiently different from other cases to justify the exercise of judicial authority" to order broad – or "open file" – discovery.[146] This has been interpreted to mean that there is an "extensive right to discovery in capital cases because of the fact that 'any evidence' may be relevant to mitigating a sentence of death."[147]

The judge's ability to order broad discovery does not mean that he or she has an obligation to do so, however. Instead, the extent to which discovery will be allowed lies within the discretion of the trial court.[148]

Because of the lack of necessary information, we were not able to determine whether the State of Alabama is in compliance with Recommendation #6.

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[146] *Ex parte* Monk, 557 So. 2d 832, 836 (Ala. 1989). Open file discovery allows the defense to review the prosecution's entire case file.

[147] Council v. State, 682 So. 2d 495, 499 (Ala. Crim. App. 1996).

[148] Broadnax v. State, 825 So. 2d 134, 156 (Ala. Crim. App. 2000) (citing Maples v. State, 758 So. 2d 1, 33 (Ala. Crim. App.))

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some States, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the U.S. Supreme Court held in *McCleskey v. Kemp*[1] that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that we identify the various ways in which race infects the administration of the death penalty and that we devise strategies to root out discriminatory practices.

[1] 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp*.[2] Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth (Baldus study), McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.[3] The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in his particular case.[4]

On January 23, 1998, the Alabama Judicial Study Commission (JSC) created a special sentencing committee to study sentencing policies and practices in Alabama.[5] During its investigation of Alabama's criminal sentencing system, the JSC sentencing committee concluded that "significant problems" exist within the Alabama's current sentencing system.[6] As a result of their study, the JSC Sentencing Committee recommended the creation of the Alabama Sentencing Commission as a separate state agency under the Alabama Supreme Court, to serve as "a permanent research arm of the criminal justice system responsible for acquiring, analyzing and reporting necessary information to officials and state agencies involved in the sentencing process, the Legislature and the public."[7]

Among duties of the Sentencing Commission, it must:

> Establish an effective, fair and efficient sentencing system for Alabama adult and juvenile criminal offenders which provides certainty in sentencing, maintains judicial discretion and sufficient flexibility to permit individualized sentencing as warranted by mitigating or aggravating factors, and avoids unwarranted sentencing disparities among defendants with like criminal records who have been found guilty of similar criminal conduct. Where there is disparity, it should be rational and not related, for example, to geography, race, or judicial assignment.[8]

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[2] *Id.*

[3] *Id.* at 291-92.

[4] *Id.* at 297.

[5] Alabama Sentencing Commission, History of the Alabama Sentencing Commission and the Timeline of Events Leading to its Creation, *at* http://sentencingcommission.alacourt.gov/history.html#_fnt%201 (last visited on May 24, 2006).

[6] *Id.* The Alabama Sentencing Commission website does not identify the "significant problems" in Alabama's sentencing system, but we can infer that "unwarranted sentencing disparities" was one of them, given the fact that eliminating "unwarranted sentencing disparities" was one of the stated goals of the commission at its inception. *Id.*

[7] *Id.* By statute, the legislature created the Sentencing Commission in May 2001. *Id.*

[8] *Id.*

In 2003, the Sentencing Commission's annual report stated that sentencing disparity "is problematic when such non-legal factors as location of the courtroom, race, wealth or sex are critical in determining the offender's sentence."[9] To eliminate this disparity, the report states that "Alabama must adopt a sentencing system that demands consistent responses to offenders with similar criminal histories and criminal conduct."[10] The report also stated, however, that disparity based upon race and gender would be thoroughly examined by the Sentencing Commission at a later time and "[r]ecommendations, if any, based upon the findings in [the data reviewed] will be the subject of an addendum to [the 2003 annual report]."[11] It does not appear that such an addendum was ever published.

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[9] ALA. SENTENCING COMM'N, RECOMMENDATIONS FOR REFORM OF ALABAMA'S CRIMINAL JUSTICE SYSTEM, 2003 REPORT 28 (2003), *available at* http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf (last visited on May 24, 2006).

[10] *Id.* at 28.

[11] *Id.* at 27 n.1.

II. ANALYSIS

A. Recommendation #1

> **The State should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.**

In 2003, the State of Alabama, through the Alabama Sentencing Commission, stated that sentencing disparities are "problematic when such non-legal factors as location of the courtroom, race, wealth or sex are critical in determining the offender's sentence."[12] The Alabama Sentencing Commission decided to conduct an investigation on the impact of sentencing disparities based upon race and gender and make recommendations based upon its findings.[13] The Commission's findings were to be reported in an addendum to its 2003 annual report.[14]

At least anecdotally, racial discrimination does appear to have an impact on the criminal justice system in the State of Alabama. Specifically, in Talladega County, a former prosecutor admitted that "race is an issue in Talladega County because it is an issue everywhere."[15] A local professor noted that "[t]he coroner is white . . . [t]he sheriff is white, . . . [and] the judges are white."[16] In one instance, a later-exonerated death-row inmate alleged that he was set up by police for murder simply because he was sending love letters to a white woman.[17] Despite these anecdotal accounts of racial discrimination, it appears that the Commission never released an addendum to its 2003 annual report detailing its findings and recommendations to remedy racial discrimination in the criminal justice system.

Although it appears that the State of Alabama has agreed to examine the impact of racial discrimination in its criminal justice system, specifically in sentencing, there is no indication that it has taken steps to develop new strategies that strive to eliminate the impact of racial discrimination in capital sentencing. The State of Alabama, therefore, does not meet Recommendation #1.

B. Recommendation #2

> **The State should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases (regardless of whether the case is charged,**

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[12] *Id.* at 28.
[13] *Id.*
[14] *Id.* at 27 n.1.
[15] Rick Halperin, *Talladega: Death Row Country – Is Fairness Missing From the State's Use of Capital Punishment?*, BIRMINGHAM POST-HERALD, Dec. 13, 2001.
[16] *Id.*
[17] Rick Halperin, *Guilty Until Proven Innocent – Four Men Are Proof That Not Everyone Sent to Death Row Should be There*, BIRMINGHAM POST-HERALD, Dec. 13, 2001 (noting that Walter "Jonnie D." McMillian, who was later exonerated because the state withheld evidence and coerced another witness to implicate him in the murder, alleges that lover letters sent to a white woman sent him to death row).

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.

The Alabama Department of Corrections collects and maintains updated race profiles of the inmates currently serving on death row[18] and the Alabama Sentencing Commission collects and maintains a database which includes information on the race of defendants charged with capital murder.[19] To the best of our knowledge, however, the State of Alabama is not currently collecting or maintaining data on the race of victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases at all stages of the proceedings.

The State of Alabama, therefore, is only in partial compliance with Recommendation #2, as it collects only race data on defendants charged with capital murder, and does not collect data on the race of victims, circumstances of crimes, aggravating and mitigating circumstances, or the nature and strength of the evidence.

C. Recommendation #3

The State 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.

To the best of our knowledge, the State of Alabama is not currently collecting and reviewing all valid studies already undertaken to determine the impact of racial discrimination on the death penalty nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases. Therefore, the State of Alabama is not in compliance with Recommendation #3.

D. 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.

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[18] Alabama Department of Corrections, Alabama Inmates Currently on Death Row, *at* http://www.doc.state.al.us/deathrow.asp (last visited on May 24, 2006). Additionally, the Alabama Sentencing Commission, in conjunction with the State Sentencing and Corrections Program of the Vera Institute of Justice, collected a variety of data on crime rates, arrest rates, commitment rates, prison population, sentence lengths, and length of time served. *See* VERA INSTITUTE OF JUSTICE, STATE SENTENCING AND CORRECTIONS PROGRAM, ALABAMA DATABOOK: A SUMMARY OF CRIMINAL JUSTICE STATISTICS FOR ALABAMA AND THE UNITED STATES (2002). However, none of this data is death-penalty-specific and does not touch on race as a factor in sentencing determinations.

[19] Alabama Sentencing Commission, Alabama Capital Murder Database (on file with author).

Alabama's death penalty system reflects some clear racial disparities. Specifically, twenty-eight out of the thirty-four people who have been executed in Alabama since 1976 were convicted of killing white people.[20] This rate is well beyond what might be anticipated in a state where 65% of all murder victims are black. Similarly, although only six percent of all murders in Alabama involve black defendants and white victims, over sixty percent of black death-row inmates have been sentenced for killing someone white.[21] Thus, it appears that those convicted of killing white victims are far more likely to receive a death sentence than those convicted of killing non-white victims.

