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Misunderstanding of Capital Instructions: Clarification is Possible

Dr. Marla Sandys, Associate Professor of Criminal Justice at Indiana University, recently completed an analysis of jurors' understanding of the often-complicated and confusing jury instructions that are provided to them as they deliberate on the appropriate sentence in death penalty cases. Professor Sandys summarizes the major national research on juror understanding of death penalty sentencing instructions, as well as details the Kentucky-specific findings of the Capital Jury Project's research, in "Misunderstanding of Capital Instructions: Clarification is Possible." Professor Sandys' conclusions comport with the seven (7) recommendations related to jury instructions found in our 2011 Kentucky Death Penalty Assessment Report, including the state-based Assessment Team's charge that the Commonwealth of Kentucky "should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary." This article is 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 KY Assessment Team on its official page at: http://ambar.org/kentucky

Dr. Marla Sandys
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> ***"It was in the outline, you know, if we found the defendant guilty, we had to go by KY state law. If we found him guilty on certain counts, and we found him guilty of capital murder, and we had to weigh some other things too but, you know, we had to give him capital punishment by state law."***
>
> **-Former Capital Juror, Capital Jury Project -- Kentucky**

The 'modern era' of capital punishment often is dated to the decision of *Gregg v. Georgia*[1] (1976) and its companion cases. The crux of *Gregg*, finding the revised capital punishment statutes constitutional, rests on the assumption that jurors could be instructed to apply the law correctly. It is through that correct interpretation and application of the law that the previously found arbitrariness and capriciousness of sentencing decisions in capital cases was to be curtailed. As noted in *Gregg:* "While such standards [to guide a capital jury's sentencing deliberations] are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary" (at 193-194). Nearly four decades of research calls the accuracy of that statement into question. This article focuses on how and then what we know about capital jurors' understanding of instructions, especially Kentucky capital jurors. It then moves to an exploration of why comprehension might be so poor. And finally, the article ends with suggested steps that could be taken to improve juror comprehension of sentencing instructions.

Empirical data shows KY 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

- 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 KY Capital Jury Instructions

12.6 - 23.8 grade level

How and What we Know About Capital Jurors' Understanding of Instructions

Two broad approaches to research have been used to study understanding of capital sentencing instructions. First are studies conducted with mock jurors, often members of the general public, persons called for jury duty, or college students. These are people who have not necessarily served as capital jurors, but whose qualification to serve as such is usually evaluated. In these studies, research participants are typically randomly assigned to read instructions, either the pattern instructions or a revised set of instructions, after which their comprehension is tested. The hallmark of this approach is its control: The investigator has the ability to isolate changes to the instructions to determine whether comprehension is improved and if so, in response to what and by how much. The second category of research on comprehension of capital sentencing instructions looks to actual capital jurors and asks them what they understood the instructions to mean. The hallmark of this approach is that you have actual jurors who served on actual cases, who were thus qualified to serve as capital jurors and who heard evidence and arguments, who then report what they understood the instructions to mean in the context of the complexity of a case. What is perhaps most informative from this area of research is that the pattern of findings is similar across both research designs. Regardless of whether the researcher is studying college students, lay citizens, or actual capital jurors, regardless of whether the study was conducted in California, Illinois (while it still had the death penalty), Ohio, Tennessee, North

[1] Gregg v. Georgia, 428 U.S. 153 (1976).

Carolina, Kentucky or elsewhere, the general conclusion from the studies is that comprehension of capital sentencing instructions is poor: (Mock) jurors do not understand what they can consider in terms of mitigation and aggravation; they do not know what the terms aggravation and mitigation mean, and they are especially confused by the burden of proof and the lack of a unanimity requirement for mitigating circumstances. What also is consistent across these studies is that comprehension can be improved.

Mock Jurors

Researchers have tested a variety of aspects to the understanding of capital instructions within the mock jury paradigm. For example, Patry and Penrod[2] (2013) provided participants with the summary of a case and then tested four variations of capital sentencing instructions: 1) no instructions; 2) a modified version of the instructions used in *Buchanan v. Angelone* (1998); 3) an adaptation of the instruction in response to Justice Breyer's dissent in *Buchanan*, and; 4) a set of instructions revised by the researchers that walked jurors through each decision that they had to make, provided a decision tree to guide the jurors, and discussed different burdens of proof and unanimity requirements for aggravators and mitigators. To test for comprehension of the instructions, the researchers asked four questions about what the appropriate penalty is when the jury either does or does not agree unanimously on aggravators and mitigators. Consistent with the results of other research in this area, overall comprehension was poor. For example, just under half of the mock jurors (44.6% of 224) indicated that a mandatory death sentence was the appropriate penalty if the jury agreed unanimously on the aggravating circumstances. The only condition that resulted in improved comprehension was the instructions revised by the researchers. Moreover, there was no significant difference in the comprehension of mock jurors who read the modified version of *Buchanan* instructions and the no instructions condition. This finding led the authors to conclude that "rewriting and restricting death penalty instructions can increase comprehensibility, but simply adding a key phrase about the definition of mitigating factors and slightly modifying sentence structures – as suggested by Justice Breyer – does not appear to increase the comprehensibility of capital penalty instructions" (at 219).

Otto, Appelgate and Davis[3] (2007) tested a revised version of Florida's capital sentencing instructions that pointed to specific areas of likely confusion and explicitly instructed mock jurors on the correct interpretation of that aspect of the instruction. The authors developed five (5) such points of clarification and added them to the pattern instructions. An example of such an added statement, to respond to the tendency of jurors to overestimate the standard of proof for mitigating circumstance, is as follows:

> Many jurors mistakenly believe that because other elements of a criminal proceeding must be proven beyond a reasonable doubt that the defense must prove a mitigating factor beyond a reasonable doubt. This is not the case. You need only be reasonably convinced that a mitigating factor exists in order to consider it established (at 508).

This targeted instruction was effective in improving the understanding of the instructions. Comprehension was statistically better (as measured by the number of correct answers to 12 items) for persons in the revised instruction condition than the pattern instruction condition. However, overall comprehension remained poor: Persons in the pattern instruction condition averaged 46.3% correct responses compared to 59.4% for the revised instruction group.

The idea that comprehension can be improved at a statistically significant level and yet be of questionable magnitude was found also in a study by Smith and Haney[4] (2011). In 2005 the California Judicial Council re-wrote and approved "plain language" instructions to be used across the state. Smith and Haney (2011) compared comprehension of the old pattern instructions to the new, plain language instructions, and in their Study 2, a set of instructions that they revised as well. Comprehension was statistically improved with the new plain language instructions. Yet again, however, the absolute level of comprehension remained poor. Persons in the old pattern instruction condition scored, on average, only 5.56 items correct (on a 16-item index) compared to an average of 7.17 items correct for persons who heard the new, plain language instruction, and an average of 8.33 items correct for the researcher-revised instruction group. Thus, the plain language instructions resulted in under 50% correct and the researcher-revised instruction barely over 50% correct.

The research presented thus far focuses on one way of measuring comprehension – the number of correct responses to multiple-choice questions about the meaning of an instruction. Not surprisingly, however, researchers have looked to other measures of comprehension as well. For instance, Smith and Haney, referenced above, asked participants to answer open-ended questions that required using the terms "aggravation" and "mitigation" in a sentence. The responses were then coded for accuracy, resulting in a scale of -4 (provided completely incorrect, opposite to the legally correct, responses) to + 4 (provided completely correct responses). In Study 1, where College students served as the participants, the group presented with the standard pattern instruction did not perform as well (average score of .306) as the group provided with the plain language instruction (average score of 1.80). Thus, in effect, the average participant was either almost correct (legally correct was scored +2; partially correct +1) in their interpretation of aggravation *or* mitigation, or partially correct in their interpretation of both concepts. Regardless of which way it was, these college students were not able to use both "aggravation" and "mitigation" correctly in a sentence.

