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November 25, 2019

The Honorable Matt Bevin
Governor of Kentucky
State Capitol Building, Suite 100
700 Capital Avenue
Frankfort, KY 40601

Re: Clemency Request of Gregory Wilson
Inmate No. 32847
Kentucky State Penitentiary at Eddyville

Dear Governor Bevin:

Please accept this letter as a request for the commutation of Gregory Wilson's death sentence. Mr. Wilson has been on death row at the Kentucky State Penitentiary since October 31, 1988, following his conviction in Kenton Circuit Court for murder and other charges. Mr. Wilson is 62 years old and has spent literally half of his life on Kentucky's death row, where he will undoubtedly die, one way or another. There is no issue of public safety involved, only a fair adjudication and a just resolution. As will be delineated below, there are a multitude of reasons to commute his sentence to life without parole, and no legitimate purpose will be served by seeking his execution.

Fundamental unfairness permeated Mr. Wilson's capital prosecution in Kenton County. From the start, the proceedings were rife with legal error, malpractice, conflicts of interest, unprofessional conduct and highly inappropriate acts by judicial officers. Abandoned by his assigned counsel and left with unprepared, inept, unqualified volunteer attorneys, his efforts to obtain qualified, prepared counsel were met with a mistaken conclusion that he wanted to represent himself. As a result of the abandonment and incompetence of his assigned lawyers, Mr. Wilson has now been on death row for over 31 years.

The total failure of the criminal justice system in his case, detailed below, forms the basis of this plea for commutation of Mr. Wilson's death sentence to life imprisonment. Nine years ago, Judge Boyce F. Martin, Jr., U.S. Court of Appeals for the Sixth Circuit, eloquently and accurately described the nature and extent of that failure:

> Over my more than thirty years on the bench, Wilson's trial stands out as one of the worst examples that I have seen of the unfairness and abysmal lawyering that pervade capital trials.
>
> * * * *
>
> To maintain the legitimacy of our adversarial system of justice, we must be confident that its two foundational components are sound: a neutral and fair arbiter, and adequate legal representation for both parties. If either pillar is fractured, as in this case, then we are left with a system that does not function. Its results cannot be trusted, particularly when a life is at stake. When a person is sentenced to death in a kangaroo court such as Wilson's, with an illicit sexual affair taking place between a co-defendant and a colleague of the trial judge and no semblance of qualified defense counsel, it irreparably tarnishes our legal system. Until we reform this broken system, we cannot rely on it to determine life and death.

Wilson v. Rees, 624 F.3d 737, 741 (6th Cir. 2010), Boyce F. Martin, Jr., Circuit Judge, dissenting from denial of rehearing en banc.

The death sentence imposed upon Mr. Wilson should be commuted to life for a variety of reasons, including:

1) **Racial considerations**: While Mr. Wilson, an African-American male, received the death penalty, a co-defendant by the name of Brenda Humphrey, a white female, received a sentence of less than death from the same jury and the same trial judge for the same conduct. The record on appeal shows that there was evidence in the form of a statement by Ms. Humphrey indicating that she inflicted the fatal injury. Yet, her life was spared and Mr. Wilson faces the death penalty. Moreover, Ms. Humphrey (DOC #03880) was released on parole to Boone County on April 19, 2017, with low level supervision for life unless she violates the terms of her parole. Today she resides in Boone County and reports to a parole officer once every three months, while Mr. Wilson is imprisoned on death row. A Kentucky study has documented the well-known racial disparities in the application of the death penalty, "The capital sentencing process in Kentucky has been significantly influenced by race." Thomas Keil & Gennaro Vito, Race and the Death Penalty in Kentucky Murder Trials, 1976-1991.

Likewise, in January of 2003, while commuting all the death sentences in Illinois, then Governor George Ryan noted that, "Our own study showed that juries were more likely to sentence to death if the victim were white than if the victim were black – 3½ times more likely to be exact. We are not alone. Just this month Maryland released a study of their death penalty system and racial disparities exist there too." As I'm sure you are aware, Governor Ryan was nominated for a Nobel Peace Prize for his principled and courageous action. Eight years later, in 2011, Governor Pat Quinn of Illinois commuted the death sentences of 15 inmates who remained on death row, and signed into law the bill abolishing the death penalty in Illinois.

2) **Inadequate counsel**: Mr. Wilson's trial took place in Kenton County in 1988 in Kenton Circuit Court. Neither the Kentucky Department of Public Advocacy (DPA) nor the local DPA Office in Kenton County lived up to its statutory and constitutional obligations to ensure that Mr. Wilson was represented by qualified, prepared defense counsel. As a result, Mr. Wilson was represented by two volunteer counsel who responded to a notice posted on the courtroom door requesting counsel to come forward to assist in the representation of Mr. Wilson and declaring, "THIS CASE CANNOT BE CONTINUED AGAIN .... PLEASE HELP. DESPERATE." Lead counsel, William Hagedorn, conducted his law practice from his house, without a computer, a working copier, a rule book or a statute book. He used the phone number of a local bar, Kelly's Keg, as his law office business number. The court record reflects that:

* Gregory Wilson asserted his right to counsel. The trial judge said he had waived counsel.

* Gregory Wilson said he was not capable of defending himself. The trial judge said Mr. Wilson had elected to represent himself.

* The volunteer attorneys, who took the job of representing Mr. Wilson as a favor to the trial judge, did nothing to prepare for trial and were absent from the courtroom on numerous occasions throughout the trial proceedings.