In its 2003 Annual Report, the Alabama Sentencing Commission stated that sentencing disparities are "problematic when such non-legal factors as location of the courtroom, race, wealth or sex are critical in determining the offender's sentence."[22] The report generally stated that "Alabama must adopt a sentencing system that demands consistent responses to offenders with similar criminal histories and criminal conduct,"[23] that it planned to thoroughly examine sentencing disparities based on race, and that "[r]ecommendations, if any, based upon the findings in [the data reviewed] will be the subject of an addendum to [the 2003 annual report]."[24] However, it does not appear that such an addendum was ever published and we were unable to ascertain whether the Alabama Sentencing Commission ever performed a thorough study of sentencing disparities based on race in Alabama.

Despite data suggesting that a victim's race may play a role in the Alabama death penalty process, it does not appear that the State of Alabama is currently developing remedial and preventative strategies to address the apparent racial disparities in the administration of the death penalty. The State of Alabama, therefore, fails to meet the requirements of Recommendation #4.

E. Recommendation #5

> **The State should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.**

The State of Alabama has not adopted 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

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[20] *See* Death Penalty Information Center, Searchable Database of Executions, *at* http://www.deathpenaltyinfo.org/executions.php (last visited on June 2, 2006) (choose "White" in the "Race of Victim" menu and "AL" in the "State" menu); AMERICAN CIVIL LIBERTIES UNION, BROKEN JUSTICE: THE DEATH PENALTY IN ALABAMA 21 (2005), *at* http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf (last visited on May 24, 2006).

[21] *Id.*

[22] 2003 REPORT, *supra* note 9, at 28.

[23] *Id.*

[24] *Id.* at 27 n.1.

defendant or the race of the victim. Therefore, the State of Alabama is not in compliance with Recommendation #5.

F. Recommendation #6

> **The State 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.**

The Commission on Accreditation for Law Enforcement Agencies (CALEA) requires certified police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Alabama to establish a written directive that prohibits bias-based profiling and requires training on how to avoid biased-based profiling.[25]

Additionally, all Alabama "peace officers"[26] are statutorily required to meet certain criteria,[27] take part in a basic training course[28] at a training academy authorized by the Alabama Peace Officer Standard and Training Commission (APOSTC),[29] and pass a battery of examinations in order to complete of the course.[30] The basic training course consists of 480 hours of training,[31] including three hours of training on "law enforcement ethics" and three hours of training on "community/news media relations."[32] While these areas could include instruction on racial sensitivity, the exact material covered within these lessons is unclear.

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[25] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at 1-4 (4th ed. 2001).

[26] A "peace officer" or "law enforcement officer" is defined as "a policeman, deputy sheriff, deputy constable, and other official who has authority . . . to make arrests" *See* ALA. CODE § 36-21-40(4) (2005).

[27] ALA. CODE § 36-21-46 (2005). One must (1) be at least 19 years of age; (2) have obtained a high school diploma or the recognized equivalent; (3) complete a required training course; (4) be certified by a licensed physical as in good health and physically fit for the performance of the duties of a law enforcement officer; (5) a person of good moral character and reputation and must not have been convicted of a felony. *Id.*

[28] The law enforcement candidate must successfully complete a basic training program approved by the Alabama Peace Officer Standards and Training Commission. ALA. CODE § 36-21-46 (2005); ALA. ADMIN. CODE R. 650-X-2-.01 (2005) (administrative rule requiring the basic training).

[29] ALA. CODE § 36-21-45 (2005); ALA. ADMIN. CODE R. 650-X-3-.01 (2005) (administrative rule requiring the basic training course be taught at a certified academy).

[30] In order to successfully complete the basic training course and obtain certification, the law enforcement candidate must (1) achieve a score of at least 70% on all written exams, the first-aid exam, the legal issues exam, and the firearms course; (2) pass the physical agility/ability test; and (3) achieve at least 95% attendance throughout the training course. ALA. ADMIN. CODE R. 650-X-4-.01(3) (2005).

[31] ALA. ADMIN. CODE R. 650-X-4-.01(1) (2005). The course generally runs for 3-4 months. *See* Alabama Peace Officer Standards and Training Commission, Basic Training, *at* http://www.apostc.state.al.us/basic_training.htm (last visited on May 25, 2006).

[32] *See* Northeast Alabama Law Enforcement Academy, Basic Training, *at* http://lea.jsu.edu/ (last visited on May 25, 2006) (click on "Basic Training," and then on "480 Hour Basic Training Curriculum"). This basic training course follows the course prescribed by APOSTC and is the same 480 hour curriculum offered at all other academies in the state. *Id.*

Although the APOSTC mandates training for all law enforcement candidates, we were unable to determine whether this training includes instruction on eliminating racial bias in every aspect of the death penalty system. Additionally, CALEA only pertains to certified police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments and the contents and scope of the training on racial profiling is unknown.

Because only some law enforcement agencies receive training on avoiding racial profiling and the State of Alabama does not require educational programs on eliminating race as a factor in all aspects of death penalty administration, the State of Alabama is only in partial compliance with Recommendation #6.

G. 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*.**

The State of Alabama does not require defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases and identify biased jurors during *voir dire*.

The Alabama Criminal Defense Lawyers Association (ACDLA), however, offers eight seminars annually on a variety of criminal defense issues, including one seminar on the death penalty each year.[33] Specifically, the ACDLA's death penalty seminar, *Loosening the Death Belt*, regularly includes a program on the best practices in jury selection[34] and has included a program on how capital attorneys can assure impartiality in death penalty cases.[35]

Although training for defense lawyers on the issue of race in capital litigation may be available, the State of Alabama does not require defense counsel to participate in training to specifically identify and develop racial discrimination claims in capital cases and to

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[33] *See, e.g.*, Alabama Criminal Defense Lawyers Association, Seminar Info, *at* http://melcooper.com/acdlaorg/seminarinfo/index-seminarinfo.htm (last visited on May 25, 2006); *see also* Telephone Interview with Ann Cooper, Executive Director, Alabama Criminal Defense Lawyers Association (Apr. 4, 2006).

[34] Alabama Criminal Defense Lawyers Association, Agenda for "Loosening the Death Belt X: Tightening the Defense – One Life at a Time," "Systematic Jury Selection in Capital Cases" (Jan. 27-28, 2006) (on file with author); Alabama Criminal Defense Lawyers Association, Agenda for "Loosening the Death Belt IX: Tightening the Defense – One Life at a Time," "Saving Good Jurors on Voir Dire and Finding the Bad Ones" (Jan. 28-29, 2005) (on file with author); Alabama Criminal Defense Lawyers Association, Agenda for "Loosening the Death Belt VIII: Tightening the Defense – One Life at a Time," "Voir Dire" (Jan. 30-31, 2004) (on file with author); Alabama Criminal Defense Lawyers Association, Agenda for "Loosening the Death Belt VII: Tightening the Defense – One Life at a Time," "Beyond Common Sense: Psychological Perspectives on Jury Selection in Capital Cases" (Jan. 31- Feb. 1, 2003) (on file with author).

[35] Alabama Criminal Defense Lawyers Association, Agenda for "Loosening the Death Belt X: Tightening the Defense – One Life at a Time," "The Role of Capital Lawyers in Assuring a Fair and Impartial Tribunal in Light of the New Agenda" (Jan. 27-28, 2006) (on file with author).

identify biased jurors during *voir dire*. The State of Alabama is, therefore, not in compliance with Recommendation #7.

H. Recommendation #8

The State should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

The "Proposed Pattern Jury Instructions for Use in the Sentence Phase of Capital Cases Tried Under Act No. 81-178"[36] instruct the jury that, "in determining what to recommend [for] the punishment . . . , [it] must avoid any influence of passion, prejudice or any arbitrary factor."[37] The Alabama Supreme Court has been clear, however, that the pattern instructions are "to be considered patterns only" and "should be altered or changed as circumstances indicate."[38] There is also not a pattern jury instruction or case law requiring judges to inform jurors 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.

Because consideration of racial factors in the jury's decision-making process would be prohibited by the non-mandatory pattern jury instruction telling the jury to avoid the influence of "passion, prejudice, or any arbitrary factor," the State of Alabama partially meets the requirements of Recommendation #8.

I. Recommendation #9

The State 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.

Canon 3 of the Alabama Canons of Judicial Ethics requires a judge to "disqualify [himself/herself] in a proceeding in which [his/her] disqualification is required by law or [his/her] impartiality might reasonably be questioned, including . . . where: [the judge] has a personal bias."[39] However, the number of judges who have actually disqualified themselves due to racial bias or prejudice is unknown. Based on the FY2004 annual report of the Alabama Judicial Inquiry Commission (JIC),[40] there were ten complaints

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[36] PROPOSED PATTERN JURY INSTRUCTIONS FOR USE IN THE SENTENCE PHASE OF CAPITAL CASES TRIED UNDER ACT. NO. 81-178 (1982).

