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Jury Selection in Capital Cases

By Ernie Lewis

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Introduction. "In recent cases we have indicated that, when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. The trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, he should be stricken. We have attempted to make this fundamental rule clear in a series of cases since *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky.2007). Nevertheless, all too often trial courts, as here, inexplicably put at risk not only the resources of the Court of Justice, but the fundamentally fair trial they are honor-bound to provide, by seating jurors whose ability to try the case fairly and impartially is justifiably doubted. As former trial judges, every member of this Court knows that there is no shortage of citizens in the Commonwealth of Kentucky willing to serve capably and honorably in the most difficult and demanding of trials.

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This issue of *The Advocate* explores major problems in the administration of the death penalty in Kentucky that include jurors who do not understand their responsibilities and inadequate voir dire along with waste, error and abuse due to imprudent prosecution of marginal capital-eligible cases as death cases. Effective common sense reforms are needed to address the massive error in the system. Meanwhile, the many significant Recommendations of the comprehensive independent 2011 Kentucky Capital Audit have not been implemented. Kentuckians want a halt to executions until the problems are fixed. Also, loan forgiveness for defenders is very important. Read about new University of Louisville opportunities.

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University of Louisville Loan Forgiveness

By Interim Dean Susan Duncan and Professor Linda Ewald

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Louis Brandeis, was born in Louisville on November 13, 1856. His first memories were of his mother serving food and coffee to Union soldiers on his front yard. That first memory of service almost certainly played a role in his legacy of service. As the documentary, *Louis D. Brandeis, The People's Attorney* highlights, he gave his time, his talent, and his treasure to the service of others. The University of Louisville Brandeis School of Law officially embraced that legacy in 1990 when the faculty approved a mandatory public service program for all law students. We were one of the first to do so, and we are still one of the few law schools that require all law students to complete 30 hours of public service each year. Our students do substantially more than the minimum, with our graduating classes routinely performing over 7000 hours, and some graduates completing more than 400 hours.

This service mindset does not stop at graduation. Each year close to 25% of Brandeis graduates choose to work in the public interest field either as prosecutors, public defenders, legal aid attorneys, or with 501(c)(3) organizations. In fact, the Department of Public Advocacy reports that 56 University of Louisville Brandeis School of Law graduates currently practice as Kentucky public defenders. Deciding to practice in the public interest sector often is a great sacrifice for graduates, who have heavy debt from student loans.

The average salary for public interest jobs is $38,000. The average amount Brandeis students borrow for school is $90,195. In an effort to help Brandeis graduates repay this crushing debt load, the School of Law recently created two loan repayment assistance endowments. Dean Susan Duncan and Professor Linda Ewald generously started the two endowments to assist students who want to work in the public interest field.

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Basically, the money from these endowments will be used to pay the graduates' loan payments for a specified number of years and works in conjunction with the Federal government's public service loan forgiveness program. Under that federal program qualifying students can discharge their loans after ten years of public service. Assisting attorneys with the loan payments in early years may be the difference needed to ease the crushing debt load and allow talented legal minds to pursue a public interest career.

The loan assistance repayment endowments make sense for a number of reasons not the least of which is to support attorneys who commit themselves to advancing truth and justice in our communities. Contributing to these type funds makes sense financially. Tuition this academic year for in-state students is $19,702 and out-of-statue tuition is $36,538. To fund a full scholarship for in-state students would be over $60,000 with tuition increases and over $100,000 for out-of-state students. Compare this to $30,000 or less which would be the amount needed to repay a student's loans for ten years when the loan will be discharged.

University of Louisville - Louis D. Brandeis School of Law

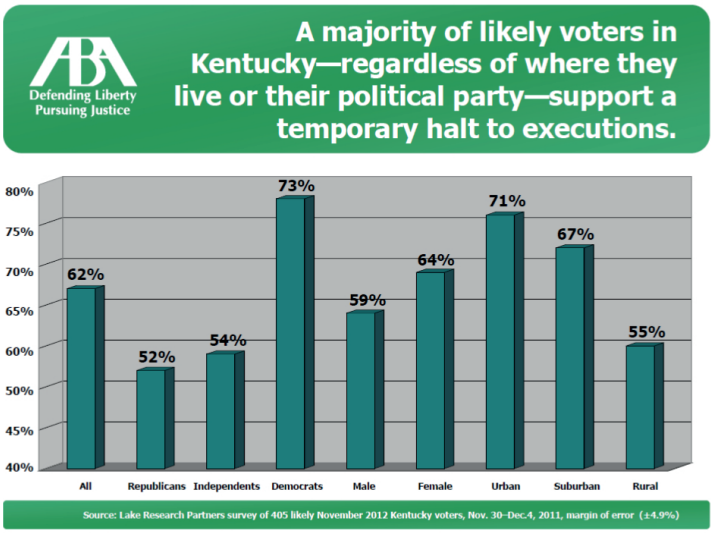
Other law schools have long traditions of loan repayment assistance programs. For example, Georgetown awards over two million dollars per year and guarantees that every graduate entering a public service career will receive the support for the full ten years. In addition, many states fund legal repayment assistance programs through IOLTA funds, state legislature funds and bar foundations. The Brandeis School of Law is confident that with the help of public-spirited lawyers across the state, it can build the endowments to benefit Kentucky attorneys and the public they serve for the future. The Brandeis School of Law hopes others will join in its efforts to ensure the best and the brightest can serve the public by donating to the endowments and encouraging the state to follow the lead of 24 other sister states and establish statewide loan repayment assistance programs. If you would like to learn more about these efforts please do not hesitate to contact Dean Susan Duncan at susan.duncan@louisville.edu or (502) 852-6373.

Kentucky Voters Support Temporary Halt in Executions

According to a 2011 survey of Kentuckians conducted on behalf of the American Bar Association Kentucky Assessment Team on the Death Penalty shows:

- A solid majority of Kentucky voters (62%) support a temporary halt to executions in Kentucky, including 44% who support it strongly.
- Majority support for a temporary halt of executions includes men (59%), women (64%), voters in urban areas (71%), suburban areas (67%), exurban areas (55%) and voters in rural areas (55%).

A temporary halt to executions in Kentucky also has support across partisan lines. Republican voters support the halt by a 10-point margin (52% support, 42% oppose), independents support it by a 16-point margin (54% to 38%), and Democrats support it by a 52-point margin (73% to 21%).



The survey questions and results are found at: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/kentucky.html

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What those citizens do not want is to have their time and money spent re-trying a difficult case because, in a prior proceeding, a trial judge was too diffident to excuse jurors who were credibly challenged.

We reiterate that trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013).

Jury selection is one of the most important parts of the capital trial. The jury in a capital case has become the most important body to persuade in the courtroom. *Ring v. Arizona*, 536 U.S. 584 (2002). There is no more crucial time in the trial of a capital case than jury selection.

It is during this prelude to the beginning of the capital trial that much of the outcome will be determined. For this reason, it is up to the trial judge to ensure fairness and thoroughness in the procedures he establishes for jury selection.

This was made clear in *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). There the Court stated that "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury… and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman v. California*, 386 U.S. 18, at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. … As was stated in *Witherspoon,* a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpability determined by a 'tribunal "organized to convict."'"

The ABA Assessment Team Report and the Capital Jury Project research both indicate that there are serious problems with the way voir dire is being conducted in Kentucky. In December 2011, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* was issued. This was the product of a two-year comprehensive study by three law professors and two former Kentucky Supreme Court Justices, among others. It presented a disturbing portrayal of the manner in which the death penalty was being implemented in Kentucky. Among other issues discussed in the report, an entire chapter was devoted to "capital juror confusion." Kentucky jurors "failed to understand the guidelines for considering aggravating and mitigating evidence. For example, 45.9% (of those interviewed by the Capital Jury Project) failed to understand that they could consider mitigating evidence at sentencing, 61.8% failed to understand that they need not find mitigation 'beyond reasonable doubt,' and 83.5% of jurors did not understand that they need not have been unanimous on findings of mitigation. Furthermore, due to confusion on the meaning of available alternative sentences, Kentucky jurors may opt to recommend a sentence of death when they otherwise would not." (Executive Summary at vi). See also Chapter 10 of the report.

While certainly jury instructions bear much of the responsibility for the education of jurors on what the law is, it is equally true that one of the primary times when jurors are educated on procedure and law is during voir dire. More importantly, confusion can be addressed during jury selection by questioning. The advantage of addressing juror confusion during voir dire is that jurors can say simply what it is they do not understand, and judges, prosecutors, and defense counsel can ensure through questioning that no juror sits who does not both understand the law and agree to follow the law.

Purpose of voir dire in a capital case. The primary goal of jury selection in a capital case is to seat a jury that will hear the case during both the merits phase and the sentencing phase with an open mind and without bias toward any of the significant issues in the case, including the various penalties.

ABA National Judicial and jury guidelines. Standard 6-1.1(a) of the *ABA Special Functions of the Trial Judge* (1999), states that the trial judge "…has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." The ABA Criminal Justice Standards *Trial by Jury Standard 15-2.4 (c)* states that "Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."

Individual voir dire is mandated by Kentucky Supreme Court rule. RCr 9.38 reads, in part, that "When the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues."