Another way in which understanding of instructions has been assessed with mock jurors is through the use of scenarios. Rather than asking respondents to answer multiple-choice questions, they are presented with a description of how a hypothetical juror acted during deliberations. The respondent is then asked whether the hypothetical juror acted in accordance with the instructions. In this way, respondents are asked to apply their understanding of the instructions to the behavior of another person. This is the approach used by Hans Zeisel,[5] then later replicated and expanded on by Diamond and Levi[6] (1996) and others.[7] An example of one of the scenarios is as follows:

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[2] Marc W. Patry & Steven D. Penrod, *Death Penalty Decisions: Instruction Comprehension, Attitudes, and Decision Mediators*, 13 J. Forensic Psychology Practice 204 (2013).

[3] Charles W. Otto, Brandon K. Applegate & Robin King Davis, *Improving Comprehension of Capital Sentencing Instructions: Debunking Juror Misconceptions*. 53 Crime & Delinquency 502 (2007).

[4] Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions.* 35 Law & Hum. Beh. 339 (2011).

[5] Hans Zeisel, Affidavit (21 August), United States District Court, Northern District of Illinois, Eastern Division, Case No. 89C3765 (1990).

[6] Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 Judicature 224 (1996).

[7] See Otto, Applegate and Davis, *supra* note 4, who included scenarios in their study, as did James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-Sentencing Instructions*, 44 Crime & Delinquency 412 (1998) in their study of Ohio citizens' (persons who were called for jury duty) understanding of instructions, and Michael B. Blankenship, James Luginbuhl, Francis T. Cullen & William Redick, *Jurors' Comprehension of Sentencing Instructions: A Test of the Death Penalty Process in Tennessee,* 14 Justice Quarterly 325 (1997).

> A juror decides that Mr. Woods was under the influence of an extreme emotional disturbance at the time he committed the murder. He decides that this fact is not a sufficient mitigating factor to preclude the death penalty and votes for the death penalty. Has that juror followed the judge's instructions? (yes/no/do not know)

Professor Zeisel's study was presented to the US District Court, Northern District of Illinois, Eastern Division, in the case of *Free v. Peters*[8] (1992). The finding of the court was relief for Free, noting that "[t]the Zeisel studies establish that neither set of instructions [those heard by the jurors in *Free* or the Illinois Pattern Instructions] is intelligible and definite enough to provide even a majority of jurors hearing them with a clear understanding of how they are to go about deciding whether the defendant lives or dies. We conclude that the Illinois statute, as implemented through these jury instructions, permits the arbitrary and unguided imposition of the death sentence and that Free's sentence was imposed in violation of the Eight and Fourteenth Amendments" (at 1130). The State appealed. The Seventh Circuit reversed the District Court opinion, partially on the basis of a criticism of Zeisel's study. The Seventh Circuit raised three general concerns with the study: 1) there was no control group; 2) there was no revised/improved instruction group, and; 3) there was no deliberation component to the study. Those methodological concerns were addressed in a study conducted by Diamond and Levi (1996) who found that revised instructions improved comprehension and that deliberation improved comprehension in only one area– non-unanimity on mitigators – to 88% (at 230).

Actual Capital Jurors: Kentucky Capital Jurors' (mis)Understanding of Sentencing Instructions

The article thus far has focused on mock jurors: In this section we turn to a discussion of actual capital jurors. In particular, this section focuses on the findings from the Kentucky component of the Capital Jury Project (CJP). Kentucky was one of the original states included in the CJP,[9] a research project, funded by the National Science Foundation, designed to understand the experience of capital jurors. The CJP involves conducting extensive (lasting on average about 3.5 hours) face-to-face interviews with capital jurors, both those who voted for life and those who voted for death. One segment of the interview is devoted to jurors' understanding of the instructions, especially their understanding of "aggravating" and "mitigating circumstances."[10]

As might be expected, given the (mock jury) research on this topic, Kentucky capital jurors have a poor understanding of the instructions, especially as they pertain to "mitigating circumstances" as can be seen in Table 1. For instance, a full 45.9%[11] of the Kentucky capital jurors from the CJP failed to understand that they could consider anything in mitigation which is almost identical to the overall finding across all states in the CJP (44.6%). Substantially more Kentucky capital jurors (61.8%), compared to all CJP jurors (49.2%), failed to understand that they need not find mitigation beyond a reasonable doubt. Likewise, a full 83.5% of the Kentucky jurors, in comparison to 66.5% of CJP jurors in total, failed to understand that the jury did not need to be unanimous in its interpretation of mitigating evidence. In addition, while the percentage is substantially lower, 15.6%, a sizeable group of these former capital jurors from Kentucky failed to understand that they must find aggravation beyond a reasonable doubt. This misunderstanding of the standard of proof required for aggravation is basically half that of the entire CJP sample (29.9%).

Table 1

Percent of Jurors who *Failed* to Understand Instructions Regarding Aggravation and Mitigation

Jurors who failed to understand that they …	Kentucky CJP Jurors (N = 109)	Jurors from All States of the CJP (N=1185)
Could consider any mitigating evidence	45.9%	44.6%
Need not be unanimous on mitigating evidence	83.5%	66.5%
Need not find mitigation beyond a reasonable doubt	61.8%	49.2%
Must find aggravation beyond a reasonable doubt	15.6%	29.9%

Thus, Kentucky capital jurors are similar to the CJP sample as a whole regarding their failure to understand that they could consider anything as mitigation. Substantially higher percentages of Kentucky capital jurors than jurors from all states of the CJP 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 CJP 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?

Barriers to Comprehension of Instructions
Lack of Clarity

The standard explanation for the difficulty in understanding instructions is that they are written by lawyers for appellate judges. Stated differently, instructions are written for legal accuracy first, and for (jurors') comprehension second. Given the complexity of the law, let alone capital punishment jurisprudence, it is not surprising that non-lawyers have difficulty understanding the finely nuanced interpretations embedded in instructions. A quick review of a few of Kentucky's 'bare bones'[12] instructions on aggravation and mitigation suggests points where confusion is likely to occur.

[8] *Free v. Peters*, 818 F. Supp. 1098 (1992).

[9] For more information about the CJP, including a link to the many publications based on CJP data, see: http://www.albany.edu/scj/13192.php

[10] For the purposes of this discussion, the findings from only Kentucky and the overall findings across 13 states are presented; the findings presented in this section come from William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51 (2003).

[11] The percentages presented in this section are based on 109 interviews of Kentucky capital jurors. The total number of Kentucky capital jurors interviewed was 113; the 109 figures is the lowest number of jurors who answered any single one of the questions.

[12] "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire" *Cox v. Cooper* 510 S.W. 2d 530, 535 (1974). What this means in practice is that the instructions may differ on a case-by-case basis thereby introducing a lack of consistency to the process. Moreover, it seems likely

Instruction on Aggravation[13] (§ 12.06)*:* The first thing to note about the instruction on aggravation is that the term "aggravating circumstance" is never defined. And while it may not be necessary to define the term in the context of this specific instruction, the use of the term "aggravating circumstance" in the instruction regarding authorized sentences (§ 12.07: "… that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.") suggests that it should be defined somewhere.

The actual instruction on aggravation reads, in part, as follows: "In fixing a sentence for the defendant, you shall consider the following aggravating circumstances which you may believe from the evidence beyond a reasonable doubt to be true." It is unclear in this sentence whether the pronoun "you" is singular – you the juror – or plural – you the jury. Furthermore, why are jurors told that they "*shall*" consider the aggravators that they "*may*" believe to be true; does that mean that they do not *have to* believe the aggravator to be true? And while the phrasing might be somewhat awkward, it is important to note that the standard of proof – beyond a reasonable doubt – is stated here explicitly.