[37] *Id.*

[38] Order of the Supreme Court of Alabama Approving Use of Alabama Pattern Jury Instructions (Ala. 1982); *see also Ex parte* Hagood, 777 So. 2d 214, 219 (Ala. 1999) (concluding that past precedent holding that "no reversible error will be found when the trial court follows . . . pattern jury instructions[s]" was "overly broad"); *Ex parte* Wood, 715 So. 2d 819, 824 (Ala. 1998) (encouraging courts to "deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case" where use of the pattern instructions would be "misleading or erroneous").

[39] ALA. CANON OF JUD. ETHICS 3(C)(1)(a).

[40] For an in-depth description of how the Judicial Inquiry Commission was created and how complaints against judges are dealt with, see Chapter 11 of this report, Judicial Independence, *supra*, at 216.

about judges based on bias and nine complaints alleging failure to disqualify.[41] Although the report states that the JIC disposed of 160 of the 167 verified complaints,[42] and investigated 29 of these complaints,[43] which led to one judge being removed from the bench,[44] we were unable to determine the number of complaints based on bias or failure to disqualify that were dismissed or led to a sanctioning or resignation of a judge.

Based on this information, Canon 3(C)(1)(a) may not sufficiently ensure that judges rightfully disqualify themselves, making it is impossible to assess whether the State of Alabama is complying with Recommendation #9.

J. Recommendation #10

> **The State 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.**

The State of Alabama does not make any exceptions to the normal procedural rules for claims of racial discrimination in the imposition of death sentences. Specifically, if a defendant fails to timely object to a discriminatory aspect of the trial, the appellate court will not review a claim based on that discrimination.[45] Furthermore, a defendant's failure to raise a claim of racial discrimination that could have been raised at trial or on appeal will preclude review in a subsequent *habeas corpus* proceeding,[46] unless (1) the defendant makes a valid claim that his counsel was ineffective for failing to object to discriminatory conduct at trial,[47] or (2) the defendant makes a valid claim based on newly discovered evidence.[48] Based on this information, the State of Alabama fails to comply with Recommendation #10.

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[41] ALA. JUD. INQUIRY COMM'N, ANNUAL REPORT FY 2004 18 (2004).

[42] *Id.* at 15-16.

[43] *Id.* at 20-21.

[44] *Id.* at 21-22. After an investigation and several appeals, Alabama Supreme Court Chief Justice Roy Moore was removed from the court for violations of Canons unrelated to racial bias. *Id.*

[45] *See, e.g.*, Bonner v. State, 564 So. 2d 99, 99 (Ala. Crim. App. 1990) (holding that a claim that the state was guilty of racial discrimination in the jury selection process is deemed waived on appeal if not raised in a timely manner in the trial court).

[46] ALA. R. CRIM. P. 32.2(a)(3), (5). *See, e.g.*, Woods v. State, 2004 WL 1909291, *11-12 (Ala. Crim. App. Aug. 27, 2004) (holding that the petitioners claim of a coerced confession was procedurally barred because he knew of it before and during the trial, failed to inform his counsel, and it could have been but was not raised at trial); Jackson v. State, 889 So. 2d 49, 52 (Ala. Crim. App. 2004) (holding that the petitioner's challenge to the sufficiency of the evidence to support his conviction is precluded from review because it could have been, but was not, raised on appeal).

[47] For example, if counsel fails to object to the striking of jurors from the jury panel based on their race, the post-conviction petitioner may raise counsel's ineffective assistance to overcome the procedural bar of the underlying racial discrimination claim. *Ex parte* Yelder, 575 So.2d 137,138 (Ala. 1991) (addressing a claim of ineffective assistance for counsel's failure to make a claim based on *Batson v. Kentucky*, 476 U.S. 79 (1986), and noting that in such a case, prejudice is presumed).

[48] *See* ALA. R. CRIM. P. 32.1(e).

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Mental Retardation defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of 18. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

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

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

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study

found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

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

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

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.

I. FACTUAL DISCUSSION

A defendant charged with a capital offense may claim that s/he suffered or suffers from: (1) mental retardation; and/or (2) mental disease or defect.

A. Mental Retardation

Alabama does not have a statute banning the execution of mentally retarded offenders, but is bound by the United States Supreme Court decision in *Atkins v. Virginia*,[1] which held that the execution of mentally retarded offenders is a violation of United States Constitution's 8th Amendment prohibition against cruel and unusual punishment.

1. Definition of Mental Retardation

While Alabama has not statutorily defined mental retardation as it relates to death penalty cases, Alabama defines mental retardation in other contexts as: (1) "significant subaverage general intellectual functioning," (2) "resulting in or associated with concurrent impairments in adaptive behavior" that is (3) "manifested during the developmental period, as measured by appropriate standardized testing instruments."[2] The Alabama Supreme Court has accepted this definition for use in death penalty cases and has further defined "significant subaverage intellectual functioning" as an IQ score of 70 or below[3] and the "developmental period" as being under the age of 18.[4] In defining adaptive behavior, the Alabama Court of Criminal Appeals has noted that adaptive behavior impairments are evidenced by "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work."[5] Later decisions have relied on these judicially-set definitions in analyzing claims of mental retardation.[6]

In determining whether an IQ score over 70 disqualifies a defendant or death row inmate from being found to have mental retardation, the Alabama Court of Criminal Appeals has, in some cases, applied a slightly broader definition of mental retardation than the Alabama Supreme Court. In *Ex parte Smith*, the Alabama Supreme Court hewed closely to a strict IQ limit of 70 when it concluded that "[t]he testimony with regard to Smith's intellectual functioning indicates that he falls within the borderline to mildly mentally retarded range with an overall IQ score of 72 a year after the murders" and that the IQ score "seriously undermines any conclusion that Smith suffers from significantly

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1 Atkins v. Virginia, 536 U.S. 304 (2002).

2 ALA. CODE § 15-24-2(3) (2006).

3 *Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002).

4 *Id*.

5 Morrow v State, 2004 WL 1909275, *2 (Ala. Crim. App. Aug. 27, 2004) (quoting *Atkins*, 536 U.S. at 308 n.3).

6 *See Ex parte* Smith, 2003 WL 1145475, *9 (Ala. Mar 14, 2003); Beckworth v. State, 2005 WL 2046331, *13-14 (Ala. Crim. App. Aug. 26, 2005); Peraita v. State, 897 So. 2d 1161, 1206 (Ala. Crim. App. 2003); Lee v. State, 898 So. 2d 790, 859 (Ala. Crim. App. 2001); Stallworth v. State, 868 So.2d 1128, 1182-83 (Ala. Crim. App. 2001).

subaverage intellectual functioning as contemplated under even the broadest definitions."[7]

In contrast, the Alabama Court of Criminal Appeals ruled in *Tarver v. State* that, although he had tested in post-conviction preparation at 76, the petitioner's IQ level was in dispute because of earlier scores below 70.[8] That court clarified its interpretation of the United States Supreme Court's controlling precedent: "In upholding the death sentence in *Ex parte Perkins*, the Alabama Supreme Court found that a full-scale IQ of 76 as an adult was *insufficient, by itself*, to establish mental retardation."[9] The court did not say the reverse however, i.e., that an IQ of 76, by itself, is proof that the petitioner was *not* mentally retarded. On the other hand, in *Beckworth v. State*, the court, in weighing the defendant's two separate IQ test scores of 67 and 73, seemed to move closer to the Supreme Court's position and indicated that "there was evidence that supported a determination" that the defendant "did not demonstrate significantly subaverage general intellectual functioning."[10]

2. Procedures for Raising and Considering Mental Retardation Claims

A determination of mental retardation can and should be made pre-trial,[11] but also may be made at trial,[12] direct appeal[13] or post-conviction proceedings.[14] The decision as to whether an offender is mentally retarded generally rests with the trial court, subject to appellate review.[15] Unless and until the legislature provides guidance as to how mental retardation claims should be handled, the Alabama Court of Criminal Appeals has decided that regardless of when in the process the issue is raised, mental retardation claims should be raised and decided by following the post-conviction process laid out in Alabama Rule of Criminal Procedure 32.[16]

a. Pre-trial and Trial Determinations

While Alabama Rule of Criminal Procedure 32 does not set out a comprehensive procedure for dealing with mental retardation claims, the Court of Criminal Appeals has encouraged "defendants to raise, and trial courts to resolve, mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial."[17]

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[7] *Smith*, 2003 WL 1145475, at *9. The court does not explain whether it is drawing some distinction in degrees of mental retardation or how it can find the defendant "mildly mentally retarded," but not run afoul of the United States Supreme Court decision in *Atkins v. Virginia*.