This rule ensures in Kentucky the existence of the most important condition of an effective capital voir dire, that of being able to question each individual juror. The existence of the individual voir dire rule does not mean that voir dire is wide-open. Rather, the trial court may legitimately limit the questions to the topics of capital punishment, race, and

pretrial publicity. On the other hand, "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" *Turner v. Murray*, 476 U.S. 28 (1986).

The rule also ensures that voir dire is conducted by the attorneys as well as the trial court. In many instances, initial questioning is done by the trial court, which then allows follow-up questions by the attorneys for the parties.

Publicity. One of the three issues requiring individual voir dire is on the issue of pretrial publicity. RCr 9.38. *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988) predated the promulgation of RCr 9.38. There the Court stated that "Inquiry in the presence of other jurors as to what a prospective juror has heard about the case poses the danger of bringing that information to the ears of the other prospective jurors. The better procedure is to question jurors separately and out of the presence of each other on such matters." *Id* at 134.

Race. Someone who harbors a prejudice based upon race has no place on a jury judging a fellow citizen. This is particularly so in a death penalty case, where racial prejudice has a troubling history. As a result, RCr 9.38 requires individual voir dire on the issue of race "if questions regarding …race…are propounded." In *Turner v. Murray*, 476 U.S. 28, 37 (1986), the Court held that "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. Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Id. at 35. Individual voir dire on the existence of racial prejudice can, if done properly, uncover any underlying racial prejudice.

In *Winstead v. Commonwealth*, 283 S.W.3d 678, 684 (Ky. 2009), the Court said that "'t]his was a capital case in which the defendant was African-American and the victim Caucasian. Winstead had also been involved in romantic relationships with Caucasian women. Under these circumstances, as Winstead correctly notes, both the Fourteenth Amendment to the United States Constitution and RCr 9.38 gave him the right to question potential jurors regarding racial prejudice."

Implied bias. Implied bias comes from the status of the person as opposed to his or her answers. For example, if the potential juror is the secretary of the Commonwealth's Attorney, they have a bias that can be implied and that can require a cause challenge to be sustained. See *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985).

Group voir dire. Group voir dire is usually the time when all issues other than race, publicity, and the death penalty are discussed. Guilt phase defenses are dealt with during group voir dire, as are issues related to the presumption of innocence, the requirement of proof beyond a reasonable doubt, the right to remain silent, and other similar issues.

There is a temptation to give short shrift to group voir dire in a capital case, given the fact that individual voir dire is guaranteed. That is a mistake, and assumes that the only issue in the case has to do with sentencing. The reality is that cases where aggravated penalties are a possibility come in all sizes, with significant issues involving insanity, extreme emotional disturbance, eyewitness identification, and other merits phase issues. All of these require a probing group voir dire.

Use of a jury questionnaire can save time and increase understanding. Principle 11(a)(1) of the ABA's Principles of Juries and Jury Trials states that "In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party."

Juror questionnaires significantly improve the efficiency and reliability of the jury selection process during trial and have been recommended by the National Judicial College in its publication, *Presiding Over a Capital Case: A Benchbook for Judges* (2010). As both parties have advance notice of any issues relating to the impartiality of a juror, the trial process can be more focused and proceed with fewer general questions about a juror's background and fundamental beliefs. Questionnaires can also lead to revelations that might not come out during a public process, particularly from introverted or embarrassed jurors. This reduces the likelihood of mid-trial or post-conviction challenges to a juror's qualifications based on a factor unrevealed during voir dire.

The specialized questionnaire is a tool the trial court should consider for creating effective and fair jury selection. The reason for this is simple: some prospective jurors will say more on paper than they will in a group. Venire persons will often try to please everyone both during group and individual voir dire. When they fill out a questionnaire in their home, however, they will be more candid and forthcoming. Quiet jurors who may never volunteer during a group setting will express their opinions more readily on paper. The preparation of a questionnaire can make the voir dire

process go more smoothly and efficiently. This does not mean that the questions to be asked on voir dire are to be handed out prior to trial. The Court in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) condemned the procedure used there of giving the prospective jurors ahead of time the questions to be asked so that they could contemplate their answers. It is noteworthy that the Court spoke favorably of the use of a jury questionnaire as well as extensive questioning of jurors in *Uttecht v. Brown*, 551 U.S. 1 (2007).

Information given to jurors prior to the beginning of voir dire. In order for the court and counsel to be able to conduct a thorough voir dire, information is given to jurors regarding the issues about which questions will be asked. The reading of the indictment is not sufficient to set into context the questions to be propounded during an adequate voir dire. Some courts allow the parties to give a brief "opening statement" during group voir dire to set the context for questioning. By allowing this, the trial court will ensure that jurors know more about the case when they are answering questions. "We are unable to perceive how a meaningful voir dire examination could be conducted without providing the prospective jurors with some information concerning the facts expected to be proven." *Tamme v. Commonwealth*, 973 S.W.2d 13, 25 (Ky. 1998).

The process effects of death qualification. There are several dynamics that are important to understand at the onset of jury selection. One must consider the effects of "death qualification" on a jury. It is well known that death-qualifying a jury has what social scientist Dr. Craig Haney calls "process effects." He points out that death-qualification results in implied labeling, that is that the law labels a case as one of the worst possible, as a case in which all of the authorities have decided that death is appropriate. It requires jurors to reflect on a possible penalty phase and to predict their behavior in that context. Further, the process of death qualification tells the jury that guilt is a given, and that a penalty phase will be reached. Professor John Blume summarizes numerous studies from the Capital Jury Project that demonstrate that many jurors sit on our capital cases who understand the voir dire process to imply that the law requires a death verdict. It is important for trial courts to avoid the "process effects" and ensure both parties a fair trial.

The trial judge has a great deal of discretion. The trial judge has a great deal of discretion during the process of jury selection. In *Uttecht v. Brown*, 551 U.S. 1 (2007), the Court affirmed that federal courts would be granting immense discretion to trial courts when reviewing their decisions made during voir dire. "'The need to defer to the trial court remains because so much may turn on a potential juror's demeanor.'" At the same time, *Uttecht* reviewed a case where voir dire lasted for several weeks, a juror questionnaire was used, and lawyers were allowed to question individually. This casts serious doubt on the single question voir dire in *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997). See also *Fugett v. Commonwealth*, 250 S.W. 3d 604 (Ky.2008).

While many of the rules of voir dire are mandated, there is much that the trial judge can do to ensure a fair jury selection process. The judge determines where voir dire will take place. She decides how much time will be spent on each juror and the scope of the questions asked of each juror. She rules on objections to certain lines of questions. She interprets *Witherspoon* and *Witt* and *Morgan* by applying them in the context of ruling on motions on each juror. "The law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause…." *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994).

Voir dire may be conducted in-chambers. The trial court may conduct voir dire either in open court or in chambers. The atmosphere of voir dire changes dramatically depending upon the setting. In-court voir dire may be stiff, and the full expression of feelings is discouraged. In-chambers voir dire is preferable because it will allow jurors to open up more. It is more considerate of the potential juror.

The adequacy of voir dire is of constitutional dimensions. ABA Standards of the Criminal Justice Section Standard 15-2.4(c), Conduct of Voir Dire Examination, states that "Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."

A thorough and comprehensive voir dire is essential in order to ensure a fair jury. The law places on counsel the burden of conducting a thorough voir dire. *Morgan v. Illinois*, 504 U.S. 719 (1992), states that "part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Particularly in capital cases, certain inquiries must be made to effectuate constitutional protections…'[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled…[w]e have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections…It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on

trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception.'" *Uttecht v. Brown*, 551 U.S. 1 (2007) speaks favorably of the extensive voir dire conducted in that case while at the same time emphasizing deference to the trial court's findings. *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1992) states that "Appellant also has the burden of proving bias and preconceived ideas as to these challenged jurors."

One of the requirements of an adequate voir dire is that counsel be given an opportunity to develop challenges for cause. *Morgan* clearly puts the burden on the defense to "lay bare the foundation of [a] challenge for cause" based upon pro-death attitudes. Citing *Witt,* the Court states that "'[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality.'" Trial courts must allow a voir dire of considerable depth in order to allow counsel for the defendant the opportunity to develop the challenge for cause. See also *Gray v. Mississippi*, 481 U.S. 648 (1987); *Hannah v. Commonwealth*, 306 S.W.3d 509 (Ky. 2010) (reversed for failure to allow defense voir dire on the "duty to retreat").

There are several challenges for cause that cannot be developed without an adequate voir dire. Many jurors believe that the penalty decision is to be based entirely on the facts presented at the guilt phase. Many jurors either do not understand what mitigation is or believe that the penalty decision should not be based upon a fair consideration of evidence in mitigation. Many jurors fail to understand, consider, or give any effect to mitigation. "Evidence that might tend to mitigate the offense is often entirely absent from the description of the process leading to imposition of the death penalty…" Jurors may not sit in a capital case if they are automatically in favor of the death penalty upon conviction of a capital offense. Nor may they sit if they would shift the burden of proof on penalty to the defense. Finally, they may not sit if they cannot consider or give effect to evidence in mitigation when considering penalty. None of these cause challenges may be developed if the process utilized is inadequate.

