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Repository Citation

Lollar, Cortney E., "Kentucky Criminal Law Experts Call for Reform" (2014). *Law Faculty Popular Media*. 20.
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Notes/Citation Information

Cortney E. Lollar, *Kentucky Criminal Law Experts Call for Reform*, 78 *Bench & B.* 26 (Jan. 2014).

KENTUCKY CRIMINAL LAW EXPERTS CALL FOR REFORM

By: Cortney E. Lollar

The Second Annual Forum on Criminal Law in the Commonwealth of Kentucky, hosted this year by the University of Kentucky College of Law, focused on a 2011 ABA report on the death penalty in Kentucky. Two years of extensive research by a team of Kentucky legal experts, including law professors from all three state law schools, retired Supreme Court justices, and other prominent lawyers from the community, led to the findings and recommendations around which the forum centered. The team members were chosen due to their eminent reputations in the state, and were not asked their views on the death penalty prior to participating on the Kentucky Assessment Team. Professor Linda Ewald, a retired University of Louisville Louis D. Brandeis School of Law professor and co-chair of the Kentucky Assessment Team, and Sarah Turberville, the ABA representative who helped spearhead the study, began the afternoon by presenting nine of the team's key findings:

- Kentucky has a high error rate in death penalty cases. Of the 78 people sentenced to death in Kentucky since the death penalty was reinstated in 1976, 50 have had a death sentence overturned on appeal, an error rate of 64 percent.
- Kentucky inadequately retains evidence in criminal cases. Evidence is not required to be retained for as long as a defendant remains incarcerated, diminishing the effectiveness of a state law that allows post-conviction DNA testing prior to execution. Such lost or missing evidence prevents the exoneration of innocent people and can prevent apprehension of the guilty.
- A lack of uniform standards on eyewitness identifications and interrogations, two of the leading causes of wrongful convictions, means that many law enforcement agencies across the state inadequately protect against wrongful convictions. The ABA recommends recording all confessions, a much easier task in the age of smartphones, and compliance with best practices for eyewitness identifications.
- The death penalty in Kentucky is applied inconsistently, as there is no mechanism in place to guide prosecutors in deciding when to seek the death penalty. Practices vary dramatically across the state. Kentucky has 57 Commonwealth attorneys. Some of them seek the death penalty in every death-eligible case, while others rarely seek it. Whether

a defendant faces the death penalty is therefore often a function of the location where the person is charged.

- A survey of jurors found a high rate of juror confusion in the standard jury instructions given during death penalty sentencing hearings. Many failed to understand the instructions critical to deciding whether a defendant should be executed.
- Kentucky public defenders are overworked, understaffed and underpaid. Kentucky public defenders handling capital cases have caseloads that far exceed the national average, and salaries that are 31 percent below those of similarly experienced attorneys in surrounding states. The state public defender budget is less than half that of the state's combined prosecutorial agencies, even though the public defender office represents individuals prosecuted by all three agencies, including the vast majority of cases in circuit court.
- Many defense attorneys who have represented capital defendants were unqualified to do so. At least 10 of the 78 people sentenced to death in Kentucky were represented by defense attorneys who were subsequently disbarred. There are no statewide standards governing the qualifications and training of attorneys appointed to handle these cases.
- Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental retardation or mental illness. Kentucky's statutory definition of mental retardation creates a maximum IQ of 70, which does not comport with modern scientific understandings.
- Kentucky does not collect data on the administration of the death penalty in the state, making it impossible to assess proportionality, as required by the U.S. Constitution, or to guarantee the system is operating fairly.

These key findings were the focus of the afternoon's discussions.

Following Professor Ewald and Turberville's remarks, two social scientists presented data further illuminating a few of the issues highlighted by the Kentucky Assessment Team. Professor Gennaro Vito, from the Department of Justice Administration at the University of Louisville, presented results from a survey of death-eligible homicide cases in Kentucky, underscoring the lack of uniformity in the imposition of the death penalty.

During the period from 2000-10, the death penalty was more than three times as likely to be imposed when the victim was a woman than when the victim was a man. Race also played a dominant role. When the defendant was black and the victim a white woman, plea agreements were significantly rarer. Professor Vito found that juries preferred life without parole to death, imposing death less than six percent of the time the sentence was presented as an option. Finally, Professor Vito commented on the lack of data collection by the state. Noting that police departments he has advised were required to collect data on race and did so quite effectively, Professor Vito suggested if the police can do it, so can the Kentucky justice system. The collection of data would help to determine where the problems lie so they can more effectively be corrected.



State Rep. John Tilley of Hopkinsville, left, and state Sen. Whitney Westerfield, also of Hopkinsville, participate in a panel discussion on the findings and recommendations of the ABA Kentucky Death Penalty Assessment Team Report. Rep. Tilley serves as chair of the House Judiciary Committee; Sen. Westerfield serves as chair of the Senate Judiciary Committee.

Professor Marla Sandys, a Ph.D. recipient from the University of Kentucky who now teaches in the Department of Criminal Justice at Indiana University, is an expert on capital jurors. Her findings support those articulated in the Kentucky Assessment Team's report. She conducted a study of jurors who served on capital juries in Kentucky. After extensive interviews, she learned many jurors were quite confused about the instructions they were given. Upward of 40 percent of jurors believed the law required them to impose the death penalty if the evidence proved either that the defendant's conduct was heinous, vile or depraved, or they believed the defendant would be dangerous in the future. More than 79 percent of jurors did not understand that mitigation evidence does not have to be proven beyond a reasonable doubt or be found by a unanimous jury, and more than 11 percent misunderstood the standard for aggravation.