[8] Tarver v. State, 2004 WL 362352, *6-7 (Ala. Crim. App. Feb. 27, 2004).

[9] *Id.* (emphasis added); *see also Morrow*, 2004 WL 1909275, at *4.

[10] *Beckworth*, 2005 WL 2046331, at *15.

[11] *Morrow*, 2004 WL 1909275, at *7.

[12] ALA. CODE § 13A-5-51(6) (2006).

[13] *Morrow*, 2004 WL 1909275, at *6.

[14] *Id.*

[15] *Id.* at *5-6.

[16] *Id.* at *6-7.

[17] *Id.* at *7.

Pre-trial, a capital defendant may file an affidavit asserting mental retardation under the "Retarded Defendant Act."[18] The "Retarded Defendant Act" premises the filing of an affidavit asserting mental retardation on "ha[ving] been identified as mentally retarded" and "ha[ving] received or [] presently receiving services through the Department of Mental Health and Mental Retardation, a program certified by the Department of Mental Health and Mental Retardation, or the Department of Education."[19] A petitioner raising a claim of mental retardation would be allowed, at an evidentiary hearing, to present expert testimony by a psychiatrist or psychologist.[20] The trial court also may order further evaluation as it deems necessary.[21]

A claim of mental retardation also may be raised during a capital trial. The Court of Criminal Appeals has held that, absent legislative action, the procedures set forth in Alabama Rule of Criminal Procedure 32 apply during capital sentencing hearings.[22] The defendant first must prove that s/he is entitled to an evidentiary hearing by petitioning the court with a clear and specific statement of the grounds upon which relief is being sought, including full disclosure of the factual basis for those grounds.[23] Once the defendant meets this burden, the defendant then must prove by a preponderance of the evidence that s/he is entitled to relief. Either party may appeal the trial court's decision.[24] The Alabama Court of Criminal Appeals then is supposed to review the ruling under an abuse of discretion standard.[25]

Despite these instructions for handling claims of mental retardation, it appears that, at least in one instance, trial courts are handling the issue differently. In *Beckworth v. State*, the Court of Criminal Appeals indicated that that the trial court, instead of following the procedures laid out in Rule 32, presented the jury two verdict forms at the end of the sentencing phase of the trial.[26] The first verdict form required the jury to provide a sentencing recommendation.[27] The second verdict form required the jurors to state whether they believed that the defendant was mentally retarded.[28]

Mental retardation also may be relevant to determining the existence of a statutory mitigating circumstance (the defendant is unable to appreciate the criminality of his/her conduct),[29] or a nonstatutory mitigating circumstance.[30] The trial judge is required in

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[18] ALA. CODE § 15-24-3 (2006).
[19] *Id.*
[20] ALA. R. CRIM. P. 32. *See, e.g.*, Tarver v. State, 2004 WL 362352, *3-5 (Ala. Crim. App. Feb. 27, 2004).
[21] *Morrow*, 2004 WL 1909275, at *7.
[22] *Id.* at *6-7.
[23] ALA. R. CRIM. P. 32.6(b).
[24] ALA. R. CRIM. P. 32.10.
[25] *Morrow*, 2004 WL 1909275, at *6.
[26] Beckworth v. State, 2005 WL 2046331, *6 (Ala. Crim. App. Aug. 26, 2005).
[27] *Id.*
[28] *Id.* In fact, the court not only failed to reprimand the trial court for failing to follow the procedures laid out in Rule 32, but instead praised the trial court's actions. *Id.* at *16 ("The trial court, acting without the benefit of any guidance from the Alabama Legislature or the appellate courts as to the procedure to be followed in determining whether a capital defendant is mentally retarded, made an earnest attempt to comply with the recent *Atkins* decision and presented the retardation issue to the jury in the form of a special interrogatory.").
[29] ALA. CODE § 13A-5-51(6) (2006).

his/her sentencing order to list and explain all mitigating circumstances that the court has found to exist.[31] A trial court finding that mental retardation exists made before the ruling in *Atkins* does not prove or disprove the existence of mental retardation when considering death penalty eligibility because exemption from the death penalty was not the issue being considered at that time.[32]

b. Direct Appeal and Post-conviction Proceedings

People convicted of capital offenses and sentenced to death who raised mental retardation claims pre-trial or at trial also may raise a claim of mental retardation in direct appeal and/or post-conviction proceedings.

If the issue of mental retardation was raised at trial, it is properly preserved for review on direct appeal.[33] The petitioner must make a threshold showing in support of his/her claim of mental retardation to obtain an evidentiary hearing.[34] A defendant may make this threshold showing by presenting evidence in support of a showing of mental retardation. This threshold showing may be met by the filing of an affidavit under the Retarded Defendant Act or by presenting evidence in support of the mitigating circumstance of mental retardation.[35] Once the defendant meets this burden of persuasion, the defendant must then prove by a preponderance of the evidence that s/he is entitled to relief.[36]

If the issue of mental retardation was not raised at trial, the matter still is reviewable on direct appeal, but the decision will be reviewed only for plain error.[37] If the issue of mental retardation was not raised at trial, the standard procedural bars of post-conviction relief apply,[38] including the bar that precludes claims that could have been, but were not raised at trial, unless the court was without jurisdiction to render judgment or to impose sentence.[39] The decision in post-conviction proceedings will be reviewed for harmless error.[40]

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[30] ALA. CODE § 13A-5-51 (2006) (noting that the available mitigating circumstances are not limited to those listed in the statute).

[31] ALA. CODE § 13A-5-47(d) (2006); *Ex parte* Taylor, 808 So. 2d 1215, 1218 (Ala. 2001); Morrow v State, 2004 WL 1909275, *9 (Ala. Crim. App. Aug. 27, 2004).

[32] *Morrow*, 2004 WL 1909275, at *5; Tarver v. State, 2004 WL 362352, *6 (Ala. Crim. App. Feb. 27, 2004).

[33] *Morrow*, 2004 WL 1909275, at *1.

[34] ALA. R. CRIM. P. 32.6(b).

[35] *Morrow*, 2004 WL 1909275, at *2-4; *Tarver*, 2004 WL 362352, at *3-6.

[36] *Morrow*, 2004 WL 1909275, at *6.

[37] ALA. R. APP. P. 45A; *see also* Peraita v. State, 897 So. 2d 1161, 1175 (Ala. Crim. App. 2003); *Ex parte* Smith, 2003 WL 1145475, *8 (Ala. Mar 14, 2003).

[38] State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

[39] ALA. R. CRIM. P. 32.2(a)(3). *See, e.g.*, Woods v. State, 2004 WL 1909291, *11-12 (Ala. Crim. App. Aug. 27, 2004) (holding that the petitioners claim of a coerced confession was procedurally barred because he knew of it before and during the trial, failed to inform his counsel, and it could have been but was not raised at trial).

[40] Lewis v. State, 889 So. 2d 623, 649 (Ala. Crim. App. 2003) (citing Chapman v. California, 386 U.S. 18 (1967)).

B. Mental Disease or Defect/Insanity

1. Definition of Mental Disease or Defect

The State of Alabama employs both of the terms "mental disease or defect" and "insanity." The term "insane" is defined in the Alabama Code as including "all persons of unsound mind."[41] The Alabama Code does not fully define "mental disease or defect," but states that it is "an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his[/her] acts."[42] The Code limits this defense by excluding any "abnormality manifested only by repeated criminal or otherwise antisocial conduct" from the definition of mental disease or defect.[43]

The Alabama Court of Criminal Appeals has held that legal insanity does not encompass every kind of mental disease or defect,[44] but that insanity must be the result of mental disease or defect to constitute a defense.[45]

2. The Mental Disease or Defect Defense and the Verdicts of "Not Guilty By Reason of Mental Disease or Defect" and "Not Guilty and Not Guilty By Reason of Mental Disease or Defect"

The defendant may raise his/her mental disease or defect as an affirmative defense to the alleged crime by entering a plea of "not guilty by reason of mental disease or defect" or "not guilty and not guilty by reason of mental disease or defect."[46] These pleas, which are equivalent to a plea of not guilty by reason of insanity, are considered to be "special pleas" "entered of record upon the docket of the court" at arraignment.[47] The trial court has discretion to allow the special plea to be entered at a later date.[48]

If the defendant raises the defense of "not guilty by reason of mental disease or defect" or "not guilty and not guilty by reason of mental disease or defect" in a timely manner, the defendant, the defendant's attorney, or the prosecutor may file a motion to request an examination "into the defendant's mental condition at the time of the offense."[49] The