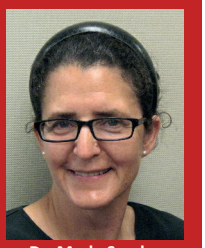
Extra peremptories to the parties should be considered. Peremptory challenges are vital to a fair voir dire process. At present, the prosecution and the defense both receive only 8 peremptory challenges. RCr 9.40. If additional jurors are to serve as alternates, RCr 9.40(2) requires the number of peremptory challenges to be increased by one. An additional peremptory challenge is also added to the defense when more than one defendant is being tried. RCr 9.40(3).

In *Mabe v. Commonwealth*, 884 S.W.2d 668 (1994), the Court stated that the "law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause…but if it is later determined that a juror should have been excused but was not, such would be reversible error because the defendant had to use a peremptory challenge and was thereby deprived of its use otherwise." Id. at 670.

The trial court has the discretion to allow adding additional peremptory challenges. "Whether to grant additional peremptories is within the discretion of the trial judge." *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998). In addition to multi-defendant cases, extra peremptory challenges should be considered when there is extensive publicity, or where the facts are egregious or unusually offensive.

The order of individual voir dire should alternate. The order of individual voir dire is important. While traditionally, the Commonwealth is allowed to go first with each juror, there is nothing in the rules that give the Commonwealth this prerogative. The first crack at a juror can give the questioning party an advantage. Initial feelings can be followed up. Rehabilitation may be attempted the first time. As a result, the trial court should consider alternating who engages the juror first in individual voir dire.

Empirical data shows Kentucky capital jurors have poor understanding of the instructions, especially as they pertain to mitigating circumstances. Nearly half failed to understand that they could consider anything in mitigation



Dr. Marla Sandys
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- Over 60% failed to understand that they need not find mitigation beyond a reasonable doubt.
- Over 80% failed to understand that the jury did not need to be unanimous in its interpretation of mitigating evidence.
- 15% failed to understand that they must find aggravation beyond a reasonable doubt.

Grade Level Necessary to Fully Understand and Apply Kentucky Capital Jury Instructions 12.6 - 23.8 grade level

See: Marla Sandys, Misunderstanding of Capital Instructions: Clarification is Possible, The Advocate (August 2014) reprinted with permission of Professor Sandys and the American Bar Association Kentucky Assessment Team on the Death Penalty. It was originally released in July 2014 by the ABA Kentucky Assessment Team on its official page at: http://ambar.org/kentucky

Educating jurors is important during capital voir dire. Jurors do not understand many things as they sit prior to, during, and after a trial. They do not understand the evidence, the law, or procedure. While jury selection cannot give jurors law degrees, all of the parties should approach the jury selection from the vantage point of the juror, that is asking herself, what does the juror not know, and what does the juror need to know in order to decide the case fairly?

In a capital case, one of the primary matters about which jurors need education is the very complex procedure involved, and what needs to be decided at each phase. Jurors who have sat in a criminal case before will begin with the understanding of a typical criminal case, which will create confusion in a capital case. Jurors who have not been a juror before can expect to be even more confused. Judges can go a long way toward explaining the procedure, but should also allow the parties to do so as well.

What are the issues about which jurors need education? In addition to the routine matters, jurors should be educated at a minimum on the following issues:

- That they will be deciding on guilt and innocence unanimously.
- The meaning and purpose of aggravating circumstances.
- That they can only find the existence of an aggravating circumstance unanimously and beyond a reasonable doubt.
- The meaning of mitigation and how it is to be used by jurors in making decisions. Jurors must be educated on the meaning and role of mitigation. Most people have no idea what mitigation means or how it relates to the decision they are being called upon to make. The law does not allow mitigation to be minimized. Rather, jurors must base their sentencing decision solely on the presence of mitigation and the balancing of that mitigation with the facts of the case. That is not how jurors make decisions in real life. Consider a question after the educational process such as, "how do you understand that you are to use evidence in mitigation in making your decision?"
- That mitigation is to be decided as a personal matter by each juror rather than unanimously
- That mitigation is not limited to those listed in the statute.
- That mental illness may be applicable to both the guilt/innocence phase and the penalty phase, and that there are different definitions of mental illness in each phase.

The standard to be used for cause challenges. To understand and apply the standards for "death penalty" and "life penalty" qualification, it is vital to understand the development of those standards. It begins with *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Jurors under the *Witherspoon* standard are eligible to sit no matter what their views are in regards to capital punishment. The *Witherspoon* standard applies to the state's ability to exclude jurors due to their opposition to the death penalty. All jurors are presumed to be eligible to sit unless the state can prove that they should be excluded. To be excluded, the juror must make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

Witherspoon was followed by *Adams v. Texas*, 448 U.S. 38, 45 (1980). There the Court said that "[t]his line of cases [*Witherspoon* and *Lockett*] establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Wainwright v. Witt, 469 U.S. 412 (1985,) modified *Witherspoon* and followed *Adams.* Under *Witt*, jurors may be excused if their views would "prevent or substantially impair the performance of their duties in accordance with their instructions and their oaths." What "impairment" means is within the discretion of the trial court. The burden is on the party seeking to exclude the particular juror to prove that they should not sit. *Witt* remains the standard most often affirmed today. *Greene v. Georgia*, 519 U.S. 145 (1996). *Witt* did not overrule *Witherspoon*. Rather, *Witt* should be viewed as a clarification of *Witherspoon*. See *Gray v. Mississippi,* 481 U.S. 648 (1987). *Gray* affirms the "Witherspoon/Witt" test as being "rooted in the constitutional right to an impartial jury." 95 L. Ed. 2d at 639. Under *Gray*, the erroneous exclusion of even one juror requires a reversal. *Lockhart v. McCree*, 476 U.S. 162 (1986) expresses the standard in a little different way. *Lockhart* states that jurors can only be excluded where they "cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, 'death qualification.'" *Lockhart* goes on to state that "not all who oppose the death penalty are subject to removal for cause in a capital case; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in a capital cases so long as they state clearly that they are willing to temporarily set aside

their own beliefs in deference to the rule of law." Id. 106 S. Ct. at 1766. *Buchanan v. Kentucky*, 483 U.S. 402, 408 (1987) articulates it this way: "Those who indicate that they can set aside temporarily their personal beliefs in deference to the rule of law may serve as jurors." 97 L. Ed. 2d at 351. *Morgan v. Illinois*, 504 U.S. 719 (1992) reiterates that "*Witherspoon* limited a State's power broadly to exclude jurors hesitant in their ability to sentence a defendant to death…a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."

Consideration of the full range of penalties. One means for qualifying a juror is to ask whether they can consider a particular option. This, of course, will apply to both prosecution and defense. "Both prosecution and defense are entitled to jurors who will fully consider the full range of penalties." *Epperson v. Commonwealth*, 809 S.W.2d 835 (Ky. 1991). See also *Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989).

Beliefs and feelings about the death penalty. All participants in the process want to know how a prospective juror feels about capital punishment. A simple question such as "tell us how you feel about the death penalty?" should be asked of each juror. No one should get hung up on the use of the word "feel." Asking a juror about his or her thoughts or beliefs should get a similarly honest answer from the juror. The parties will want to listen to the answer to this question and ask follow-up questions. Without sufficient follow-up, the parties will not be able to develop either grounds for a challenge for cause or the ability to exercise an intelligent peremptory challenge. Follow-up questions can be similar to the following: "How long have you felt this way?" "Why do you feel this way?" "Tell us more about your feelings?" "For what crimes is the death penalty appropriate?" These are some of the many questions that can be utilized to follow up on the fundamental first question.

Jurors must understand that the death penalty is available only for homicides with an aggravating circumstance. Many jurors believe that the death penalty should be applied in all murder cases. Those same jurors will affirm to the judge that they can consider the full range of penalties. Without a thoughtful question, those jurors will be allowed to sit although they are unqualified. Questions should be posed to uncover this sort of bias, questions such as: "What is your understanding of an aggravating circumstance?" "How do you feel about the fact that a murder without an aggravating circumstance has a maximum penalty of a life sentence rather than the death penalty?" "What do you believe the proper penalty is for murder?"

Jurors must be excluded for cause if they would automatically impose death for all murders. Today, as many jurors are excludable due to their pro-death feelings as those with anti-death feelings. Both prosecution and defense must be given the latitude to develop challenges for cause in these areas. The standard which applies to exclusion of pro-life jurors must also apply to the pro-death juror. Equally as important will be the exclusion of jurors who are unable to consider mitigation.

An important way to uncover a challenge for cause is to ensure that the juror understands what kind of cases are appropriate for the death penalty. A question such as "when is the death penalty appropriate?" will reveal the answer to this question. For many jurors, death is appropriate for all murder cases, or for all "intentional" murder cases. A sentence of less than death for such jurors may be appropriate only for self-defense cases, or accidental killings. It is important to get those matters out of the way and not make an assumption that the juror knows what kinds of cases we are dealing with. The standard to use on this issue comes from *Morgan v. Illinois*, 504 U.S. 719 (1992) which states that a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views." *Id*. at 502-503. A *Morgan* challenge is to be judged by the same standard as that used for the exclusion of pro-life jurors.

There is also Kentucky law which predated *Morgan* and should also be considered in determining the standard to be applied. In *Stanford v. Commonwealth*, 734 S.W.2d. 781 (Ky. 1987), aff'd 492 U.S. 361 (1989), the Court held that the defendant has a right to "life qualify" the jury. In *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988), the Court stated that "a juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the minimum penalty prescribed by law." *Id*. at 137. See also *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989).