Professor Sandys ran the Cooper's Jury Instructions for death penalty cases through commonly used tests of readability and ease of reading. She found that most of the jury instructions relevant to death sentencing require more than a college education to understand, striking in a state where approximately 20 percent of the population has a college degree. Similarly, she found the ease of reading shockingly low, usually ranging between 30 and 40, but going as low as 15 on a scale of 1-100, with 60-70 being the ideal. Professor Sandys recommended the state hire a linguist to work with judges, prosecutors, defense attorneys and former jurors in crafting jury instructions that are both legally accurate and easier to understand. The result would be greater confidence in juror findings and fewer reversals.

The afternoon's keynote speaker, Stephen Bright, is a native of Boyle County who received both his undergraduate and law degrees from the University of Kentucky. Bright went on to become the director of the Atlanta-based Southern Center for Human Rights, where he remains president and senior counsel. He also has taught at Yale Law School for the past 20 years. Having represented capital defendants at both the trial and appellate levels throughout his career, Bright brought a more personal perspective.

He began by asserting his view that there is an emerging consensus against the death penalty. Bright discussed the change of heart many prominent lawyers and politicians previously in favor of capital punishment have had. From Judge Dorothy Beasley, the lawyer who argued for the state in *Furman v. Georgia*, the case leading to the temporary cessation of the death penalty in 1972, to the former attorney general for the state of Virginia, Mark Earley, who, after participating in 15 executions, no longer is in favor of capital punishment, many respected and thoughtful lawyers have determined it is time to abandon the death penalty.

Bright then noted the recent drop in the number of death sentences imposed by juries, as well as in the number of executions. Juries imposed 78 death sentences nationwide in 2012, and the number of executions dropped to the mid-40s. Bright highlighted a study revealing two percent of all counties in the United States account for the majority of death sentences, and 20 percent of counties account for the entire death row population. Turning his focus to Kentucky, Bright observed that 17 individuals were sentenced to death between 2000-06, but only four have received a death

sentence in the past seven years. Kentucky has executed three people since 1976, two of whom declined to exercise their rights to appeal, "volunteering" for death instead. Seven of the 78 people sentenced to death have died of natural causes.


Bright also focused on several issues raised by the Kentucky Assessment Team's report. Commenting on the "scandalously" low standard of legal representation we, as a society, have accepted, he noted there are no rich people on death row. "People who are well-represented don't get the death penalty," he remarked. He also observed, consistent with Professor Vito's results, that race still determines who gets the death penalty, more often than not. Although the Kentucky Racial Justice Act might minimize the risk of race playing a role, Bright raised the question of whether we are willing to tolerate the risk of race playing any role in the death penalty. Finally, he turned to the issue of mental illness, discussing the differences in culpability between someone with mental illness and someone without such deficits.

The afternoon concluded with an esteemed panel of judges, legislators, professors, cabinet members and federal and state lawyers. Although the speakers did not agree on all of the findings and recommendations, there was the unmistakable consensus that if we are going to have a death penalty in Kentucky, we need, as state House Judiciary Committee Chair John Tilley so succinctly put it, "to get it right." Kentucky Assessment Team member and retired Supreme Court Justice James Keller articulated the general consensus that we need to correct the problems highlighted in the report in order to avoid executing people we should not be.

Most panelists agreed that some solutions were, in the words of state Senate Judiciary Committee Chair Whitney Westerfield, "no duh" fixes. For example, no one openly questioned that evidence should be retained for the entirety of a defendant's sentence. The panelists also seemed to agree that interrogations should and could be recorded. Jefferson County Commonwealth Attorney Thomas Wine reflected that law enforcement in his jurisdiction record every interrogation, an approach he endorsed. Many seemed to concur with a suggestion by United States Attorney Kerry Harvey that the state create a centralized prosecution system, such as the one used in the federal system, to set guidelines, oversee pursuit of the death penalty across the state, and ensure consistency in the exercise of discretion. The report aims to bring such uniformi-

ty and standardization to the legal process, from the collection of data to the final sentencing, according to Kentucky Assessment Team member and retired Supreme Court Justice Martin Johnstone.

The report was released in 2011, but now, two years later, the state has made few steps toward effecting the proposals contained therein. (One piece of legislation, House Bill 41, passed in the 2013 session of the Kentucky General Assembly, does aim to allow increased access to DNA testing.) But the concern panelists repeatedly raised is the cost of implementing the recommendations. Supporters of the assessment team's report argue that many of the problems could be solved without significant cost. As Kentucky Assessment Team member and University of Kentucky College of Law Professor Allison Connolly stated in response to a question from the audience, "I don't think you can put a dollar sign on what the Constitution requires."

Predominantly, the panelists seemed to embrace the view that problems with Kentucky's death penalty need fixing. "We have a constitutional reality," Justice and Public Safety Secretary J. Michael Brown confirmed, but "we struggle with a constitutional application of that reality." According to a poll conducted by the ABA and provided to attendees of the forum, a solid majority (62%) of likely voters statewide support a temporary halt on executions to allow for problems with the system to be identified and corrected. That support, the ABA poll indicates, is consistent across the state – a majority of men, women, urban, suburban, rural, Republican, Democratic and Independent voters all favor Kentucky "get[ting] it right." Based on their comments during the question and answer period, attendees appeared to agree. 



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