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41 ALA. CODE § 1-1-1(5) (2006).
42 ALA. CODE § 13A-3-1(a) (2006).
43 ALA. CODE § 13A-3-1(b) (2006).
44 Brackin v. State, 417 So. 2d 602, 604 (Ala. Crim. App. 1982).
45 Bui v. State, 551 So. 2d 1094, 1105 (Ala. Crim. App. 1988) (overturned on other grounds).
46 ALA. R. CRIM. P. 14.2(c)(3)-(4).
47 *See, e.g.*, Baker v. State, 95 So. 467, 470 (Ala. 1923).
48 *Id.*
49 ALA. R. CRIM. P. 11.2(a)(2). In contrast, the Alabama Code provides that when the judge "receives notice that the defense . . . may proceed on the basis of mental disease or defect as a defense to criminal responsibility; it shall be the duty of the presiding judge to forthwith order that such defendant be committed to the Department of Mental Health and Mental Retardation for examination by one or more mental health professionals appointed by the Commissioner of the Department of Mental Health and Mental Retardation. The commissioner shall place the defendant under the observation and examination of one or more mental health professionals, each of whom is either a licensed psychologist holding a Psy. D. or Ph.D degree or a licensed physician who specialized in psychiatry. The assigned mental health professional(s) shall examine the defendant with respect to determining the presence of any mental disease

court also may order an examination on its own.[50] If the defendant, the defendant's attorney, or the prosecutor files a motion requesting a mental examination, the motion must state the facts upon which the examination is sought.[51] If the defendant requests such an examination, s/he must "establish that his[/her] sanity at the time of the offense w[ill] be a significant factor at trial."[52]

The court will order a mental examination if it finds "reasonable grounds" to order an examination.[53] Once the court is satisfied that reasonable grounds do exist, it will (1) appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition, or (2) order that an examination be conducted by a psychiatrist or psychologist appointed by the Commissioner of the Department of Mental Health and Mental Retardation.[54] The court also may "appoint additional experts and may order the defendant to submit to physical, neurological, or psychological examinations, when the court is advised by the examining psychologist or psychiatrist that such examinations are necessary for an adequate determination of the defendant's mental condition."[55]

Any psychiatrist or psychologist appointed by the court or the Department of Mental Health and Mental Retardation must, after examining the defendant, give the judge a written report which may, among other things, contain a statement of opinion regarding the mental condition of the defendant at the time of the alleged offense and the relation of any mental disease or defect to the alleged offense.[56] In addition, the report should "describe the defendant's mental condition in broad medical language; the psychiatrist or psychologist should avoid references to any definition of legal insanity. Whether a person is mentally ill is a medical judgment that a psychologist or psychiatrist should make; whether the defendant is sufficiently ill to be exonerated of criminal responsibility, i.e., whether the defendant is legally insane, is a legal judgment for the jury or trier of fact to make after proper instructions."[57]

Alternatively, or in addition to any court-ordered examination, the defendant's lawyer may have the defendant examined by an independent expert at any time at the defense's expense.[58]

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or defect which, if determined to be present, would affect the capacity of the defendant to proceed or continue to trial or which would affect the defendant's criminal responsibility at the time of the commission of the crime." ALA. CODE § 15-16-22(a) (2006). The defendant then will be "subject to the observation of and examination by the mental health professional(s)" for as long as is necessary "to determine the mental condition of the defendant so far as it affects his[/her] capacity to proceed or continue to trial or criminal responsibility." ALA. CODE § 15-16-22(b) (2006). As soon as the examination is complete, the mental health professional(s) must make a "full written report" to the clerk of the court. The report will be placed in the file and will be accessible to the court, the prosecutor, and the defendant's attorney. ALA. CODE § 15-16-22(c) (2006).

[50] ALA. R. CRIM. P. 11.2(a)(2).
[51] ALA. R. CRIM. P. 11.2(c).
[52] Russell v. State, 715 So. 2d 866, 870 (Ala. Crim. App. 1997).
[53] ALA. R. CRIM. P. 11.3(a).
[54] *Id.*
[55] ALA. R. CRIM. P. 11.3(d).
[56] ALA. R. CRIM. P. 11.3(c).
[57] ALA. R. CRIM. P. 11.3(d) cmt.
[58] ALA. R. CRIM. P. 11.4.

In cases in which the defendant claims that s/he had a mental disease or defect at the time of the crime, the jury must assess whether the defendant is "guilty," "not guilty," "not guilty by reason of insanity at the time of the crime," or "not guilty and not guilty by reason of mental disease of defect."[59]

When the sanity of the defendant is at issue, both the prosecution and defense are given wide latitude in presenting evidence of the defendant's mental state.[60] The Alabama Rules of Criminal Procedure disallows evidence from a compulsory mental examination to be used in proving guilt,[61] however, unless 1) the evidence was obtained through sources or means independent of the examination, or 2) the evidence obtained or made available through the compulsory mental examination is used for the rebuttal of the defendant's evidence in support of a plea of not guilty by reason of mental disease or defect.[62]

In order for the defendant to prove that s/he was insane at the time of the offense, the defendant must rebut the presumption that all defendants over fourteen years of age are responsible for their actions[63] by establishing through clear and convincing evidence[64] that is "clearly prove[n] to the reasonable satisfaction of the jury,"[65] that as a result of severe mental disease or defect, the defendant was unable to appreciate the nature and quality or wrongfulness of his/her acts at the time of the alleged offense.[66] If the defense proves chronic or permanent insanity, the burden of proving sanity at the time of the offense shifts to the prosecution, however.[67] If the defendant suffers from intermittent "spells" of insanity, the burden remains on the defense to prove that the offense was committed during one of these "spells."[68]

At the close of evidence, the court must inform the jury that it may consider the verdicts of "guilty," "not guilty," "not guilty by reason of mental disease or defect," and "not guilty and not guilty by reason of mental disease or defect."[69]

The Alabama Code states that criminal or antisocial conduct, without more, does not constitute "severe mental disease or defect."[70] The Court of Criminal Appeals has also held that "moral idiocy,"[71] "sociopathic or psychopathic personality,"[72] "emotional insanity,"[73]

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59 ALA. R. CRIM. P. 14.2.
60 Brown v. State, 686 So. 2d 385, 408 (Ala. Crim. App. 1995).
61 ALA. R. CRIM. P. 11.2(b)(2).
62 ALA. R. CRIM. P. 11.8.
63 ALA. CODE § 15-16-2 (2006).
64 ALA. CODE § 13A-3-1(c) (2006).
65 ALA. CODE § 15-16-2 (2006).
66 ALA. CODE § 13A-3-1(a) (2006).
67 Montgomery v. State, 781 So. 2d 1007, 1015-16 (Ala. Crim. App. 2000).
68 *Id.* at 1015.
69 ALA. R. CRIM. P. 14.2(c).
70 ALA. CODE § 13A-3-1(b) (2006).
71 Clayton v. State, 226 So. 2d 671, 674 (Ala. Crim. App. 1969); *see also* Thompson v. State, 542 So. 2d 1286, 1295 (Ala. Crim. App. 1988).
72 *Clayton*, 226 So. 2d at 674.
73 Bui v. State, 551 So. 2d 1094, 1105 (Ala. Crim. App. 1988).

"temporary mania,"[74] and "atrocity"[75] do not rise to the level of "severe mental disease or defect." Intoxication, standing alone, also does not constitute "mental disease or defect."[76]

Alabama courts have not settled on a definition for the term "wrongfulness." In *Ivery v. State*, the Court of Criminal Appeals noted that there is a conflict among authorities as to whether "wrongfulness" means "morally wrong," "legally wrong," "morally or legally wrong," or "morally and legally wrong."[77] In *Archie v. State*, the court acknowledged that while the *Ivery* court had left the definition of "wrongfulness" open, it did indicate that "'wrongfulness' could be defined as relating to a defendant's appreciation of moral and legal wrongfulness."[78]

In determining whether the defendant was able to appreciate the nature and quality or wrongfulness of his/her acts, the Court of Criminal Appeals has drawn a distinction between knowing right from wrong and "appreciat[ing] the . . . wrongfulness of [one's] acts."[79] As explained in *Ivery v. State*, "'[a] person's capacity to appreciate the criminality of his[/her] conduct or to conform his[/her] conduct to the requirements of the law is not the same as his[/her] ability to know right from wrong. . . . A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because [s/]he does not fully comprehend or is not fully sensible to what [s/]he is doing or how wrong it is.'"[80]

If the jury finds the defendant "not guilty by reason of mental disease or defect" or "not guilty and not guilty by reason of mental disease or defect," the court must determine whether the defendant should be held for a hearing on the issue of his or her involuntary commitment to the Alabama State Department of Mental Health.[81] "If the court determines that there is probable cause to believe that the defendant is mentally ill and as a consequence of such mental illness poses a real and present threat of substantial harm to himself[/herself] or to others, the court shall order the defendant confined for examination and treatment in an appropriate mental health facility or released upon conditions imposed by the court, until a hearing can be held . . . to determine whether the defendant shall be involuntarily committed to the custody of the commissioner or to such other public facility as the court may order."[82]

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[74] *Id.*

[75] *Id.*

[76] ALA. CODE § 13A-3-2(d) (2006). However, "involuntary intoxication," where admissible to negate an element of an offense, encompasses a lack of the "capacity either to appreciate the criminality of [one's] conduct or to conform [one's] conduct to the requirements of law," ALA. CODE § 13A-3-2(a), (c) (2006), thus retaining the broader exemption for involuntary acts, while the code section defining "mental disease" is more stringent.