There are several iterations of the juror who is an "automatic death penalty" juror and thus excludable for cause. In addition to actually supporting only the death penalty for an intentional murder, the juror may also be excludable because they support the death penalty for all murders of a particular

nature (double homicides, or the killing of a child), or they may start with death and require the defense to prove that a sentence other than death is appropriate (the burden shifter). A juror may not be an automatic death penalty juror but may be excludable under *Witt* because they are impaired on a constellation of death penalty and criminal justice views.

A challenge under *Morgan* should be available whenever the juror supports the death penalty in every murder case, the juror supports the death penalty in this particular case, the juror is unable to consider the minimum penalty of 20 years, the juror is unable to consider the statutory and non-statutory mitigating circumstances and give those circumstances mitigating effect in rendering a sentencing decision, the juror would impose death in all cases with certain facts (they have a particular personal crime threshold), the juror would place the burden of proof on the defendant regarding the sentence, or the juror would begin with death or life without parole and work downward as the evidence of mitigation is considered.

Jurors must understand and give full effect to mitigation. Mitigation is the most misunderstood aspect of a capital case. Questioning jurors about the mitigation in the case is an important element of jury selection. It is as important as questioning a juror about mental illness in an insanity case. There are two purposes to mitigation questioning. The most important is to determine the juror's feelings about mitigation to allow the parties to exercise the peremptory challenges intelligently. The second purpose is to determine whether the juror is "mitigation qualified."

Morgan gives wide latitude in questioning regarding mitigation. The parties must have a thorough knowledge of what mitigation is and be able to explain it to the jurors. It is vital to explain to jurors what role mitigation plays in this process.

Jurors will often tell the trial judge that they can consider mitigation without really understanding what mitigation is. It is vital that a more probing and thorough voir dire be allowed in order to uncover this level of confusion.

Questions that are appropriate to both discover whether a juror understands mitigation and will consider and give effect to mitigation are as follows: "How do you feel about the use of alcohol?" "How have you seen alcohol effect people over time?" "Some people believe that if someone is drunk when they do something, they are more responsible than if they are sober. Others believe that if someone is drunk when they do something, they are less responsible for what happened. How do you feel?" "How do you feel that mental illness affects someone in making decisions?" "What experiences have you had with persons with mental illness?" "Some people feel that a person with a mental illness is even more dangerous than someone without a mental illness and thus should be sentenced more harshly. Others feel that if a person is mentally ill, she should be treated for that mental illness and her sentence should not be as harsh. How do you feel?" "How would you use evidence of mental illness in making your penalty decision?" "How important would it be in making your penalty decision that my client came from difficult family circumstances?" "How important would it be in making your penalty decision that the defendant was placed in numerous foster homes as a child?"

A juror is not qualified to sit if he or she believes that mitigation is something that is unimportant to the penalty decision. Many jurors believe that the penalty decision should be based only upon the facts of the crime and the defendant's criminal record. If that is the case, the juror is not qualified to sit. Voir dire must be broad enough to allow for the discovery of this bias against mitigation.

Jurors are confused about mitigation. "Substantially higher percentages of Kentucky capital jurors than jurors from all states of the Capital Jury Project fail to understand that they need not be unanimous on mitigating circumstances, and that they need not find mitigation beyond a reasonable doubt. Kentucky capital jurors are, however, less likely than the Capital Jury Project jurors as a whole to be mistaken about the burden of proof required for aggravating circumstances. All told, the most likely situation is that a juror serving on a capital case in Kentucky does not understand how to consider and possibly give effect to mitigating evidence, and to a lesser extent, may not require the state to prove aggravating circumstances beyond a reasonable doubt. The obvious follow-up question is why is understanding so poor?" Sandys, *The Advocate,* August 2014, p. 3.

Jurors who are unable to consider and give effect to mitigation are excludable. Jurors may be excluded not only because of their pro-death views, but also because of their inability or unwillingness to consider mitigation and give it effect in their sentencing decision. "[S]uch jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Morgan v. Illinois*, 119 L. Ed. 2d,at 507. "Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty." *Id*. at 508. "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for

that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Id*. at 509. In *Fugett v. Commonwealth*, 250 S.W. 3rd 604 (Ky. 2008), the Court held that the trial court erred in failing to dismiss a juror for cause who would consider the age of the defendant only where he was 10, 11, or 12. The juror also stated that he would consider low intelligence and a bad family life "but they would not have much effect on his opinion. Nor did he believe that factors such as the use, or abuse of alcohol should be considered." *Fugett* provides support for questioning on the specific mitigation involved in the case.

As a starting point, a prospective juror must be willing to consider and give effect to all statutory mitigation listed in KRS 532.025. In order to uncover the inability to consider statutory mitigation, questions specific to that mitigation must be asked. For example, KRS 532.025(2)(b)(7) requires a juror to consider intoxication as a mitigating factor. To discover whether a juror is mitigation impaired on this mitigating circumstance, a question such as this must be asked: "How would you use evidence of a person's intoxication on alcohol or drugs in arriving at a penalty decision?"

Jurors cannot sit if they disagree with certain mitigating circumstances. The Capital Jury Project has revealed startling facts about jurors who have sat on capital cases. Many of them do not believe that specific statutory mitigating circumstances are mitigating. 90% of jurors who sat on capital cases do not consider drug addiction as mitigating. 86% do not agree that intoxication is mitigating. 43% do not believe that a history of mental illness is mitigating. Clearly, jurors who harbor these opinions are excludable for cause.

Jurors must be able to consider and give effect to specific nonstatutory mitigating circumstances. It is not sufficient to consider and give effect only to the eight statutory mitigating circumstances. In addition, prospective jurors must be willing to consider and give effect to all mitigation which is of constitutional dimension. From *Lockett v. Ohio*, 4038 U.S. 586 (1978), onward, the Supreme Court has defined mitigation from an Eighth Amendment perspective, stating what must be allowed into evidence. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court stated that a jury must consider mitigation of a defendant's youth and troubled family background and give it "effect." *Brewer v. Quarterman*, 550 U.S. 286 (2007) expanded that requirement to one of giving the mitigating evidence "full effect." See also *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). A troubled childhood and emotional disturbance was viewed as mitigation in *McCoy v. North Carolina*, 494 U.S. 433 (1990). In *Hitchcock v. Dugger*, 481 U.S. 393 (1987) the defendant's having inhaled gas fumes to the point of passing out, coming from an impoverished family background, and having his father die of cancer was said to be mitigating. Adjustment to prison life was said to be mitigating in *Skipper v. South Carolina*, 476 U.S. 1 (1986). *Penry v. Lynaugh* 492 U.S. 302, (1989) made it clear that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." None of these opinions, interpreting what is required by the Eighth Amendment, have any impact unless jurors are asked during voir dire whether they can consider specific mitigation and give it full effect.

Mitigation is to be decided by each juror, not the jury as a whole. Jurors need to understand that mitigation does not have to be unanimous in order for it to be considered. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990). Each juror must consider evidence in mitigation and give it the effect that they believe it deserves. Jurors will need to be educated individually on this requirement. A question such as this is appropriate: "How will you use evidence of alcoholism in your penalty decision?" "What if you believe alcoholism is something that is important for your decision, but the other jurors do not agree?" "The law is that each juror has a right to give whatever weight she wants to a particular piece of mitigating evidence. What do you think about that?"

Jurors also must may consider any factor that they determine is mitigating. Jurors will not understand that without the court and counsel explaining that to them. They may personally react to the defendant, the facts in the case, or anything else that brings about a mitigating reaction.

No nexus is required between mitigation and the crime. *Tennard v. Dretke*, 542 U.S. 274 (2004) makes it clear that mitigation does not have to have a nexus with the crime. Mitigation may be virtually anything that relates to the defendant, his family upbringing, his character, how he relates to family members, or his history. For example, the Court stated that "the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter" in a case looking back to the defendant's Korean War experiences. *Porter v. McCollum*, 558 U.S. 30 (0.0.2009).

It is important for the juror to understand that they must base their penalty decision on the mitigation they hear. This is counterintuitive. The jurors naturally believe they are to base their decision on the facts of the case, the heinousness of the crime, the intentionality of the crime, and the lack of

remorse. Unless the trial court and the parties do something to educate the jurors differently, unqualified jurors will be allowed to sit. Some possible questions to ask include: "How will you use evidence you hear about mental illness in making your penalty decision?" "How do you understand the penalty decision process as it has been explained to you?" "Why is it important to consider evidence of the defendant's fetal alcohol syndrome when making a penalty decision?"

Mitigation does not have to be proven beyond a reasonable doubt. Jurors also need to understand that mitigation does not have to be proven beyond a reasonable doubt.

Jurors need to understand that this is their individual decision. No one can suggest to the jury that their decision is merely a recommendation to the trial court. Many of them believe that the trial court is the ultimate sentencer, or that she can correct their errors. Many jurors believe that they are merely making a recommendation. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985). All the parties must do everything they can to imbue the juror with the solemnity of their decision. Questions may include:

"Some people believe that the jury simply makes a recommendation and that other people do the sentencing. Other people believe that the jury makes the ultimate penalty decision. What do you think?" "Who do you believe makes the final decision about whether someone will live or die?" "What do you think happens once a jury makes a verdict?"