Instruction on Mitigation (§ 12.05)*:* As with the instruction on aggravation, the first thing to note about this instruction is that "mitigation" is never defined, except to refer to "extenuating facts and circumstances." The lack of a definition of "mitigation" is again problematic because the term is used in a way that assumes understanding. For example, the last mitigating circumstance listed in the instruction is "Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." If "mitigating" is not defined, it is difficult to know whether it is being interpreted correctly, whether jurors understand that they can consider any circumstance from the evidence that suggests a sentence less than death. The likelihood that jurors understand the term correctly is further brought into question by reading the concluding paragraph of the instruction on mitigation (§ 12.05). In particular, jurors are told to "consider also those aspects of the Defendant's character, *and those facts and circumstances of the particular offense of which you have found him guilty* (emphasis added), about which he has offered evidence in mitigation of the penalty to be imposed upon him…" It seems reasonable to suggest that jurors might believe erroneously that "mitigation" must have a nexus to the crime[14] or even that "mitigating circumstances" are "circumstances of the particular offense of which [they] have found him guilty" – that might be seen as reasons in support of a guilty verdict and thus more likely to support a sentence of death.

The last mitigator listed in the instructions, that catchall category noted above, raises an additional question of interpretation. This is the only time in either instruction § 12.05 (mitigation) or § 12.06 (aggravation) that the pronoun you is defined and it is defined as referring to "the jury." Given that this is the only time that the pronoun is defined, it raises the question of whether jurors would assume that every time that the pronoun is used it refers to the jury as a whole or whether because this is the only time that it is defined, all other uses of the pronoun refer to the individual juror. The fact that a full 83.5% of former Kentucky capital jurors interviewed as part of the CJP failed to know that they need not be unanimous in consideration of mitigating circumstances suggests that Kentucky capital jurors are adopting the plural definition of "you" found in this last mitigator to all potential mitigators. The last point that needs to be made regarding the instruction on mitigation is that nowhere in the instruction is the standard of proof noted. As indicated previously, the standard of proof is made explicit regarding the aggravators. The fact that it is not made explicit regarding the mitigators raises the question of whether jurors use the correct standard of proof to interpret evidence of mitigation. Again, that is an empirical question and findings from the CJP reveal that almost 62% of the former Kentucky capital jurors who were interviewed for that project failed to know that the standard was *not* beyond a reasonable doubt. In some regards, that is not surprising. Media portrayals of criminal trials focus on the need for proof beyond a reasonable doubt (and that the jury must be unanimous). If jurors are not told otherwise, one might expect them to default to what they know from elsewhere, what they think is the correct course of action.

Readability

Another reason why the instructions may be poorly understood has to do with their readability, a measure of how easily a text is read and understood. One form of this analysis comes directly from Microsoft Word. Word is equipped to conduct a check of the spelling and grammar of a document and to provide readability statistics as part of that analysis. The report presents the results of two analyses, the Flesch Reading Ease and the Flesch-Kincaid Grade Level.[15] According to Word, the analyses are based "on the average number of syllables per word and words per sentence."[16] For general readability, Word suggests that the Flesch Reading Ease score be between 60 and 70 (on a 100-point scale) and that the grade level be between 7.0 and 8.0. The results of the analyses of Kentucky's sentencing instructions are presented in Table 2.

Table 2

Readability of Kentucky Capital Sentencing Instructions

	Flesch Reading Ease Score (100 point scale)	Flesch-Kincaid Grade Level (standard school grades)
Mitigation, § 12.05	**42**	**14.2**
Aggravation, § 12.06	**30.8**	**12.6**
Authorized Sentences, § 12.07	**15.7**	**23.8**

that jurors would give greater weight to the instructions read by the judge, who commands the most respect in the courtroom, than attempts at clarification by attorneys. This is, of course, an empirical question.

[13] All instructions referenced in this section come from Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal §§ 12.05-12.07, 5th ed. (Matthew Bender & Co., Inc.: 2013).

[14] *Tennard v. Dretke*, 542 U.S. 274 (2004).

[15] Rachel Small, *Assessing Readability of Capital Pattern Jury Instructions*, 1 RWU J. Res. Psych. 33 (2009), conducted the same analyses on the pattern instructions from 35 states. Her findings, for the most part, are presented in the aggregate though she does single out Kentucky, in a positive fashion, for "provid[ing] an example of one of the easiest descriptions of mitigating factors, for example, 'The defendant has no significant history of prior criminal activity.'" (at 79). Given her focus on a single statutory mitigator from Kentucky, rather than the overall instruction as was evaluated here, it is difficult to make any further comparisons. Her general findings, however, are in keeping with the results for Kentucky presented in Table 2: overall Reading Ease scores and grade levels of capital sentencing instructions fall below general guidelines.

[16] See: http://office.microsoft.com/en-us/word-help/test-your-document-s-readability-HP010148506.aspx

It is clear that the instructions fail to meet the general guidelines for readability. None of the instructions meet the target goal of a Reading Ease score between 60-70 or a grade level of 7.0 to 8.0. In fact, the key instruction that is to 'guide' the jurors on how they are to arrive at their sentencing decision achieves a Reading Ease score of only 15.7 on a 100-point scale (with higher scores indicating greater ease of understanding). Similarly, that instruction is written for someone who has completed 23.8 years of school. The results regarding the instructions for aggravation and mitigation, while not as extreme as for the instruction on authorized sentences, still fall woefully short of the target for readability.[17] Given the difficulty of the instructions, the grade level at which they are written, it is no great surprise that jurors fail to understand them. The logical question becomes what should be done about it?

Suggested Next Steps

The research is clear: Both mock jurors and actual jurors do not understand capital sentencing instructions all that well, especially when it comes to mitigation. What also is clear, however, is that understanding of those instructions can be improved; every study that tested revised instructions found improved comprehension. The challenge is to come up with an approach that results in *meaningful* improvement of comprehension.

Given the research presented herein, one might be tempted to think that comprehension cannot exceed approximately 60% correct. English and Sales[18] (1997) disagree, suggesting that there is no ceiling to the improvement that is possible in re-writing instructions. In fact, one of the earliest studies of comprehension of instructions[19] obtained comprehension scores of 80% albeit not based on a capital case. The distinguishing characteristic of that study is that the instructions were re-written twice. The first attempt resulted in improved comprehension scores from a baseline of 51% correct to 66% correct, which is similar to what other researchers have found. Yet, when they re-wrote the instructions again, comprehension improved to 80%. Thus, the lesson learned is not to stop with one re-write; rather, one recommendation is to set a target level of comprehension and continue to revise the instructions until that goal is reached. Embedded in this recommendation is another one: Revised instructions should be tested as part of the process. Deciding to re-write the instructions is only part of the solution. The decision has to be made to write instructions that jurors can understand and that determination is one that can be done best through testing. It makes no sense to revise instructions only to find out after the fact that they are still incomprehensible to the average juror. Finally, any endeavor to improve instructions should be a joint effort. Obviously, one needs representatives of the legal community to ensure that any revised instructions are in keeping with the letter of the law. Beyond that, however, it would be helpful to invite former capital juror(s) to join the discussion, to present their perspective based on their unique experience. Likewise, enlisting the assistance of a (psycho) linguist, someone trained in how to present information in way that is both accurate and understandable, would be wise. The same is true for a social scientist, someone who is trained to run the studies to determine the level of comprehension as part of the process of revising instructions.

Periodic re-writing of instructions is a routine part of the judicial process.[20] This article suggests a way to increase the effectiveness of that process by being committed, at the outset, to revising and testing instructions until an agreed upon level is achieved, and by engaging in that process as a collaborative effort among persons with varied expertise. The alternative is to continue to assume that jurors understand instructions and that standard re-writing procedures result in improved comprehension when the research tells us those are faulty assumptions.