[77] Ivery v. State, 686 So. 2d 495, 501 (Ala. Crim. App. 1996).

[78] Archie v. State, 875 So. 2d 336, 343 n.5 (Ala. Crim. App. 2003).

[79] *Ivery*, 686 So. 2d at 502.

[80] *Id.*

[81] ALA. CODE § 15-16-41 (2006); ALA. R. CRIM. P. 25.2(a).

[82] ALA. R. CRIM. P. 25.2(b); *see also* ALA. CODE § 15-16-41 (2006). While the statute states that the defendant should be placed in the custody of the sheriff while waiting for a final hearing on commitment, the United States Court of Appeals for the 11th Circuit and the Alabama Office of the Attorney General have held that a mentally ill person is to be placed in a mental health facility as opposed to a county jail. *See* Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984).

The defendant must be released from custody if the court does not believe that there is probable cause to think that the defendant is mentally ill and poses a real and present threat of substantial harm to himself/herself and/or others.[83] If the judge finds that there is probable cause to believe that the defendant is mentally ill and poses a real and present threat of substantial harm to himself/herself and/or others, a final hearing on involuntary commitment must be held within seven days.[84] The hearing may be continued to a later date, up to thirty days from the date when the court found that there was probable cause.[85] If, at the final hearing, the court finds that the defendant is mentally ill and poses a real and present threat of substantial harm to himself/herself and/or to others, the court will order the defendant committed to the custody of the Commissioner of the Alabama State Department of Mental Health or to another public facility.[86] If the court does not make such a finding, the defendant must be released from custody.[87] The court may modify the commitment order at any time and also may order the Commissioner to submit periodic reports on the defendant's status.[88]

If the defendant is found "guilty" rather than "not guilty by reason of mental disease or defect," s/he may present evidence of his/her mental condition as mitigation during the sentencing phase of the capital trial.

C. Resources Provided to People with Mental Retardation or Mental Disabilities

Defense counsel may apply for funds to pay for "expenses reasonably incurred," including fees of investigators and expert witnesses, with prior approval of the court.[89] Appellate counsel also may apply for reimbursement of "expenses reasonably incurred"[90] and no statutory cap is set on such fees in capital cases.[91] In addition to being eligible for expert assistance under state law, a defendant who claims that s/he suffered or suffers from a mental condition also may file a motion requesting expert assistance at public expense to assist in preparing his/her defense and/or evidence in mitigation for the penalty phase pursuant to the United States Supreme Court's decision in *Ake v. Oklahoma*.[92]

A defendant has no "right" to receive a mental examination at state expense simply because s/he requests one,[93] but "if an indigent defendant shows the need and relevance for the expert assistance, the state is required to provide the funds for that expert

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[83] ALA. R. CRIM. P. 25.2(c); *see also* ALA. CODE § 15-16-41 (2006).
[84] ALA. R. CRIM. P. 25.3. *But see* ALA. CODE § 15-16-42 (2006) (providing for thirty days).
[85] ALA. R. CRIM. P. 25.3.
[86] ALA. CODE § 15-16-43 (2006); *see also* ALA. R. CRIM. P. 25.6(b).
[87] ALA. R. CRIM. P. 25.6(a).
[88] ALA. R. CRIM. P. 25.7(a)-(b).
[89] ALA. CODE § 15-12-21(d) (2006).
[90] ALA. CODE § 15-12-22(d)(3) (2006).
[91] ALA. CODE § 15-12-22(d)(1) (2006); *see also* Samra v. State, 771 So. 2d 1108, 1113 (Ala. Crim. App. 1999).
[92] 470 U.S. 68, 83 (1985).
[93] Grider v. State, 766 So. 2d 189, 190-92 (Ala. Crim. App. 1999) (overruled on other grounds); Nelson v. State, 511 So. 2d 225, 236-38 (Ala. Crim. App. 1986).

assistance."[94] The Alabama Court of Criminal Appeals has held that in a capital case, the defendant must:

> show a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial. To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense.[95]

Simple speculation that the expert would help the defense is not enough to meet this standard.[96] "Evidence already known and available" to the defendant "through his[/her] own knowledge and experience and through the testimony of his family members" can also render an expert unnecessary.[97]

A defendant may be entitled to state-provided expert assistance even if s/he retains counsel, if s/he proves his/her inability otherwise to pay the expert,[98] or if s/he has counsel retained for him/her by others.[99]

D. "Next Friend"[100] Petitions On Behalf of the Incompetent

A "next friend" has standing to file a petition on behalf of a death row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the "next friend" can establish that s/he is truly acting in the best interests of the inmate[101] and that the inmate is incompetent within the definition articulated by the United States Supreme Court in *Rees v. Payton*.[102]

Pursuant to *Rees*, an individual is incompetent if s/he lacks the "capacity to appreciate his[/her] position and make a rational choice with respect to continuing or abandoning further litigation" or suffers "from a mental disease, disorder, or defect which may substantially affect his[/her] capacity in the premises."[103] The standard articulated in *Rees* involves a determination of three issues: (1) whether the individual suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect

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[94] Dubose v. State, 662 So.2d 1156, 1176 (Ala. Crim. App. 1993).
[95] Lee v. State, 898 So. 2d 790, 852 (Ala. Crim. App. 2001).
[96] *Id.* at 853.
[97] Beckworth v. State, 2005 WL 2046331, *9 (Ala. Crim. App. Aug. 26, 2005).
[98] *Dubose*, 662 So. 2d at 1176.
[99] *Ex parte* Sanders, 612 So. 2d 1199, 1199-1201 (Ala. 1993).
[100] A "next friend" is an individual acting for benefit of a person sui juris, without being regularly appointed guardian. A "next friend" is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit s/he appears. Where permitted, in a capital case, this includes acting to assert claims for a defendant who seeks to waive such claims.
[101] Lonchar v. Zant, 978 F.2d 637, 641 (11th Cir. 1993) (citing Whitmore v. Arkansas, 495 U.S 149, 163 (1990)); *see also* Centobie v. Campbell, 407 F.3d 1149, 1151 (11th Cir. 2005).
[102] Henderson v. State, 733 So. 2d 484, 489 (1998) (citing Rees v. Peyton, 384 U.S. 312, 314 (1966)).
[103] *Rees*, 384 U.S. at 314.

prevents that individual from understanding his/her legal position and the options available to him/her; and (3) whether a mental disease, disorder, or defect prevents that individual from making a rational choice among his/her options.[104] Rational reasons for choosing not to pursue post-conviction proceedings include: "[the inmate] was tired of languishing in prison; [the inmate] was pessimistic [s/he] would ever get out of prison; and [the inmate] truly believed [s/he] would be happier in the afterlife."[105]

E. Competency to be Executed[106]

A death-sentenced inmate who is found to be "insane" at any time before the execution of the sentence may not be executed.[107] While the procedures that should be used to claim that a defendant is ineligible for execution as a result of insanity are not articulated in the Alabama Code or Rules of Criminal Procedure, the United States Court of Appeals for the Eleventh Circuit and the Alabama Court of Criminal Appeals have held that common law principles apply and that the analogous procedures for competency to stand trial should be used.[108]

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[104] *Lonchar*, 978 F.2d at 641; Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir. 2000) (citing *Lonchar*, 978 F.2d at 641-42).

[105] *Hauser*, 223 F.3d at 1323.