Misunderstanding about the length of time the client will serve should be clarified. There is a misconception that has been prevalent for many years that persons sentenced to life in prison get paroled after serving just a few years, generally six or eight years. This must be addressed in voir dire. *Shields v. Commonwealth*, 812 S.W.2d 152 (Ky. 1991) allows for counsel to question the jurors on the full range of penalties, and should apply as well to a full voir dire on the time people have to serve on particular sentences, parole, etc. Questions that are appropriate could be: "One of the possible penalties for an intentional murder is life in prison. How much of the time would a person have to serve before being eligible for release on parole?" "How long do persons have to serve in Kentucky before being released on parole?" "If you were to give a sentence of life without parole, what is your understanding of what that means?" "What do you believe a life without parole sentence means?"

The Magic Question. In *Montgomery v. Commonwealth*, 819 S.W.2d 713 (1992), the Court ended the practice of seating jurors who were able to answer the "magic question" regarding many issues, in that case pretrial publicity. The Court said that, "[o]ne of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the "magic question." But, as Chief Justice Hughes observed in *United States v. Wood*, 299 U.S. 123, 146 (1936), "[i]mpartiality is not a technical conception. It is a state of mind." A trial court's decision whether a juror possessed "this mental attitude of appropriate indifference" must be reviewed in the totality of circumstances. It is not limited to the juror's response to a "magic question."…There is no "magic" in the "magic question." It is just another question where the answer may have some bearing on deciding whether a particular juror is disqualified by bias or prejudice, from whatever source, including pretrial publicity. The message from this decision to the trial court is the "magic question" does not provide a device to "rehabilitate" a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire. We declare the concept of "rehabilitation" is a misnomer in the context of choosing qualified jurors and direct trial judges to remove it from their thinking and strike it from their lexicon."

Jurors who have heard a great deal about the case, who have formed an opinion about the defendant's guilt, cannot be rehabilitated by promising to set aside their opinions and be fair. On the other hand, *Witt*, *Morgan*, and *Lockhart* all call upon counsel to probe jurors sufficiently to determine whether they may be excused for cause, or whether a cause challenge by the prosecution would be erroneous. *Montgomery* means that biased jurors must be excluded for cause. At the same time, counsel must insist that the *Witherspoon/Witt* line of cases mean that counsel must be allowed to conduct a thorough and probing voir dire on penalty and mitigation qualification.

The interplay between *Montgomery* and capital jury selection is fluid. *Mabe v. Commonwealth*, 884 S.W.2d 668 (1994) states that "*Montgomery* directs attention to the totality of the evidence on voir dire with the comprehensive question being whether the juror has a mental attitude of 'appropriate indifference.' *Montgomery* rejects the idea that a magic question may be asked which can rehabilitate a juror whose answers to voir dire questions demonstrate a pervasive prejudice. On the other hand, *Montgomery* does not eliminate trial court discretion or absolve the trial court of its duty to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and his understanding of the law…A per se disqualification is not

required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Id*. at 671.

Conclusion. It is important to emphasize the importance of voir dire in a capital case. Everyone involved should want unbiased jurors who understand the process and the use of aggravating and mitigating circumstances. And all should remember that "trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused. " *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013).

Symposium on the Death Penalty: Reforming a Process Fraught With Error

John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld
PROBING "LIFE QUALIFICATION" THROUGH EXPANDED VOIR DIRE
29 Hofstra L. Rev. 1209 (2001)

Data from Kentucky illuminate this disheartening picture. Almost 30% of persons who serve as capital jurors in Kentucky reported that they would automatically vote for the death penalty upon conviction for capital murder.

See Ronald C. Dillehay & Marla R. Sandys, Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification, 20 Law & Hum. Behav. 147, 158-59 (1996) (relating findings, based on survey of 148 Kentucky felony jurors, that 28.2% of the respondents who would not be disqualified as jurors under the Witt disqualification standard would nonetheless always give the death penalty in cases involving intentional murder).

Waste in Kentucky Capital Prosecutions is Significant

2011 Statewide Audit: Implement Charging Recommendation Process to Reduce Waste, Abuse, and Error

By Ed Monahan

H]owever strongly one may favor the death penalty in principle, its propriety in practice depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion.

-Walter Berns, Defending the Death Penalty, 26 Crime & Delinq. 503, 511 (1980).

High cost

Ed Monahan
Public Advocate

Prosecuting a homicide in Kentucky as a death penalty case greatly increases the cost to the court, prosecution, defense and taxpayer. It substantially delays the ultimate resolution of the case.

The Kentucky death penalty was reinstituted in December 1976. There are 34 persons on Kentucky's death row. There have been three executions since 1976, and two of them were voluntary, Edward Lee Harper, Jr. on May 25, 1999 and Marco Allen Chapman on November 21, 2008. The only involuntary execution was Harold McQueen, Jr. on July 1, 1997. Hundreds of millions of dollars have been spent on the Kentucky death penalty process.

High error rate

The error rate is strikingly high. As of December 2011, of the 78 people sentenced to death in Kentucky since 1976, 50 have had a death sentence overturned on appeal by Kentucky or federal courts. This is an error rate of more than 64%. These 50 reversals over 35 years is an average of more than one reversal per year. Between 2008 and 2014, there were five reversals of death sentences. Since 1920, 10 KY Governors have granted clemency to 37 persons sentenced to death. Governor Patton commuted the death sentence of Kevin Stanford on December 8, 2003. Governor Fletcher commuted the death sentence of Jeffrey Leonard on December 10, 2007.

Few sentences of death

The most common result of a capital prosecution is a sentence less than death. Between 1976 and 2011 there have been 78 people sentenced to death in Kentucky, about 2 per year. This rate has continued to decrease in recent years. Since 2006, there have only been five death sentences in Kentucky:

- None from December 2006 to February 2010
- Two in 2010
- One in 2011
- One in 2012

- None in 2013
- One in 2014

Imprudent prosecution of marginal cases

The imprudent prosecution of a marginal case as capital when it is not a serious capital case is a significant problem in Kentucky. Prosecutors have the discretion to decide whether to prosecute a capital-eligible case as a death penalty case or not. Some prosecutors decide always to prosecute a capital-eligible case as a death penalty case, in effect exercising no discretion. However, other prosecutors are careful only to prosecute a case as a death penalty case if it merits that resource-intensive procedure. The waste these overbroad prosecutions causes occurs in Kentucky in a variety of ways across the state.

For instance, in the 2010 Raymond Clutter capital case in Boone County the parties conducted five days of capital voir dire before the Court declared a mistrial because of an opening statement error of the prosecutor. Thereafter, the prosecutor decided not to seek the death penalty upon retrial.

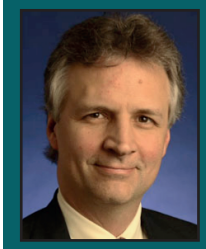
There are a significant number of death penalty prosecutions that proceed to trial but still result in non-capital sentences and even in jury verdicts that the defendant is not guilty of murder. Some examples of extensive wasteful death penalty cases that went to trial with death as a possible sentence but resulted in acquittal, reckless homicide or manslaughter verdicts are:

- **Kendrick Hunt** (Hickman County 12-CR-0002) charged with robbery and/or complicity to robbery, murder and/or complicity to murder, kidnapping and/or complicity to kidnapping; acquitted on all robbery and murder charges; guilty of wanton endangerment 1st, and unlawful imprisonment 1st. Sentence of 10 years, nonviolent.
- **Robert Yell** (Logan County 04-CR-00232) charged with arson 1st, murder, attempted murder, assault 3rd, assault 4th, resisting arrest, menacing, terroristic threatening, alcohol intoxication, PFO 1st. Convicted of arson first, manslaughter 2nd, assault 1st (instead of attempted murder), AI and PFO 2nd Sentence of 56 years.
- **Joshua Cottrell** (Hardin County 03-CR-00465) charged with murder, first-degree robbery, tampering with physical evidence and second-degree persistent felony offender. After a jury trial, he was convicted of second-degree manslaughter, tampering with physical evidence, theft by unlawful taking over $300, and being a second-degree persistent felony offender. He was sentenced to 20 years in prison.
- **Scot Gaither** (Daviess County 02-CR-446) charged with murder, kidnapping victim death, robbery 1st, tampering with physical evidence. Convicted of manslaughter 1st, kidnapping victim death, theft by unlawful taking, and tampering. Mr. Gaither received an illegal sentence of LWOP, which has been vacated in a post-conviction action, but due to continued litigation in federal court, he has not yet been resentenced.
- **Wesley Meeks (**Greenup County 01-CR-155) charged with Burglary 1st, 3 counts of theft by unlawful taking over $300, sodomy 1st, and murder. Convicted by a jury of second-degree manslaughter, first-degree burglary, and theft by unlawful taking (felony). He was sentenced to 35 years in prison.
- **Larry Osborne** (Whitley County 98-CR-00006-001) charged with murder, arson, robbery, burglary, and theft. Reversed on appeal, *acquitted of all charges.*

Fayette County Capital Prosecutions where Defendant was Acquitted of Murder

- **Adrian Benton** (Fayette County 06-Cr-01043-001) charged with murder, 3 counts robbery 1st, 2 counts

Kentucky Conservatives against the Death Penalty



John David Dyche

In a February 18, 2014 article, John David Dyche wrote:

"The conservative case against the death penalty has come to Kentucky. It is a compelling one.