When Governments Kill
A Conservative Argues for Abolishing the Death Penalty

Richard Viguerie

In a 2009 article, Richard Viguerie, who has been called **"one of the creators of the modern conservative movement"** by The Nation magazine, wrote: "Conservatives have every reason to believe the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government-run operation, which we conservatives know are rife with injustice. But here the end result is the end of someone's life. In other words, it's a government system *that kills people*."

Picture courtesy of Pat Delahanty, Riverbirch Productions.

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The death penalty system is flawed and untrustworthy because human institutions always are. But even when guilt is certain, there are many downsides to the death penalty system. I've heard enough about the pain and suffering of families of victims caused by the long, drawn-out, and even intrusive legal process. Perhaps, then, it's time for America to re-examine the death penalty system, whether it works, and whom it hurts."

[17] According to recent Census figures, a full 82.4% of Kentucky residents age 25+ have graduated high school or higher; only 21% of Kentucky residents age 25+ have a Bachelor's degree or higher (see: http://quickfacts.census.gov/qfd/states/21000.html)

[18] Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 Psych., Pub. Pol., & L. 381 (1997).

[19] Amiram Elwork, James J. Alfini & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 Judicature 432 (1982).

[20] The Center for Jury Studies, a project of the National Center for State Courts, engages in research, education, and public outreach in an effort to help judges and court staff improve jury management. Recognizing the importance of instructions to their mission, the Center convened a national conference on pattern instructions in 2008. In anticipation of that meeting, the Center administered a survey to Pattern Jury Instruction (PJI) Committees across the nation. In that context, the Center notes that "judicial and bar leaders have become increasingly aware of the importance of pattern jury instructions. Of much importance is the credibility of instructions to trial judges, lawyers, and reviewing courts in terms of legal accuracy and clarity to jurors. To meet increased expectations, many PJI committees are considering new internal procedures to address organizational and technical issues such as the optimal committee composition, membership qualifications, and publication and dissemination strategies" (Paula L. Hannaford-Agor & Stephanie N. Lassiter, *Contemporary Pattern Jury Instruction Committees: A Snapshot of Current Operations and Possible Future Directions,* at 2, *see*: http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx

ABA Recommendations for Jury Instructions in Kentucky Capital Cases: A Brief Summary

Glenn McClister
Staff Attorney

In late 2009, the American Bar Association (ABA) began a comprehensive audit of the administration of the death penalty in Kentucky. The Kentucky audit team consisted of two retired Kentucky Supreme Court Justices, a former chair of the House Judiciary Committee, 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 438-page report which resulted from the audit, published in December of 2011, contained a number of recommendations for systemic reform, including: (1) death-row demographics, (2) DNA testing, and the location, testing, and preservation of biological evidence, (3) law enforcement tools and techniques, (4) crime laboratories and medical examiner offices, (5) prosecutors, (6) defense services during trial, appeal, and state post-conviction and clemency proceedings; (7) direct appeal and the unitary appeal process, (8) state post-conviction relief proceedings, (9) clemency, (10) jury instructions, (11) judicial independence, (12) racial and ethnic minorities, and (13) intellectual disability and mental illness. The report focused on fairness and accuracy in capital cases. It took no position with regard to whether the death penalty should be abolished. It was only concerned with its proper administration.

The ABA had seven recommendations concerning the use of jury instructions in capital cases. Here is a summary of those recommendations and how the ABA found that they applied in Kentucky.

1. Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary. The ABA cited work done by the Capital Jury Project in Kentucky as the basis for this recommendation. Interviews conducted with individuals who actually served as jurors in a capital case revealed that the great majority of capital jurors in Kentucky do not properly understand the applicable law. The only way to improve this dismaying situation is to revise the jury instructions and do actual controlled experiments on mock jurors to identify any improvements in juror comprehension.

2. Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations. The ABA found that this recommendation is already standard practice in Kentucky.

3. Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law. The ABA noted that current caselaw in Kentucky does not entitle a criminal defendant to instructions defining 'mitigating circumstances," despite the widespread evidence that Kentucky jurors fail to understand the guidelines for identifying and weighing mitigation evidence.

4. Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences. This recommendation includes a call for a clearer explanation of the Kentucky alternatives to the death penalty as well as a clarification that life without parole means that the defendant will actually die in prison - a fact understood by only roughly half of the jurors who were told of this alternative to a death sentence. Current caselaw in Kentucky does not allow evidence of minimum parole eligibility in capital cases.

5. Trial courts should not place limits on a juror's ability to give full considerations to any evidence that might serve as a basis for a sentence less than death. The ABA again cites findings of the Capital Jury Project in Kentucky to underscore the fact that the standard instructions on mitigating evidence in Kentucky capital cases do not make it clear enough that a Kentucky juror can have his or her own, individual reasons for giving less than death and that those reasons do not have to be agreed upon by anyone else in the jury.

6. Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even when an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty. The Kentucky Supreme Court has upheld death sentences in cases in which the defendant has requested, and been denied, these instructions. Yet the Capital Jury Project has discovered that some jurors who have been given the instructions currently used had formed the conclusion that, if aggravators were established, the law required a death sentence. Jurors should understand that a death sentence is never required by Kentucky law.

7. In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors. The ABA found that Kentucky is not in compliance with this recommendation because the Supreme Court has not required instructions which make this clear to jurors.

The full report is available at: http://ambar.org/kentucky.

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

Ed Monahan
Public Advocate

Prosecuting a homicide as a capital case greatly increases the cost even when the most common result is a sentence less than death.

All of the many "studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison. Jury selection, the trial itself, and initial appeals will consume years of time and enormous amounts of money before an execution is on the horizon."[21]

In North Carolina, it was determined that "Proceeded capital cases cost at least 3 times more than similar cases that proceeded non-capital."[22] Defending a death penalty case costs about four times as much as defending a case where the death penalty is not sought, according to a new study by the Kansas Judicial Council.[23]

A new study of the cost of the death penalty in Colorado revealed that capital proceedings require six times more days in court and take much longer to resolve than life-without-parole (LWOP) cases. The study, published in the University of Denver Criminal Law Review, found that LWOP cases required an average of 24.5 days of in-court time, while the death-penalty cases required 147.6 days.[24] A study released by the Urban Institute on March 6, 2008 forecast that the lifetime cost to taxpayers for capitally-prosecuted cases in Maryland since 1978 will be $186 million.[25] A state analysis of the costs of the death penalty in Indiana found the average cost to a county for a trial and direct appeal in a capital case was over ten times more than a life-without-parole case. The average capital case resulting in a death sentence cost $449,887, while the average cost of case in which a life-without-parole sentence was sought and achieved was only $42,658.[26]

The significant costs are front loaded in the process. Kentucky has 30-60 capital eligible cases each year. Prosecutors exercise their discretion to prosecute many of those cases seeking the death penalty. Most plead to a non-death sentence but only after a long, expensive pretrial process. Some go to trial. Those are long and expensive. Few trials result in a sentence of death.

An enduring reality of all policy decisions is that resources are never limitless, and every resource assigned to one project is a resource which cannot be assigned to another. Kentucky is currently spending considerable money for a death penalty system which does not result in many death verdicts and far fewer executions at the same time it does not have sufficient resources for courts, prosecutors, defenders, and corrections.

Five Ways to Reduce Error, Waste, 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

The imprudent prosecution of marginal cases as capital is significant. This waste occurs in Kentucky in a variety of ways across the state. 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.