[106] In 1986, the United States Supreme Court, in *Ford v. Wainwright*, found that procedures for assessing an inmate's mental competency are in violation of the Eighth Amendment of the United States Constitution if the procedures do the following: (1) fail to include the inmate in the "truth-seeking process;" (2) deny the inmate the opportunity to challenge or impeach the state-appointed psychiatrists' opinions; and (3) place the decision on the inmate's mental capacity wholly within the executive branch. *See* Ford v. Wainwright, 477 U.S. 399, 413-16 (1986).

[107] ALA. CODE § 15-16-23 (2006).

[108] Magwood v. Smith, 791 F.2d 1438, 1446 (11th Cir. 1986); Magwood v. State, 689 So.2d 959, 973 (Ala. Crim. App. 1996). The court may order, or the defendant, the defendant's attorney, or the prosecutor may request, an examination "to assist in the determination of the defendant's present mental condition and competency." *See supra* note 49 and accompanying text. If the defendant, the defendant's attorney, or the prosecutor files a motion requesting an examination, the motion must state the facts upon which the examination is sought. ALA. R. CRIM. P. 11.2(c). In addition, if the motion is made by the defendant or the defendant's attorney, it must include a written demand for a jury in order to preserve the right to a jury in any subsequent competency hearing. *Id.*

If the court finds that "reasonable grounds" to order a mental examination exist, the court will order an examination and will (1) appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition, or (2) order that an examination be conducted by a psychiatrist or psychologist appointed by the commissioner of the Department of Mental Health and Mental Retardation. ALA. R. CRIM. P. 11.3(a). The court also may "appoint additional experts and may order the defendant to submit to physical, neurological, or psychological examinations, when the court is advised by the examining psychologist or psychiatrist that such examinations are necessary for an adequate determination of the defendant's mental condition." ALA. R. CRIM. P. 11.3(d).

Any psychiatrist or psychologist appointed by the court or the Department of Mental Health and Mental Retardation must give the judge a written report which contains an opinion of whether the defendant is incompetent. ALA. R. CRIM. P. 11.3(c). If the expert's opinion is that the defendant is incompetent, the report also must state the expert's opinion of:

(1) The condition causing the defendant's incompetency and the nature of the condition;
(2) The treatment required for the defendant to attain competency;

The Alabama Code defines competency as "whether or not a defendant . . . (a) understands the nature of the charges preferred against him; and (b) is capable of assisting his attorney in the preparation of the defense of his case."[109] Similarly, the Rules of Criminal Procedure define competency as "sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant."[110]

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(3) The most appropriate form and place of treatment, in view of the defendant's therapeutic needs and potential danger to himself/herself or others, and an explanation of appropriate treatment alternatives;

(4) The likelihood of the defendant's attaining competency under treatment and the probable duration of the treatment; and

(5) The availability of the various types of acceptable treatment in the local geographic area, specifying the agencies or the settings in which the treatment might be obtained and whether the treatment would be available on an out-patient basis."

Id. In determining sanity, the court may, but is not required to, impanel a jury and to examine witnesses. ALA. CODE § 15-16-23 (2006). If the court is satisfied that the inmate is insane, it must enter an order suspending the execution. *Id.* The inmate's execution will be stayed for the duration of the inmate's incompetency. *Id.*

The court's decision regarding competency to be executed is final and unreviewable. "This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge. No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict." *Id.* If the court subsequently believes that the inmate's sanity has been restored, it must enter another order setting an execution date, however. *Id.*

[109] ALA. CODE § 22-52-30(1) (2006).

[110] ALA. R. CRIM. P. 11.1.

II. ANALYSIS

A. Recommendation #1

> **The State should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure. 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.**

The American Association on Mental Retardation (AAMR) defines 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 the age of 18.[111]

Alabama has not banned the execution of mentally retarded offenders legislatively, but is precluded from executing mentally retarded offenders by the United States Supreme Court's decision in *Atkins v. Virginia*.[112] In the state's "Retarded Defendant Act," designed to protect mentally retarded defendants in the criminal justice system, Alabama defines mental retardation as: (1) "significant subaverage general intellectual functioning," (2) "resulting in or associated with concurrent impairments in adaptive behavior" that (3) "manifested during the developmental period, as measured by appropriate standardized testing instruments."[113] While the Alabama definition is similar to the AAMR definition of mental retardation, there are several more limiting features in the Alabama statute and state caselaw.

Under the AAMR definition, limited intellectual functioning requires that an individual have an impairment in general intellectual functioning that places him or her in the lowest category of the general population. By themselves, IQ scores are not precise enough to identify the upper boundary of mental retardation. Experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but the definition also includes some individuals with IQ scores in the low to mid-70s.[114] No IQ maximum

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[111] American Association on Mental Retardation, AAMR Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on May 25, 2006).

[112] 536 U.S. 304 (2002).

[113] ALA. CODE § 15-24-2(3) (2006).

[114] The relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation. *See, e.g.*, AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 57-59 (Ruth Luckasson et al. eds., 10th ed. 2002) [hereinafter 2002 MENTAL RETARDATION]; AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 14 (Ruth Luckasson ed., 9th ed. 1992) ("Mental retardation is characterized by significantly subaverage intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in

lower than 75 should ever be imposed.[115] Clinical judgments by experienced diagnosticians are necessary to ensure accurate diagnoses of mental retardation.

The definition set forth in Alabama's "Retarded Defendant Act" complies with the AAMR definition in that it does not set a specific IQ cutoff for mental retardation. Judicial decisions have, however, inserted an IQ score limitation of 70,[116] despite the Alabama Supreme Court's instruction to apply the broadest and most liberal definition of mental retardation.[117] There is some judicial uncertainty as to whether an IQ score in the low or mid-70s disqualifies a defendant or death-row inmate from being found to have mental retardation. In deciding this issue, the Alabama Court of Criminal Appeals has inconsistently applied a somewhat broader definition of mental retardation than the Alabama Supreme Court. At a minimum, it does not appear that Alabama is in compliance with Recommendation #1 requiring that no maximum IQ score under 75 be imposed.

The AAMR definition of mental retardation includes adaptive behavior limitations that produce real-world disabling effects on a person's life. This was included in the definition of mental retardation to ensure that an individual is truly disabled and not simply a poor test-taker.[118] Under this definition, adaptive behavior is "expressed in conceptual, social, and practical adaptive skills" and focuses on broad categories of adaptive impairment, not service-related skill areas.[119] The United States Supreme Court in *Atkins v. Virginia* indicated that a limitation in adaptive behavior was comprised of deficits in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[120] Alabama courts have not explicitly defined the term "adaptive

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classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) ("This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."). *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION (John W. Jacobson & James A. Mulick eds. 1996); NATIONAL RESEARCH COUNCIL, MENTAL RETARDATION: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS 5 (National Academy Press 2002).

[115] This fact is reflected in the *Atkins* decision, where the Court noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5.

[116] *See, e.g.*, Morrow v. State, 2004 WL 1909275, *6 (Ala. Crim. App. Aug. 27, 2004) (noting that the Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), has use an IQ score of 70 or lower, consistent with definition of "mental retardation" in the Retarded Defendant Act).

[117] *Id.* at *1; *Ex parte* Smith, 2003 WL 1145475, *9 (Ala. Mar. 14, 2003).

[118] James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 8 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on May 25, 2006).

[119] *Id.*

[120] *Atkins*, 536 U.S. at 309 n.3. Since the *Atkins* decision, the AAMR has dispensed with the requirement of the existence deficiencies in at least two or more of the ten skill areas in order to make a finding that there is a deficiency in adaptive behavior. The AAMR now states that many of the ten adaptive skill areas continue to be relevant considerations in mental retardation assessments, but clinicians now are less

behavior," but have included such issues as social skills, vocational skills, ability to engage in abstract thinking, ability to understand the consequences of actions,[121] interpersonal relationships, and employment history[122] in determining whether a person has adaptive behavior deficits.

The AAMR requires that mental retardation be manifested during the developmental period, generally defined as up until the age of 18. This does not mean that a person must have been IQ tested with scores in the mentally retarded range during the developmental period, but instead, that there must have been manifestations of mental disability, which at an early age generally take the form of problems in the area of adaptive functioning.[123] The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.[124]

Alabama courts have defined the "developmental period" as being under the age of 18.[125] This portion of the state definition complies with the AAMR definition. A review of Alabama caselaw indicates that the state does depend on clinical judgment in determining mental retardation and that the testing used in determining mental retardation need not have been performed prior to the crime.[126]

Based on this information, the State of Alabama is only in partial compliance with Recommendation #1. Although there is some confusion, the Alabama Supreme Court and Alabama Court of Criminal Appeals appear to use an IQ maximum lower than 75, potentially disqualifying defendants and death-row inmates with IQs in the low to mid-70s from being found to be mentally retarded.