Two Republican state representatives, David Floyd of Bardstown and Julie Raque Adams of Louisville, joined with six Democrats, including some of the chamber's most liberal members, to sponsor House Bill 330. They want to abolish the death penalty and replace it with life imprisonment without parole for both inmates already sentenced to death and others going forward.

Some may reflexively think that eliminating the death penalty undermines conservative support for law and order and being tough on crime. It need not, especially if citizens have confidence that sentences of life in prison without parole are firmly administered without allowing inmates too many creature comforts and recreational privileges.

To paraphrase Victor Hugo, there is nothing so powerful as an idea whose time has come.

Abolition of the death penalty is such an idea, and its time has come for conservatives. Kentuckians owe a debt of gratitude to the conservative leaders like Floyd and Adams who are taking action on the issue."

wanton endangerment 1st, tampering, PFO 2d. Convicted of complicity to manslaughter 2d, two counts robbery 1st, complicity to robbery 1st, wanton endangerment 1st, wanton endangerment 2nd, PFO 2nd, acquitted of tampering. Sentence of 27 years. Death was excluded after completing voir dire, but before the jury was sworn in.

- **Sam Duff** (Fayette County 01-CR-00869) charged with murder, violation of a DVO aggravator. Convicted of manslaughter 1st. Sentence of 19.5 years.
- **Carlos Cortez** (Fayette County 99-CR-00369-002) charged with murder, robbery 1st, and burglary 1st; *acquitted on all charges.*
- **Myron Wilkerson** (Fayette County 98-CR-00631-002) charged with murder, burglary 1st; robbery 1st. Convicted of manslaughter 2nd , 10 years, acquitted of burglary, guilty of robbery 1st , 20 years
- **Gene Tapp Perry** (Fayette County 97-CR-00741) charged with murder, rape 1st and PFO 1st. Acquitted of rape 1st. Convicted of manslaughter 1st and PFO 1st. Life sentence.
- **Mark Dixon** (Fayette County 95-CR-00577) charged with murder, robbery 1st, 3 counts of wanton endangerment 1st; *acquitted on all charges.*
- **Earl Cheeks** (Fayette County 90-CR-00049-002) charged with murder and robbery 1st; convicted of manslaughter 2nd, acquitted of robbery. Sentence of 20 years.
- **C.H. Brown** (Fayette County 87-CR-00506-001) charged with murder and robbery 1st; acquitted of murder, Convicted of robbery. Sentence of 20 years.

Jefferson County Capital Prosecutions where Defendant was Acquitted of Murder

- **Nashawn Stoner** (Jefferson County 98-CR-02446) charged with murder and two counts of Robbery 1st, *acquitted on all charges.*
- **Donnez Porter** (Jefferson County 97-CR-01951) charged with two counts of murder, robbery 1st, assault 1st, *acquitted on all charges.* (Motion to exclude death penalty pretrial due to prosecutorial misconduct was denied.)

Jefferson County Capital Prosecutions where Notice of Aggravating Factors was Filed then Death Excluded by Prosecution

- **Taiwan Lewis** (09-CR-002874) charged with two counts of Murder, 2 counts Attempted Murder and 2 counts Assault, Notice of Aggravating factors filed 12/10/2009, and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.
- **Gary Bond** (10-CR-001550) charged with Murder and Sodomy, Notice of Aggravating factors filed 10/29/2010, and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.
- **Conrai Kaballah** (11-CR-002821) charged with 2 counts of Murder, Notice of Aggravators filed 10/05/2011 and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.

Jefferson County Capital Prosecutions where at Trial for Murder Defendant was Found Guilty of Manslaughter

- **Isiah Fugett** (04-CR-000391) charged with 2 counts of Murder, 1 count of Robbery, Notice of Aggravating factors filed 03/02/2005. Defendant was convicted by

Representative David Floyd (right), a Republican from Bardstown, and **Senator Gerald Neal** (left), a Democratic from Louisville, testify on abolishment of the death penalty at the August 1, 2014 hearing before the Interim Joint Judiciary Committee in Paducah KY. In the 2015 session, Rep. Floyd has introduced HB 82, an Act abolishing the death penalty and replacing it with life without parole. Sen. Neal has filed SB 15, an Act to abolish the death penalty and replace it with life without parole, and SCR 11 establishing a task force to study the costs to the state and local governments related to administering the death penalty in all phases of the criminal justice system and the number and outcomes of death-eligible cases; require the task force to submit a report to the Legislative Research Commission by December 1, 2015. Representative Floyd has filed a similar resolution, HCR 30.

Picture courtesy of Pat Delahanty, Riverbirch Productions

the jury of Manslaughter, Acquitted of Robbery. Case was reversed on appeal and settled before retrial.

- **Adam Barker** (07-CR-000691) charged with Murder, Attempted Murder and Criminal Mischief, Notice of Aggravators filed 08/15/2007, convicted by jury of Manslaughter (case was reversed, retried, and the defendant was again convicted of manslaughter).

Jefferson County Capital Prosecutions where Prosecution was Withdrawn or the Case Amended to Class D at or on Eve of Trial

- **Andrew Cochran** (07-CR-002782) charged with Murder, Robbery and Burglary, Notice of Aggravating factors filed 10/08/2007. After nearly a week of individual voir dire and all the usual pre-trial preparation and expense, the case was settled for credit for time served (almost three years) on facilitation to Murder, Robbery and Burglary.
- **Commonwealth v. John Warren Noble** (10-CR-00029) Defendant was indicted for a "cold case" murder and robbery and Notice of Aggravating Factors was filed. After the defendant spent nearly a year in jail, the case was dismissed on the literal eve of trial because the prosecution did not believe it had enough to proceed against him. The prosecution fought harder to resist a bond reduction motion than anything else in the case.

2011 Kentucky Capital Audit Criticizes Prosecution Charging Process

A 2011 Kentucky specific Audit, the American Bar Association's *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* (December 2011), uncovered major deficiencies in the way the death penalty has been implemented in Kentucky since 1976. See: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/kentucky.html

The statewide Study audited and evaluated Kentucky procedures and practices against national ABA capital punishment best practice protocols. The comprehensive 438 page Audit Report considered all death penalty cases prosecuted in Kentucky since 1976 and makes a series of critically important Findings and Recommendations to address the problems identified with the way the death penalty is administered in our state. The 2011 Audit focuses on fairness and accuracy in capital cases. The Assessment team, as well as the ABA, took no position with regard to whether or not the death penalty should be abolished. It was only concerned with its proper administration. The 2011 Program Audit recommended changes which must be made to eliminate waste, abuse and error.

The Kentucky Assessment Team consisted of two retired Kentucky Supreme Court Justices, a former chair of the House Judiciary Committee, and distinguished law professors and bar leaders. Over two years, it conducted the most extensive evidence-based analysis of the manner in which the death penalty is administered in Kentucky in the history of the Commonwealth. The 2011 Report identified problems in Kentucky's charging process:

> "**Inconsistent and Disproportionate Capital Charging and Sentencing** (Chapter 5) With fifty-seven Commonwealth's Attorneys offices in Kentucky, there are conceivably fifty-seven different approaches to the decision to seek capital punishment. In some instances, it appears that the Commonwealth's Attorney will charge every death-eligible case as a capital case. While the vast majority of Commonwealth's Attorneys may seek to exercise discretion in death penalty cases to support the fair, efficient, and effective enforcement of law, there is no mechanism in place to guide prosecutors in their charging decisions to support the even-handed, nondiscriminatory application of the death penalty across the Commonwealth." Id. at v.

The 2011 Audit explained that, "Kentucky imposes no requirement on Commonwealth prosecutors to maintain written policies governing the exercise of prosecutorial discretion in capital cases, nor must prosecutors maintain policies for evaluating cases relying upon eyewitness identification, confessions, or jailhouse snitch testimony - evidence that constitutes some of the leading causes of wrongful conviction. Death sentences imposed in cases in which the prosecution has significantly relied upon this sort of evidence underscores the need for prosecutors to adopt policies or procedures for evaluating the reliability of such evidence.

"While the vast majority of prosecutors are ethical, law-abiding individuals who seek justice, our research revealed inefficient and disparate charging practices among some Commonwealth's Attorneys, as well as instances of reversible error due to prosecutorial misconduct or error in death penalty cases. In addition, the large number of instances in which the death penalty is sought as compared to the number of instances in which a death sentence is actually imposed calls into question whether current charging practices ensure the fair, efficient, and effective enforcement of criminal law. This places a significant burden on Commonwealth courts, prosecutors, and defenders to treat as capital many cases that will never result in a death sentence, taxing the Commonwealth's limited judicial and financial resources. In 2007, for example, Kentucky's public

defender agencies reportedly undertook representation in ninety seven death penalty cases. However, in the over thirty years since Kentucky reinstated the death penalty, Kentucky courts have sentenced to death only seventy-eight defendants and only three executions have taken place in the Commonwealth. There is also geographic disparity with respect to capital charging practices and conviction rates in Kentucky. Since 2003, fifty-three percent of Fayette County murder cases have gone to trial compared to twenty-five percent in Jefferson County." Id. at xxi.