Often, capital cases do not just result in non-capital sentences, but even in jury findings that the defendant is not even guilty of murder. Some examples of cases that went to trial with death as a possible sentence but resulted in acquittal, reckless homicide or manslaughter verdicts are as follows:

- Joshua Cottrell (Hardin County, 03-CR-00465) – convicted of Manslaughter 2nd ;
- Larry Osborne (Whitley County, 98-CR-00006-001) - acquitted on retrial after reversal on appeal

<u>Fayette County Capital Prosecutions Where Defendant Was Acquitted of Murder Charge</u>

- C.H. Brown (87-CR-00506-001) - charged with Murder and Robbery 1st ; acquitted of Murder, guilty of Robbery;
- Mark Dixon (95-CR-00577) - charged with Murder, Robbery 1st, and 3 counts of Wanton Endangerment 1st ; acquitted on all charges;
- Carlos Cortez (99-CR-00369-002) - charged with Murder, Robbery 1st , and Burglary 1st ; acquitted on all charges

<u>Fayette County Capital Prosecutions Where Defendant Was Convicted on Lesser Charge</u>

- Earl Cheeks (90-CR-00049-002) - charged with Murder and Robbery 1st; convicted of Manslaughter 2nd, acquitted of Robbery;

[21] Richard C. Dieter, Executive Director, Death Penalty Information Center, *Testimony Submitted to the Kentucky Senate Standing Committee on Judiciary Hearings on the Costs of the Death Penalty* (March 1, 2012) Frankfort, Kentucky.
[22] *FY07 Capital Trial Case Study PAC and Expert Spending in Potentially Capital Cases at the Trial Level* (December 2008). "The DA's decision whether to seek the death penalty is the paramount factor driving capital case costs, regardless of whether the case ends in a trial, plea, or dismissal. Cases in which the defendant faced the death penalty cost at least 3 times more than cases in which the defendant faced life without parole."
[23] Report of the Judicial Council Death Penalty Advisory Committee, Judicial Council, Kansas Legislature, Feb. 13, 2014.
[24] J. Marceau and H. Whitson, *The Cost of Colorado's Death Penalty*, 3 Univ. of Denver Criminal Law Review 145 (2013).
[25] John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight, Askar Darmenov, *The Cost of the Death Penalty in Maryland,* Urban Institute Justice Policy Center (March 2008).
[26] Fiscal Impact Statement Bill Number: SB 43, Jan 6, 2010.

- Myron Wilkerson (98-CR-00631-002) -charged with Murder, Burglary 1st; Robbery 1st; guilty of Manslaughter 2nd, 10 years, acquitted of Burglary, guilty of Robbery 1st , 20 years

Jefferson County Capital Prosecutions Where Defendant Was Acquitted of Murder Charge

- Nashawn Stoner (98-CR-02446) - charged with Murder and two counts of Robbery 1st, acquitted on all charges;
- Donnez Porter (97-CR-01951) - charged with Murder (2 counts), Robbery st 1, and Assault 1st, acquitted on all charges. (Motion to exclude death penalty pretrial due to prosecutorial misconduct was denied.)

Five common sense reforms necessary to reduce error, waste, abuse in the expensive capital system

1. Limit when the death penalty can be sought

Kentucky has many aggravating factors that allow prosecutors to notice death in many Kentucky murders at the prosecutor's total discretion.[27] Aggravating circumstances that elevate a maximum sentence to the death penalty "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[28] With such wide latitude, the existing Kentucky statute does not sufficiently assist prosecutors in determining which cases warrant seeking death and which do not. It allows prosecutors to exercise their discretion to prosecute every technically eligible case as capital. Kentucky's statute should be more limiting with regard to when a death penalty can be sought. Other states have genuinely narrowed the type of cases that can be prosecuted as capital.

For instance, Maryland changed its capital punishment law, sharply limiting when the death penalty could be sought. The legislation limited the cases in which the court or jury could impose a death sentence to those in which the state presents the following types of evidence:

> 1. Biological or DNA evidence that links the defendant to the murder;
>
> 2. A videotaped, voluntary interrogation and confession of the defendant to the murder; or
>
> 3. A video recording that conclusively links the defendant to the murder.

The law also specifically prohibited the death penalty if the state relies solely on eyewitness evidence. A person convicted of 1st degree murder can be sentenced to death, life without parole (a sentence to prison for the defendant's "natural life"), or life in prison.

This act was based on research and findings regarding the most common causes of wrongful convictions in capital cases and was designed to eliminate those causes from the capital case process.[29] The act also expressed the intent that any savings from reducing the number of death penalty cases be used to expand victim services for survivors of homicide.

Kentucky could implement the same or similar limitations as Maryland did and would save millions of dollars currently being spent on cases that should not be prosecuted as capital.

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."

2. In capital cases, require timely, complete open file discovery, including requiring an agent of the Commonwealth Attorney to provide all of their information timely

Kentucky should move toward timely open file discovery in capital cases by statute. Open file discovery has been adopted in other states and was recommended as a best practice by The Justice Project, in a policy review funded by the Pew Charitable Trust, *Expanded Discovery in Criminal Cases*, The Justice Project (2007):

> To prevent wrongful convictions, and improve efficiency in the criminal justice system, it is necessary that discovery laws be as expansive as possible at the pretrial phase and that they be uniform, mandatory, and enforced…. To best protect a defendant's right to due process and improve the system's ability to efficiently resolve cases, states should enact more expansive discovery laws comparable to the laws governing discovery in civil cases. [30]

[27] See 532.025(2)(a).
[28] *Zant v. Stephens*, 462 U.S. 862, 877 (1983).
[29] Maryland Commission on Capital Punishment, *Final Report to the General Assembly,* December 12, 2008, pp. 61-81.
[30] *Id*. at 2.

The Justice Project observed that such a policy is beneficial in its consistency and predictability:

> An open-file policy reduces discretionary decisions in determining what evidence is "material" (meaning that it will affect the outcome of trial) and "exculpatory" (meaning that it will tend to negate guilt or mitigate a sentence) and should thus be disclosed to the defense. By allowing the defense access to the state's entire file, open-file discovery reduces the potential for error and the inefficiencies inherent in making the decisions on an item-by-item basis.[31]

It is too common for discovery to be turned over very late before trial or during or after a reversal on appeal. For instance, in the capital case *Commonwealth v. Ordway*, Fayette Circuit Court, 07-CR-01319, substantial discovery was not turned over to the defense until *after* the reversal of the defendant's death sentence. In the capital case *Commonwealth v. Elzandrae Warren*, Fayette Circuit Court, 11-CR-00155-05, significant discovery was turned over, but two weeks before trial. This 11th hour or after the trial discovery ambushes the defendant, causes continuances and wastes the court's time.

Statutory requirements for full discovery of all evidence in possession of the prosecutor and prosecution agents are necessary to provide timely, fair processes and greater efficiencies. "The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment."[32]

Kentucky Governors' Capital Clemency Grants

From 1920-2007, 10 Kentucky Governors granted clemency to 37 persons sentenced to death.

Since 1967, 3 Kentucky Governors granted clemency to 5 people sentenced to death.

A Kentucky statute requiring open file discovery could be modeled after North Carolina's Discovery Statutes, adopted in 2004 and amended in 2011.[33]

Additionally, the Kentucky Supreme Court's ethics rules set out special ethical requirements for prosecutors related to discovery. Kentucky's statutes should reflect these special ethical requirements:

SCR 3.130(3.8) Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:….

(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 3.8(c) "is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution."[34]

It is "a violation of the Kentucky Rules of Professional Conduct (SCR 3.130 (3.8(c)) for a prosecutor, on his/her own initiative to fail to make a timely disclosure of exculpatory evidence."[35]

3. Statutorily authorize a judge to eliminate death as a possible punishment when appropriate

A judge has inherent judicial power to preclude abusive or wasteful prosecutions and to issue equitable relief in capital cases. This judicial authority should be explicitly recognized in statute for all capital cases as it is now explicitly authorized for capital cases that involve intellectual disability. This will reduce the wasteful prosecutions of cases as capital when they are only technically capital cases.