B. Recommendation #2

> **All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.**

Alabama has no laws, rules, procedures, standards, or guidelines that require training on issues surrounding mental retardation.

Training on mental retardation issues is available for prosecutors through elective continuing legal education programs put on by the Office of Prosecution Services.[127] To

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focused on whether deficits exist in two of them, and instead evaluate them on a spectrum in terms of conceptual, social, and practical skills. 2002 MENTAL RETARDATION, *supra* note 114, at 81-82.

[121] *Morrow*, 2004 WL 1909275, at *5.

[122] *Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002).

[123] Ellis, *supra* note 118.

[124] *Id.*

[125] *Perkins*, 851 So. 2d at 456.

[126] *See, e.g.*, *Morrow*, 2004 WL 1909275; *Perkins*, 851 So. 2d at 456.

[127] Telephone Interview with Randy Hillman, Executive Director, Office of Prosecution Services (Dec 8, 2004).

the best of our knowledge, there is no equivalent training program for judges, police officers, or prison authorities.

Based on this information, it appears that some actors within the criminal justice system may be receiving training on mental retardation, but not all actors are required to receive this training. The State of Alabama, therefore, is not in compliance with Recommendation #2.

C. Recommendation #3

> **The State 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 skills deficiencies of a defendant who counsel believes may have mental retardation.**

Alabama does not have any policies in place to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. Instead, capital defendants who may be mentally retarded are assigned (or not assigned) counsel under the same rules and fee structure as every other capital defendant. No training is required to assist counsel in recognizing mental retardation in their clients, in understanding its possible impact on their client's ability to assist with their defense, on the validity of their confessions (where applicable), and on their eligibility for capital punishment.

Before or during trial, defense counsel may apply for funds to pay for "expenses reasonably incurred," including investigator and expert witness fees, with prior approval of the court.[128] No statutory cap is set on such fees in capital cases.[129] Appellate counsel also may apply for reimbursement of "expenses reasonably incurred."[130] A defendant has no "right" to receive a mental examination at state expense and must satisfy the court of the necessity of such an examination.[131] A defendant may be entitled to state-provided expert assistance even if s/he retains private counsel, if s/he proves his/her inability otherwise to pay the expert,[132] or if s/he has counsel retained for him/her by others.[133] The Alabama Court of Criminal Appeals has held that a capital defendant must "make a threshold showing that . . . the requested experts [here, an investigator and mitigation

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[128] ALA. CODE § 15-12-21(d) (2006).

[129] ALA. CODE § 15-12-21(d)(1) (2006). For an in-depth discussion of fees paid, including for an investigator and an MRI examination, see Samra v. State, 771 So. 2d 1108, 1113 (Ala. Crim. App. 1999).

[130] ALA. CODE § 15-12-22(d) (2006).

[131] Grider v. State, 766 So. 2d 189, 190-92 (Ala. Crim. App. 1999) (competency to stand trial at issue); Nelson v. State, 511 So. 2d 225, 236-38 (Ala. Crim. App. 1986) (same).

[132] Dubose v. State, 662 So. 2d 1156, 1176 (Ala. Crim. App. 1993).

[133] *Ex parte* Sanders, 612 So. 2d 1199, 1199-1201 (Ala. 1993).

expert] would probably assist his defense and that the denial of funds to hire the experts would result in a fundamentally unfair trial."[134]

Based on this information, the State of Alabama is not in compliance with Recommendation #3.

D. Recommendation #4

> **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.**

Given the lack of legislation regarding the procedures to be used for finding mental retardation in the capital context, there is no set procedure for when—prior, during, or after trial—a determination of mental retardation will be made. However, Alabama courts have encouraged "defendants to raise, and trial courts to resolve, mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial."[135]

While the Alabama Court of Criminal Appeals' intention is that mental retardation determinations occur as early as possible, it is unclear whether in practice the State of Alabama meets Recommendation #4.

E. 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.**

The burden of proving mental retardation, under the approach set forth by the Alabama Supreme Court, largely follows the approach advocated above.

The Alabama Supreme Court has said that in the absence of legislative action, mental retardation claims should be raised and decided by following the post-conviction process laid out in Alabama Rule of Criminal Procedure 32.[136] An Alabama capital defendant has the initial burden of proving that s/he is entitled to an evidentiary hearing. Once the defendant meets this initial burden, the defendant retains the burden of proof and must prove that s/he is entitled to relief by a preponderance of the evidence.[137]

Therefore, the State of Alabama is in compliance with Recommendation #5.

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[134] Lee v. State, 898 So. 2d 790, 859 (Ala. Crim. App. 2001).
[135] Morrow v. State, 2004 WL 1909275, *7 (Ala. Crim. App. Aug. 27, 2004)
[136] *Id.* at *6-7.
[137] *Id.* at *6.

F. 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.

Alabama has no state law ensuring that the *Miranda* rights of mentally retarded people are sufficiently protected or that false, coerced, or garbled confessions are not obtained or used. The "Retarded Defendant Act"—the only state law providing added protections to mentally retarded persons charged with crimes—provides guidance starting only after the arrest, interrogation, and confession stage.[138]

Alabama not only fails to take special steps designed to protect the *Miranda* rights of mentally retarded people and to protect against false or coerced confessions, but state courts have moved in the other direction by holding that "a confession is not inadmissible merely because the accused was of less than normal intelligence."[139] "Evidence tending to show a defendant's weak mentality, feeblemindedness, and mental stress does not affect the admissibility of the confessions, but rather is a matter that bears on the weight, credibility and effect to be given the confessions by the jury."[140] "A defendant's low IQ does not preclude a finding that a *Miranda* waiver was voluntary unless the defendant is so mentally impaired that he did not understand his *Miranda* rights."[141]

Based on this information, the State of Alabama fails to meet the requirements of Recommendation #6.

G. Recommendation #7

The State 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.

Courts can protect against "waivers" of rights, such as the right to counsel, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant's mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant's mental disability. It does not appear that the State of Alabama requires courts to conduct hearings to determine whether a defendant's mental disability affects his/her ability to make a knowing and voluntary waiver.

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[138] ALA. CODE § 15-24-3 (2006).

[139] Arnold v. State, 348 So. 2d 1092, 1096 (Ala. Crim. App. 1977); *see also* Burgess v. State, 339 So. 2d 121, 123 (Ala. Crim. App. 1976).

[140] Allred v. State, 313 So. 2d 195, 201 (Ala. Crim. App. 1975).

[141] Beckworth v. State, 2005 WL 2046331, *23 (Ala. Crim. App. Aug. 26, 2005); *see also* Hodges v. State, 2005 WL 995440, *10 (Ala. Crim. App. Aug. 29, 2005).

Alabama generally requires that waivers be knowing, intelligent, and voluntary.[142] "The determination of whether there has been an intelligent waiver" of a constitutional right "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[143]

As an example of how this plays out in regards to the right to counsel, the State of Alabama will allow a defendant to waive his or her right to counsel after the court has determined that the waiver is knowing, intelligent, and voluntary.[144] In *United States v. Cash*, the United States Court of Appeals for the Eleventh Circuit outlined the factors necessary to determine the validity of a waiver of the right to counsel:

(1) The defendant's age, educational background, and physical and mental health;
(2) The extent of defendant's contact with lawyers prior to the trial;
(3) The defendant's knowledge of the nature of the charges, possible defenses, and penalties;
(4) The defendant's understanding of the rules of procedure, evidence, and courtroom decorum;
(5) The defendant's experience in criminal trials;
(6) Whether standby counsel was appointed and the extent to which that counsel aided the defendants;
(7) Any mistreatment or coercion of defendant; and
(8) Whether the defendant was trying to manipulate the events of trial.[145]

While these factors must be considered, they do not need to be considered in a separate hearing; instead, Alabama courts require that the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what [s/]he is doing and his[/her] choice is made with eyes open.'"[146]

Based on this information, it does not appear that the State of Alabama is in compliance with Recommendation #7.

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[142] ALA. R. CRIM. P. 6.1(b) (requiring this standard for a waiver of counsel); *see also* Sibley v. State, 775 So.2d 235, 243 (Ala. Crim. App. 1997) (noting that "some cases have spoken of waiver of an appeal as requiring 'knowing and intelligent' action").
[143] Miller v. Dugger, 838 F.2d 1530, 1538 (11th Cir. 1988) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[144] ALA. R. CRIM. P. 6.1(b).
[145] United States v. Cash, 47 F.3d 1083, 1088-89 (11th Cir. 1995).
[146] Teske v. State, 507 So. 2d 569, 570-71 (Ala. Crim. App. 1987) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).