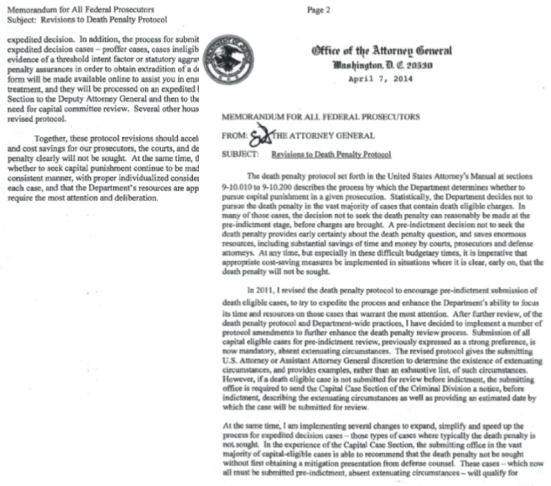
2011 Audit Charging Recommendation

To address the disparity and the waste, the American Bar Association's Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report (December 2011) made the following recommendation: "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." Id. at 147-152.

US DOJ Protocol

The type of charging process recommended by the ABA is already working at the national level. The United States Department of Justice has internal procedures governing death penalty cases. They are found at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

To "accelerate decision times and achieve resource and cost savings for our prosecutors, the courts, and defense counsel in cases in which the death penalty clearly will not be sought," the US Department of Justice's protocol requires a process to decide deliberately whether to proceed with a capital-eligible case as a death penalty case or not with most decisions being not to seek death. Attorney General Holder stated in an April 7, 2014 DOJ Memorandum that "the Department decides not to pursue the death penalty in the vast majority of cases that contain death-eligible charges."



Memorandum for All Federal Prosecutors
Subject: Revisions to Death Penalty Protocol

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Section to the Deputy Attorney General and then to the
need for capital committee review. Several other hous
revised protocol.

Together, these protocol revisions should acce
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whether to seek capital punishment continue to be mad
consistent manner, with proper individualized consider
each case, and that the Department's resources are app
require the most attention and deliberation.

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Office of the Attorney General
Washington, D. C. 20530
April 7, 2014

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: Revisions to Death Penalty Protocol

The death penalty protocol set forth in the United States Attorney's Manual at sections 9-10.010 to 9-10.200 describes the process by which the Department determines whether to pursue capital punishment in a given prosecution. Statistically, the Department decides not to pursue the death penalty in the vast majority of cases that contain death eligible charges. In many of those cases, the decision not to seek the death penalty can reasonably be made at the pre-indictment stage, before charges are brought. A pre-indictment decision not to seek the death penalty provides early certainty about the death penalty question, and saves enormous resources, including substantial savings of time and money by courts, prosecutors and defense attorneys. At any time, but especially in these difficult budgetary times, it is imperative that appropriate cost-saving measures be implemented in situations where it is clear, early on, that the death penalty will not be sought.

In 2011, I revised the death penalty protocol to encourage pre-indictment submission of death eligible cases, to try to expedite the process and enhance the Department's ability to focus its time and resources on those cases that warrant the most attention. After further review, of the death penalty protocol and Department-wide practices, I have decided to implement a number of protocol amendments to further enhance the death penalty review process. Submission of all capital eligible cases for pre-indictment review, previously expressed as a strong preference, is now mandatory, absent extenuating circumstances. The revised protocol gives the submitting U.S. Attorney or Assistant Attorney General discretion to determine the existence of extenuating circumstances, and provides examples, rather than an exhaustive list, of such circumstances. However, if a death eligible case is not submitted for review before indictment, the submitting office is required to send the Capital Case Section of the Criminal Division a notice, before indictment, describing the extenuating circumstances as well as providing an estimated date by which the case will be submitted for review.

At the same time, I am implementing several changes to expand, simplify and speed up the process for expedited decision cases – those types of cases where typically the death penalty is not sought. In the experience of the Capital Case Section, the submitting office in the vast majority of capital-eligible cases is able to recommend that the death penalty not be sought without first obtaining a mitigation presentation from defense counsel. These cases – which now all must be submitted pre-indictment, absent extenuating circumstances – will qualify for

Jefferson County Charging Practice Changes under New Commonwealth Attorney

The homicide charging process has changed in Jefferson County. The Jefferson County Commonwealth Attorney has adopted a practice analogous to the US DOJ protocol. This is responsive to the 2011 Audit Recommendation. The waste in Jefferson County has been reduced as the number of death prosecutions has declined based on the individual factors of each case. This new practice resolves cases sooner and benefits the courts, prosecutors, public defenders and taxpayers.

Senator Robin Webb

Senator Robin Webb Introduced SB 86 (2013) and SB 202 (2014) to Implement The ABA Assessment Team Recommendations

Conclusion: High Error, Substantial Waste

These are times of very limited resources. There is a significant waste of resources in the Kentucky capital process that has consequences to other criminal and civil cases because of the disproportionate amount of time and money spent on death penalty cases as compared to other important civil disputes and serious crime prosecutions that also need sufficient preparation and focus on both sides to ensure a safer and fairer community. There are some cases that are serious capital cases, those cases in which the criminal behavior arguably is the worst of the worst. There are other cases that are only technically capital. Our current Kentucky system allows those which are only technically capital to be prosecuted as if they were serious capital cases. To minimize waste – particularly when we know that there is a high risk of reversal in capital cases – the resources spent prosecuting a capital case in Kentucky could be better spent on providing more robust resources to all other cases or to saving the Commonwealth tax dollars.

This is verified by the ABA Kentucky Assessment Team's 2011 Audit. That Audit examined all death sentences imposed in the Commonwealth since 1976. It identified the wasteful nature of the process in Kentucky, "…capital prosecutions occur in far more cases than result in death sentences. This places a significant judicial and financial burden on Commonwealth courts, prosecutors, defenders, and the criminal justice system at large, to treat many cases as death penalty cases, despite the fact that cases often result in acquittal, conviction on a lesser charge, or a last minute agreement to a sentence less than death.

All these factors call into serious question "whether the Commonwealth's resources are well-spent on the current error-prone nature of the death penalty in Kentucky. Budget shortfalls have undoubtedly compounded the problem, resulting in furloughs and budget cuts to the courts, prosecutors' offices, and defenders' offices across the Commonwealth in the last few years. This will inevitably lead to greater risk of error. Finally, actors in the criminal justice system must expend an extraordinary amount of time prosecuting, defending, and adjudicating capital cases as compared to other criminal and civil cases. This contributes to burdensome caseloads and clogged dockets, affecting the quality of justice administered to all Kentuckians." Id. at xii.

The death penalty process in Kentucky has a high cost and a high error rate. It produces few death sentences and has substantial waste. It needs to be fixed or eliminated.

Five Ways to Reduce Error, Waste, and Abuse in Capital Prosecutions in Kentucky

1. Limit when the death penalty can be sought
2. Require timely, complete open file discovery, including requiring an agent of the Commonwealth Attorney to provide all of their information timely
3. Statutorily authorize judge to eliminate death as a possible punishment when legally appropriate
4. Ensure meaningful and comprehensive individual voir dire in death penalty cases to avoid trials with jurors who do not fully qualify in being able to meet their obligations
5. Enact reforms recommended by 2011 independent comprehensive audit of the way capital process in Kentucky is working

For a further explanation of these see *The Advocate* (August 2014) at 7-14 at:

http://dpa.ky.gov/NR/rdonlyres/07572EE0-EC4F-4AAD-8CF8-A938C0397EC0/0/AdvocateAugust2014FINALreduced.pdf

Recommendations of 2011 Kentucky Capital Audit have not been Implemented

The ABA has issued the following information about the Kentucky assessment process that was conducted 2009-2011 by a state-based team that collected and analyzed laws, rules, procedures, standards, and guidelines relating to the administration of capital punishment in the Commonwealth. The Kentucky Assessment Team determined whether the Commonwealth is in compliance with the ABA Protocols and made Recommendations needed to improve the fairness and accuracy of Kentucky's death penalty system. The Kentucky Assessment Team is comprised of:

- Linda Ewald, Co-Chair, University of Louisville Louis D. Brandeis School of Law, Louisville, KY;
- Michael J. Z. Mannheimer, Co-Chair, Northern Kentucky University Salmon P. Chase College of Law, Highland Heights, KY;
- Hon. Michael Bowling, Managing Partner, Bowling Law Office Middlesboro, KY;
- Allison Connelly, University of Kentucky College of Law, Lexington, KY;
- Hon. Martin E. Johnstone, Kentucky Supreme Court (Retired), Prospect, KY;
- Hon. James Keller, Kentucky Supreme Court (now deceased), Lexington, KY;
- Frank Hampton Moore, Jr., Cole & Moore, P.S.C., Bowling Green, KY; and
- Marcia Milby Ridings, Hamm, Milby & Ridings, London, KY.

