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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 exonerations 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 or mental illness 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.


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 approxi-
imately 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 under-
stand. The result would be greater confi-
dence in juror findings and fewer reversals.

The afternoon's keynote speaker, Stephen
Bright, a native of Boyle County who re-
ceived both his undergraduate and law de-
grees from the University of Kentucky. Bright
going on to become the director of the At-
tlanta-based Southern Center for Human
Rights, where he remains president and sen-
cior counsel. He also has taught at Yale Law
School for the past 20 years. Having repre-
sented 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 politi-
cians previously in favor of capital punish-
ment 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 execu-
tions. Juries imposed 78 death sentences
nationwide in 2012, and the number of execu-
tions 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
dead population. Turning his focus to
Kentucky, Bright observed that 17 individu-
als 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 tol-
erate 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, cabi-
net 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 Ken-
tucky, we need, as state House Judiciary
Committee Chair John Tilley so succinctly
put it, “to get it right.” Kentucky Assess-
ment 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 re-
tained for the entirety of a defendant's sen-
tence. 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 discre-
tion. The report aims to bring such uniformi-
ty and standardization to the legal process,
from the collection of data to the final sen-
tencing, 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 Ken-
tucky 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
Connelly 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 em-
brace the view that problems with Ken-
tucky’s death penalty need fixing. “We have
a constitutional reality,” Justice and Public
Safety Secretary J. Michael Brown con-
ferred, but “we struggle with a constitution-
al 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 Inde-
dependent 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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