After the most comprehensive two year audit of the administration of the death penalty in Kentucky, the American Bar Association's *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* (December 2011) noted, "…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."[36]

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[31] *Id.*

[32] Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: the Critical Importance of Full Open-File Discovery, Duke Law School Legal Studies Research Paper Series,* No. 182 (January 2008).

[33] Article 48 - Discovery in the Superior Court.
§ 15A-901. Application of Article.
§ 15A-902. Discovery procedure.
§ 15A-903. Disclosure of evidence by the State - Information subject to disclosure.
§ 15A-904. Disclosure by the State - Certain information not subject to disclosure.
§ 15A-905. Disclosure of evidence by the defendant - Information subject to disclosure.
§ 15A-906. Disclosure of evidence by the defendant - Certain evidence not subject to disclosure.
§ 15A-907. Continuing duty to disclose.
§ 15A-908. Regulation of discovery - Protective orders.
§ 15A-909. Regulation of discovery - Time, place, and manner of discovery and inspection.
§ 15A-910. Regulation of discovery - Failure to comply.
§§ 15A-911 through 15A-920. Reserved for future codification purposes.

[34] ABA Formal Ethics Opinion 09-454 Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense (July 8, 2009). Rule 3.8(c) "does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."

[35] *Tate v. Commonwealth,* unpublished, 2008-SC-000205-MR. , May 21, 2009.

[36] *Id*. at xii.

These are times of very limited resources. There is a significant waste of resources in the Kentucky capital process that has consequences on other criminal cases and on civil cases. There are cases that are authentically subject to the death penalty. There are other cases that are only technically capital. Our current Kentucky system allows those which are "only technically capital cases" to be prosecuted as if they were genuinely capital. The prosecution of cases as capital when they are not authentic capital cases is a significant problem in Kentucky. To address this problem, the trial court should be given the explicit statutory authority to exercise neutral review and oversight of the capital process in order to administer justice and conserve judicial resources. This would reduce wasteful capital prosecutions and efficiently allow the court to eliminate death as a penalty pretrial. It would also allow court dockets to be used for other criminal or civil cases as capital cases consume large amounts of time while action on other cases is deferred.

This proposed authority is constitutional. Courts have the power to remove the death penalty as a possible punishment when the decision to do so is a matter of law rather than fact.[37] As stated in *Smothers v. Lewis*, 672 S.W.2d 62 (Kentucky 1984), "In addition to the Court's Constitutional rule making power, the Court is also vested with certain 'inherent' powers to do that which is reasonably necessary for the administration of justice within the scope of their jurisdiction." In *Reid v. Cowan*, 502 S.W.2d 41, 42 (Kentucky 1973) the Court said, "…sometimes in a criminal case the only way that protection can be enforced is by declaring that the rights of the state have been forfeited through the arbitrary actions of its officers."[38]

In addition to revising the Kentucky death penalty statutes to take into account the most common causes of wrongful convictions in capital cases, a statute should explicitly authorize a court to remove death as an option at sentencing when the requirements of the death penalty statute are not met, giving the authority to a judge upon motion and evidentiary hearing or it could require a showing by the prosecution in every case before it is permitted to proceed capital. Such as:

> If the Court concludes that there is a legal basis to prohibit the Commonwealth from seeking the death penalty in a capital case or that the exclusion of death as a possible penalty is an appropriate sanction for violations of Court Orders, it may so order. Where such an order is entered prior to trial, the case shall proceed through jury selection and trial as a non-capital case.[39]

Currently, KRS 532.130, .135, and.140 set out a pretrial process for the determination by the court whether a defendant has a serious intellectual disability that would preclude prosecution of a case as capital. It is working well to resolve these issues timely and is reducing wasteful prosecutions.

Majority of Kentuckians Support a Suspension of Executions To Allow Time for Problems within the System to Be Remedied

A 2011 poll shows that a majority of Kentuckians support a suspension of executions to allow time for problems within the system to be remedied. The November 30-December 4, 2011 survey of 405 most likely voters statewide found 62 percent support a temporary halt to executions. The support was consistent across the state: a majority of men, women, urban, suburban, and rural, Republican, Democratic, and Independent voters all favored a temporary halt to executions. The poll, with an error rate of plus or minus 4.9 percent, was conducted for the Kentucky Assessment Team by Lake Research Partners of Washington, D.C.

The ABA Kentucky Assessment Team found that capital prosecutions occur in far more cases than result in death sentences, concluding that, "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."

532.130 Definitions for KRS 532.135 and 532.140.

(1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing, is referred to in KRS 532.135 and 532.140 as a defendant.

(2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as

a defendant with a serious intellectual disability. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

532.135 Determination by court that defendant has a serious intellectual disability.

(1) At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a defendant with a serious intellectual disability and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal.

(2) At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a defendant with a serious intellectual disability in accordance with the definition in KRS 532.130.

(3) The decision of the court shall be placed in the record.

(4) The pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial. If it is determined the defendant is an offender with a serious intellectual disability, he shall be sentenced as provided in KRS 532.140.

532.140 Offender with a serious intellectual disability not subject to execution -- Authorized sentences.

[37] *Commonwealth v.Smith,* 634 S.W.2d 411 (Ky. 1982). *Cf., Commonwealth v. Ryan,* 5 S.W.3d 113 (Ky. 1999), in which the court could not remove death as an option at sentencing based on a factual determination of mental illness. But see also KRS 532.130, *et seq.*, which gives a judge statutory authority to remove death as an option upon a (factual) finding of serious intellectual disability.

[38] *See also, e.g., Commonwealth v. Grider,* 390 S.W.3d 803 (Ky. App. 2012), in which the trial court had the authority to dismiss the charges against the defendant over the objections of the Commonwealth, when the Commonwealth's refusal to obey discovery orders caused severe prejudice to the defendant. Rcr 7.24(9).

[39] For the authority to remove death as a possible punishment in response to noncompliance with orders of the court, see *Grider, supra.*

(1) KRS 532.010, 532.025, and 532.030 to the contrary notwithstanding, no offender who has been determined to be an offender with a serious intellectual disability under the provisions of KRS 532.135, shall be subject to execution. The same procedure as required in KRS 532.025 and 532.030 shall be utilized in determining the sentence of the offender with a serious intellectual disability under the provisions of KRS 532.135 and 532.140.

(2) The provisions of KRS 532.135 and 532.140 do not preclude the sentencing of an offender with a serious intellectual disability to any other sentence authorized by KRS 532.010, 532.025, or 532.030 for a crime which is a capital offense.

(3) The provisions of KRS 532.135 and 532.140 shall apply only to trials commenced after July 13, 1990.

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

Individual voir dire is critical to ensuring jurors fully understand their role and responsibility and their ability for unbiased decision-making based on the facts and the law. Kentucky should require by statute full and thorough opportunity to develop the record by the attorneys conducting voir dire. A possible statute is:

> When the Commonwealth seeks the death penalty, the court shall permit the attorney for the Commonwealth and the defendant or the defendant's attorney to conduct the examination of prospective jurors individually out of the presence of other prospective jurors for questions regarding capital punishment, areas of mitigation specific to the case, race, and pretrial publicity. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct a full and thorough examination of each juror on these issues in order that each side may make a complete record of whether a prospective juror is qualified for a capital case.

In a series of opinions, the United States Supreme Court has 1) detailed what is required of jurors to qualify to sit in judgment of individuals in capital cases, and 2) specified upon whom the burden falls to ensure juror qualification on issues involving views of capital punishment and consideration of mitigating factors. The Kentucky Supreme Court has also set out the standard but a statute by the General Assembly is needed to make explicit what is required.