The review by the Kentucky Assessment Team, produced troubling findings:

- Of the last 78 people sentenced to death in Kentucky, 50 have had a death sentence overturned on appeal by Kentucky or federal courts. That is an error rate of more than 60 percent.
- Evidence in criminal cases is not required to be retained for as long as a defendant remains incarcerated, and the problem of lost evidence significantly diminishes the effectiveness of a state law that allows post-conviction DNA testing prior to execution. Such lost or missing evidence prevents exonerating innocent people and can prevent apprehension of the guilty.
- There are no uniform standards on eyewitness identifications and interrogations, and many of Kentucky's largest law enforcement agencies do not fully adhere to best practices to guard against false eyewitness identifications and false confessions, two of the leading causes of wrongful conviction nationwide.
- Kentucky public defenders handling capital cases have caseloads that far exceed national averages and salaries that are 31 percent below those of similarly experienced attorneys in surrounding states. Private attorneys who take on representation of a person facing the death penalty make far less than other attorneys contracted by Kentucky to perform legal services on civil matters.
- At least 10 of the 78 people sentenced to death were represented by defense attorneys who were

subsequently disbarred. There are no statewide standards governing the qualifications and training of attorneys appointed to handle capital cases.

- A survey of jurors serving in capital cases found a disturbingly high percentage failed to understand sentencing guidelines before deciding whether or not a defendant should be executed. This is not the fault of the jurors, but rather the failure to adequately instruct the jurors.
- There is no mechanism in place to guide prosecutors in deciding what charges to bring to support the non-discriminatory application of the death penalty across the state.
- Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental disabilities.
- There is a lack of data-keeping throughout the administration of the death penalty in Kentucky, making it impossible to guarantee that the system is operating fairly, effectively and efficiently.

The Team further cautioned that the ongoing fiscal crisis faced by the Commonwealth would undoubtedly lead to greater risk of error in death penalty cases.

The Team issued a series of Recommendations to address the problems identified in the assessment. Among them:

1. Kentucky must guarantee proper preservation of all biological evidence in capital cases, and courts should order DNA testing if the results could create a reasonable probability that a defendant should not have been sentenced to death.
2. Law enforcement training and practices should comport with well-known best practices to promote apprehension of the guilty and prevent conviction of the innocent.
3. Kentucky should adopt statewide standards governing the qualifications and training required of defense attorneys in capital cases.
4. Kentucky should provide additional funding to ensure defense attorneys who represent indigent capital defendants are paid at a rate to ensure the high quality provision of legal services in such complex and demanding cases as a death penalty case.
5. Guidelines governing the exercise of prosecutorial discretion in death penalty cases should be adopted for statewide application.
6. Kentucky should establish a statewide clearinghouse to collect data on all death eligible cases.
7. Kentucky's post-conviction rules and practices should be amended to permit adequate development and consideration by the courts of an inmate's claims of constitutional error.
8. To improve death penalty juror comprehension, the state must revise the jury instructions typically given in capital cases.
9. Shortcomings of the Kentucky Racial Justice Act must be corrected to ensure that the Act serves as an effective remedy for racial discrimination in death penalty cases.
10. Kentucky should adopt legislation exempting the severely mentally ill from the death penalty.

Recommendations have not been implemented

In 2012, there was a hearing in the House and Senate Judiciary Committees on the ABA Kentucky Assessment Team audit. On February 27, 2012, Representative Jesse Crenshaw introduced HCR 173 which would have created a Kentucky Death Penalty Reform Implementation Task Force to develop a strategy to implement the reforms recommended by the American Bar Association's Kentucky Death Penalty Assessment Report. It had Republican and Democrat cosponsors. It passed the House 73-18 but was never called for a vote by the Senate Judiciary Committee. Senator Robin Webb introduced a bill in both the 2013 (SB 86) and 2014 (SB 202) sessions to enact recommended reforms. They were not called for either an informational hearing or for a vote.

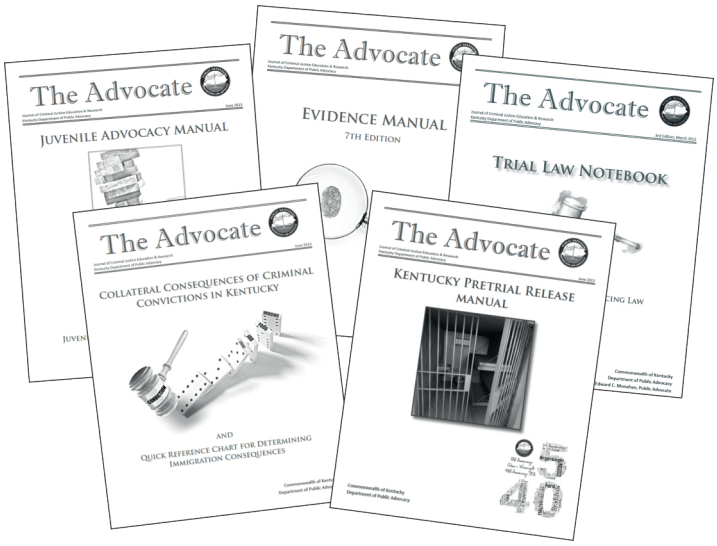
The Kentucky Supreme Court Criminal Rules Committee has considered the ABA Assessment Team's recommendations that its Chair deemed relevant to the Judiciary. It has made Recommendations to the Kentucky Supreme Court for further consideration.

Areas of reform addressed in Senator Webb's 2014 SB 202 included:

- improvements in the collection, preservation, and testing of DNA and other types of evidence;
- law enforcement identifications and interrogations;
- crime laboratories and medical examiner offices;
- prosecutorial professionalism;
- defense services;
- the direct appeal process;
- state post-conviction proceedings;
- the clemency process;
- jury instructions;
- matters relating to judicial independence;
- treatment of racial and ethnic minorities; and
- intellectual disability and mental illness issues.

To date, nothing much has changed since the 2011 Audit was released over 3 years ago. None of its Recommendations have been implemented.

For the full information released by the ABA and the complete Audit, see: http://ambar.org/kentucky.



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Replace the death penalty with life without parole

By Joseph P. Gutmann, Stephen Ryan and J. Stewart Schneider
Special to The Courier-Journal

Three years ago, a report was released by the American Bar Association revealing serious problems related to fairness and accuracy in the use of the death penalty in Kentucky.

The report followed an exhaustive two-year review of every case in which the death penalty had been imposed in the commonwealth since 1976; the review was conducted by an assessment team of Kentucky attorneys, former Kentucky Supreme Court justices and law school professors. The findings were numerous and troubling. Among them:

» Of the last 78 people sentenced to death in Kentucky, 50 have had a death sentence overturned on appeal by Kentucky or federal courts — an error rate of more than 60 percent.

» At least 10 of the 78 people sentenced to death were represented by defense attorneys who were subsequently disbarred.

» There is no requirement that evidence in criminal cases be retained as long as a defendant remains incarcerated, and the problem of lost evidence significantly diminishes the effectiveness of a state law that allows post-conviction DNA testing prior to execution.

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J. Stewart Schneider

Stephen Ryan

» There are no uniform standards on eyewitness identifications and interrogations, and many of Kentucky's largest law enforcement agencies do not fully adhere to best practices to guard against false eyewitness identifications and false confessions.

» Kentucky public defenders handling capital cases have caseloads that far exceed national averages and salaries that are 31 percent below those of similarly experienced attorneys in surrounding states.

» There are no statewide standards governing the qualifications and training of attorneys appointed to handle capital cases.

» Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental disabilities.

» There is a lack of data-keeping throughout the administration of the death penalty in Kentucky, making it impossible to guarantee that the system is operating fairly, effectively and efficiently.

These findings were so disturbing that the assessment team recommended that Kentucky suspend all executions until the issues are adequately addressed. A poll taken when the report was released found 62 percent of likely Kentucky voters statewide supported a temporary halt to executions. The support for a suspension was consistent across the state regardless of gender, geography or party registration.

Unfortunately, there has been no significant change in Kentucky's death penalty law since this sobering report was released, although legislation has been proposed to address some of the problems it identified. Judicial action temporarily stopping executions in Kentucky has been related to concerns about the method of executions and drugs used, not the findings of the ABA team.

Without question, this is a difficult issue, and efforts to "fix" the death penalty in Kentucky will be costly and time-consuming.

But there is one approach that is simpler and less expensive: Abolish the death penalty and replace it with life in prison without parole for convicted offenders.

Studies have shown the cost of numerous legal appeals prompted by death sentences is far greater than the cost of locking up offenders for the rest of their lives. The death penalty also traps the families of victims in a decades-long cycle of uncertainty, court hearings and waiting for an execution that may never come.

The ABA review suggests that the death penalty is broken beyond repair in Kentucky. Replacing it with life without parole is the best approach for our state — removing the possibility that an innocent person will be executed, saving limited tax dollars, protecting public safety and providing certainty and justice to the families of victims.

Joseph P. Gutmann is a former Jefferson County Assistant Commonwealth's Attorney. Stephen Ryan is a retired circuit court judge and former prosecutor, defense attorney and probation and parole officer. J. Stewart Schneider is stated supply speaker of Community Presbyterian Church of Bellefonte and former Commonwealth's Attorney for the 32nd Judicial Circuit in Boyd County.

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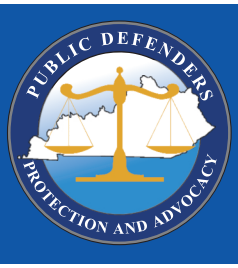

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Recommendations of 2011 Kentucky Capital Audit have not been Implemented