Views on the Death Penalty

The Supreme Court has held that potential jurors with reservations about the death penalty are not automatically disqualified from sitting as jurors in capital trials.[40] The Court later explained that only if these reservations would "prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath" can such a juror be disqualified.[41] The Court also specified that jurors must be able to consider all available punishments, not just the death penalty. The death penalty is never legally required or mandatory regardless of the facts of the case.[42] *Lockhart v. Mcree*[43] states 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 case so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."[44] *Buchanan v. Kentucky*[45] 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."[46]

The Burden is on the person seeking exclusion

"'[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality.'" *Wainwright v. Witt*.[47] If the burden is on the party seeking exclusion, then that party must be permitted voir dire of considerable depth.[48]

"Death Qualified" and "Life Qualified"

In 1992 the Court again significantly changed the jury selection process when it ruled that any potential juror who would automatically impose a sentence of death for someone he or she has convicted of intentional murder is not qualified to sit.[49] Not only must potential jurors be "death qualified" under *Witherspoon,* they must now be "life qualified" as well. The Court examined several issues including: "whether on voir dire the court must, on defendant's request, inquire into the prospective jurors' views on capital punishment."[50] *Morgan* also states that "[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."

> "We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so."[51]

[40] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
[41] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).
[42] *Lockett v. Ohio*, 438 U.S. 586 (1978).
[43] 476 U.S. 162 (1986).
[44] *Id.*, 476 U.S. at 176.
[45] 483 U.S. 408 (1987).
[46] 483 U.S. at 416.
[47] 469 U.S. 412, 423 (1985).
[48] See also *Gray v. Mississippi*, 481 U.S. 648 (1987); *Hannah v. Commonwealth*, 306 S.W. 3d 509 (Kentucky. 2010)(reversed for failure to allow defense voir dire on the "duty to retreat")
[49] *Morgan v. Illinois*, 504 U.S. 719(1992).
[50] *Id*.
[51] *Id.*

Mitigation

Jurors must also be able to consider and give effect to mitigation.[52] Only when a juror in a capital prosecution is able to consider and give effect to mitigating evidence is there an assurance that there has been an individualized determination on sentence.[53] A juror must further understand that he or she, alone, is responsible for his or her sentencing decision. A belief that "responsibility for any ultimate determination of death will rest with others" creates an impermissible bias toward a death sentence.[54]

The defendant carries the burden of eliciting information from a juror with regard to mitigation. As stated in *Morgan*, *supra*, "jurors are not impartial if they would automatically vote for the death penalty, and that questioning in the manner petitioner requests is a direct and helpful means of protecting a defendant's right to an impartial jury." Protecting the defendant's rights through questioning of jurors is a duty that falls upon defense counsel, not the Commonwealth.

Meaningful Voir Dire is Necessary

The Kentucky Supreme Court has also been outspoken on the need for developing a record through voir dire of juror qualification. The landmark case addressing the dynamics of capital jury selection in Kentucky is *Grooms v. Commonwealth.*[55] Even before the United States Supreme Court's opinion in *Morgan*, the Kentucky Supreme Court recognized the necessity of excusing jurors who would always impose a death sentence upon individuals they believed had committed an intentional, aggravated murder and who believed mitigating evidence was irrelevant to the sentencing decision. In reversing the trial court's refusal to strike such a juror for cause, the Kentucky Supreme Court stated:

> The testimony of Juror Veech makes it abundantly clear that he favors the death penalty to the exclusion of all other penalties as punishment for intentional murder. Mitigating circumstances or compassion would have nothing to do with it… Some persons are strongly in favor of the death penalty, while others have a strong aversion to it. It is not that a juror favors the use of the death penalty or disfavors it that will disqualify him as a juror. It is only when a juror feels so strongly against the death penalty that he could never, in any circumstance, vote to impose it, or feels so strongly in favor of the death penalty for murder that upon a determination of guilt he could never, in any circumstance, vote to impose a lesser penalty than death.[56]

It is important to note that the voir dire examination in *Grooms* was rather lengthy and quite thorough. In fact, the *Grooms* court set forth the entire colloquy in its opinion, and held that "the trial court abused its discretion in denying the appellant's challenge for cause." Absent the ability of both the Commonwealth's and the defense attorneys to fully explore these issues, in effect, making a record, the Kentucky Supreme Court would have been without sufficient information to determine whether an abuse of discretion had occurred.

In *Uttecht v. Brown*,[57] the Supreme Court found that the trial court acted well within its discretion in granting the state's motion to excuse a juror for cause on the ground that he could not be impartial in deciding whether to impose a death sentence. In reaching this decision, the Supreme Court noted that the trial judge had before him eleven days of voir dire, during which the trial court – before deciding a contested challenge brought by either side – gave each a chance to explain its position and recall the potential juror for additional questioning. In upholding the trial court's discretion, the Supreme Court noted that it had before it a very long and detailed record of the proceedings, and stressed the importance of the record:

The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But **where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire,* the trial court has broad discretion**.[58]

The cumulative message of *Grooms* and *Uttecht* is that a trial court has broad discretion as to whether or not to strike a juror for cause, but only when there has been a "lengthy questioning" on the issues of views on capital punishment, mitigating factors, race and pretrial publicity. Yet, it has been the practice of some Kentucky circuit courts, post-*Grooms*, to limit the length and thoroughness of examination in capital trials.

Juror confusion is high because of a lack of adequate instructions and a lack of adequate individualized voir dire. An empirical analysis of jurors who have served in Kentucky capital cases found a very 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 voir dire and instruct jurors.

5. Enact reforms recommended by 2011 independent, comprehensive program audit of the way capital process in Kentucky is working

A 2011 Kentucky audit uncovered major deficiencies the way the death penalty has been implemented in Kentucky since 1976. The audit evaluated Kentucky procedures and practices against national ABA capital benchmark protocols. The independent audit 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. Its report focuses on fairness and accuracy in capital cases. It took no position with regard to whether or not the death penalty should be abolished. It was only concerned with its proper administration.

The program audit recommended changes must be made to eliminate waste, abuse and error.

Areas of needed reform identified by the ABA Kentucky Assessment Team audit included:

- Inadequate Protections to Guard against Wrongful Convictions (Chapters 2, 3, 4).
- Inconsistent and Disproportionate Capital Charging and Sentencing (Chapter 5).

[52] *Lockett v. Ohio, supra.*; *Eddings v. Oklahoma*, 455 U.S. 104, 114, (1982); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Skipper v. South Carolina*, 476 U.S. 1, (1986); *Mills v. Maryland*, 486 U.S. 367 (1988).
[53] *Lockett*, *supra*.
[54] *Caldwell v. Mississippi*, 472 U.S. 320, (1985).
[55] 756 S.W. 2d 131 (1988).
[56] *Id.*
[57] 551 U.S. 1 (2007).
[58] *Id*. at 20.

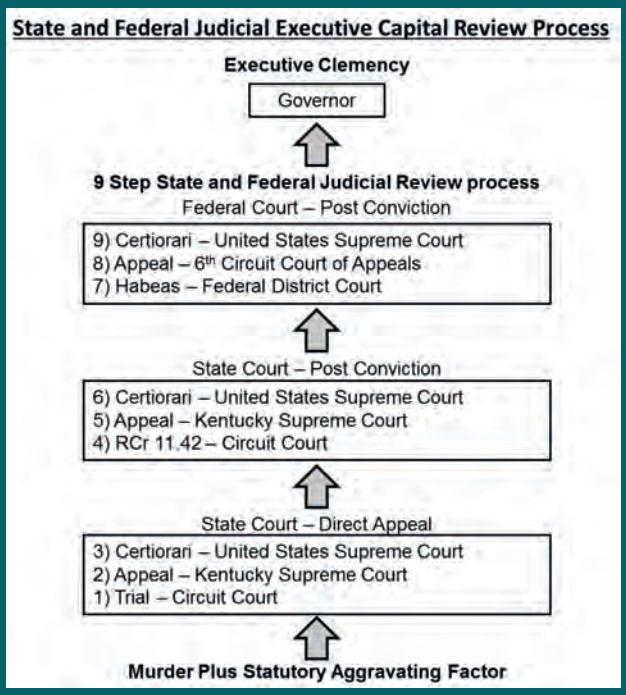
- Deficiencies in the Capital Defender System (Chapter 6).
- Capital Juror Confusion (Chapter 10).
- Imposition of a Death Sentence on People with Intellectual Disability or Severe Mental Disability (Chapter 13).
- Lack of Data (Chapter 12).
- Prevention of Wrongful Convictions (Chapters 2, 3, 4, 5).
- Improvement of Defense Services (Chapter 6).
- Ensuring Proportionality in Capital Charging and Sentencing (Chapters 5, 7).
- Error Correction During Post-Conviction Review (Chapters 8, 13).
- Gubernatorial Clemency Powers (Chapter 9).
- Improved Juror Instruction and Comprehension (Chapter 10).

The comprehensive 438 page audit by the American Bar Association Kentucky Assessment Team on the Death Penalty was of all death penalty cases prosecuted in Kentucky. The Kentucky audit 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.

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[59] and 2014[60] sessions to enact recommended reforms. They have not been called for either an informational hearing or for a vote.

Senator Robin Webb

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



The Kentucky Supreme Court Criminal Rules Committee is considering the ABA Assessment Team's recommendations its Chair deems relevant to the judiciary. To date, it has recommended that the following be sent on to the Kentucky Supreme Court for further consideration:

- Recommendation #7 on page 87 of Chapter 3, Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging line-up accuracy.
- That the Commonwealth fully fund our Commonwealth's Attorneys' and County Attorneys' offices, the Department of Public Advocacy, Metro Public Defenders, the Kentucky crime laboratories, as well as the criminal divisions of the Kentucky Attorney General's Office, as their proficiencies directly impact the reliability of our criminal justice system.
- Recommendation #5 in Chapter 10, Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death. While it has not finished its deliberations, the Committee has rejected many other recommendations.

But to date, nothing much has changed since the audit was released nearly 3 years ago. None of its recommendations have been implemented.

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;

[59] SB 86
[60] SB 202

- jury instructions;
- matters relating to judicial independence;
- treatment of racial and ethnic minorities; and
- intellectual disability and mental illness issues.

The Kentucky Assessment Team co-chairs were Linda Ewald, formerly University of Louisville Louis D. Brandeis School of Law, Michael J.Z. Mannheimer of the Northern Kentucky University Salmon P. Chase College of Law. Additional members were Michael Bowling, former state representative and an attorney with in Middlesboro; Allison Connelly of the University of Kentucky College of Law; former Supreme Court Justice Martin E. Johnstone of Prospect; former Supreme Court Justice James Keller of Lexington; Frank Hampton Moore Jr., an attorney with Cole & Moore in Bowling Green; and Marcia Milby Ridings, an attorney with Hamm, Milby & Ridings in London.

ABA Number of Recommendations Per Chapter		
Chapter	**Title**	**Recommendations**
2	**Collection, Preservation & Testing of DNA and Other Types of Evidence**	**4**
3	**Law Enforcement Identifications and Interrogations**	**9**
4	**Crime Laboratories and Medical Examiner Offices**	**2**
5	**Prosecutorial Professionalism**	**6**
6	**Defense Services**	**5**
7	**The Direct Appeal Process**	**1**
8	**State Post-Conviction Proceedings**	**12**
9	**Clemency**	**11**
10	**Capital Jury Instructions**	**7**
11	**Judicial Independence**	**6**
12	**Racial and Ethnic Minorities**	**10**
13	**Intellectual Disability, Mental Illness, and the Death Penalty**	**20**
Total Recommendations		**93**

The full report is available at: http://ambar.org/kentucKentucky

Reduce the Error, Waste, Abuse with Five Commonsense Reforms or Eliminate the Penalty

Kentucky has an expensive and time-consuming process of prosecuting many death eligible cases but almost all cases end with a life or life without parole sentence. Since the reinstatement of the death penalty in 1976, hundreds of millions of dollars have been spent on Kentucky capital process. Most all of this money is spent on cases which do not result in death, and those that do have an extraordinary error rate. Since 2006, there have been an average of about 200 homicides per year with up to 60 of those capital eligible with over 30 prosecuted as capital. There have been 5 death verdicts. Of the 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 64%. There have been 3 executions since 1976, 2 were volunteers.

The time is now to fix it or eliminate it. There are some people who should be imprisoned for the rest of their life. Life without parole meets all appropriate needs of our society.

Ed Monahan
Public Advocate

HERALD-LEADER EDITORIAL

Callous disregard for ensuring justice

KY. DEATH-PENALTY REFORMS IGNORED FOR YEARS

Almost three years ago, the American Bar Association released a devastating audit of the death penalty in Kentucky.

The result of a two-year effort, the findings were extensive, 438 pages, and well-documented. Among the most damning findings were these:

- At least 10 of the 78 people sentenced to die since 1976 had been represented by lawyers who were later disbarred.
- Of those 78 convictions, 50 were overturned because of significant legal errors.
- Jurors often didn't understand the instructions given to them in death penalty cases.
- There are inadequate protections to prevent executing people who are seriously mentally ill.

The report included 93 specific recommendations to remedy this dreadful state of affairs.

Not one of them has been implemented.

Bills to address the problems, and to abolish the death penalty, have been introduced since the ABA report, but have stalled with no action.

That's the background as the Kentucky General Assembly's Interim Joint Committee on Judiciary hears testimony on the death penalty today.

Unlike a committee hearing in one house during a legislative session, this won't end with a vote up or down on proposed legislation. It is largely an educational or fact-finding session.

That's OK. The facts should be aired again and again until lawmakers decide to face, and deal with this issue.

The most basic reason is the most compelling: It is a fundamental human rights violation to wrongly take someone's life.

But this issue goes way beyond the individuals who might be wrongly sentenced to death, and those close to them.

If Kentucky is this sloppy about cases involving life and death, how can citizens trust the system gets it right on lesser charges?

If the wrong people are convicted for crimes at any level, then those who actually committed them are still walking our streets.

It takes enormous resources to prosecute and defend death penalty cases, spending them on a system that doesn't work is an unconscionable waste.

The bottom line that these committee members need to take into the next session is this: Kentucky needs to either fix the problems with the death penalty or abolish it.

Friday, August 1, 2014. Reprinted with permission of Lexington Herald-Leader

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. *Picture courtesy of Pat Delahanty, Riverbirch Productions.*

Kentucky Criminal Justice System Makes Tragic Mistakes
Wrongful Convictions Are a Problem in Kentucky as Evidenced by the Following Cases

Kentucky has seen 14 documented wrongful convictions. Two were cases where the death penalty was sought:

1. **Edwin A. Chandler,** 1993, Jefferson County capital case; convicted of Robbery 1st and Manslaughter 2nd, sentenced to 30 years. Sentence vacated due to police misconduct and failure to investigate other leads.
2. **Larry Osborne**, 1999, Whitley County, convicted of 2 counts of Murder, Arson 1st, Robbery 1st, and Burglary 1st, sentenced to death. He was acquitted upon reversal and retrial. See *Osborne v. Commonwealth*, 43 S.W.3d 234 (Kentucky 2001).

Kentucky
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Five Ways to Reduce Error, Waste, 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