Mr. Wilson did not receive anything resembling a fair trial. When the local DPA Office in Kenton County failed to provide counsel for Mr. Wilson, the Department of Public Advocacy initially assigned Kevin McNally, from its Frankfort office, to the case. It was after McNally and the Department of Public Advocacy later withdrew from Mr. Wilson's case that the two completely unqualified lawyers, William Hagedorn and John Foote, responded to the trial judge's desperate plea for volunteers. The ineffective assistance of Hagedorn and Foote predictably resulted in Mr. Wilson's conviction and death sentence. Indeed, John Foote later filed an affidavit during post-conviction proceedings in the case in which he admits and details the extent of the legal malpractice that occurred in Mr. Wilson's case (see attached affidavit).

In a 2003 feature article in The Courier-Journal (November 9, 2003), Kevin McNally stated that the biggest regret in his career was leaving a capital defendant (Mr. Wilson) in the lurch in 1988, when he resigned after 12 years from the state Department of Public Advocacy, saying he was burned out after representing the "worst of the worst with no resources." His quoted explanation was: "I thought the system was going to come to the rescue, and it didn't." (See attached newspaper article).

3) **The Commonwealth's case was untested and inherently unreliable:** The foundation of the case against Gregory Wilson consisted of the testimony of the co-defendant, Brenda Humphrey, and a jail house snitch, Willis Maloney. Ms. Humphrey blamed everything on Mr. Wilson while Mr. Maloney claimed that Mr. Wilson had confessed his guilt to him while the two of them were in jail. Neither of these witnesses was subjected to cross-examination by competent counsel. Had Mr. Wilson been represented by effective counsel, the jury that convicted him would have known that co-defendant Brenda Humphrey had confessed to her sister that she, Brenda, was the one who had killed the victim by slitting her throat, and the jury would have known that Willis Maloney was the prosecutor's paid, professional snitch, a

member of the Ku Klux Klan and also a former client of Mr. Wilson's volunteer, court-appointed counsel (a fundamental, grievous conflict of interest that was never revealed to Mr. Wilson).

4) **With no case in mitigation, death was inevitable:** Gregory Wilson was sentenced to death by a jury that never heard about Mr. Wilson's childhood background of neglect, abuse and poverty. Mr. Wilson's volunteer counsel did nothing to investigate, prepare or present a case in mitigation. Mr. Wilson's mother died when Gregory was 16. His mother had four children by four fathers, all of whom were absent from the family home. Mr. Wilson has learning disabilities, in addition to physical and psychological problems that were misdiagnosed and untreated. There is a history of schizophrenia in his family. Despite the dysfunctional nature of his family and upbringing, it is documented that, as a child, he once saved the family from perishing in a house fire. However, the jury that condemned him to death never knew any of these facts.

5) **Kenton Circuit Court in 1988 was a courthouse out of control:** Although Mr. Wilson was unaware of it at the time of his trial, it is now clear, and a matter of record, that co-defendant Brenda Humphrey, a prostitute, was having an illicit sexual relationship with a Kenton Circuit Court judge. Moreover, the prosecutor in the case, Donald Buring, knew about the unseemly affair and concealed the facts about what was going on. Brenda Humphrey, while in pretrial detention, was having sex (before, during and after trial) with the trial judge's self-described "dear friend" and chambers mate of 14 years, Judge James Gilliece. Among other things, Buring knew that Judge Gilliece had provided an outfit for Ms. Humphrey to wear at trial and that Ms. Humphrey was being taken, on the trial judge's orders, to Judge Gilliece's chambers during recesses in the trial. Mr. Buring said nothing about it and did nothing about it.

The testimony at a state court hearing held in Ms. Humphrey's case in July 2002 painted a vivid, although incomplete, picture of a Kenton County judicial system run amok. The people who were in charge of the major components of the criminal justice system -- the prosecutor, the detectives, the jailer, the bailiffs, the judge's secretary -- all knew what was going on. The Judge Gilliece-Brenda Humphrey affair and the cover-up of that affair guaranteed that Mr. Wilson could not receive a fair trial. The officials charged with the responsibility to ensure justice were, instead, focused on hiding an illicit sexual affair.

6) **The justice system failed**: The injustice of Mr. Wilson's case has attracted national attention over the years. On February 3, 2000, ABC's "Nightline" correspondent Michael McQueen described the case as follows: "In Covington, Kentucky, Gregory Wilson faced the death penalty for murder and couldn't afford a lawyer. After posting a note in the courthouse asking for help, a judge found him two – one who worked out of a bar, another who had never handled a felony. Wilson asked for new lawyers and was refused. He was convicted and sentenced to die."

Similarly, in the 1997 Annual Survey of American Law published by the New York University School of Law (see attached excerpts), Kentucky native Stephen B. Bright, noted lawyer and death penalty expert, wrote that, "The difficulty of enforcing the right to counsel is illustrated by the plight of an African-American man, Gregory Wilson, who faced the death penalty in Covington, Kentucky." Mr. Bright proceeds in his article to recount the facts and circumstances of the case, to-wit: "the judge presiding over the case had difficulty finding a lawyer for Wilson, because a Kentucky statute limited compensation for defense counsel in

capital cases to $2,500. When the head of the local indigent defense program suggested to the judge that more compensation was necessary to obtain a lawyer qualified for such a serious case, the judge suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio River to raise money for the defense. The judge eventually obtained counsel by posting a notice in the courthouse asking any member of the bar to take the case with the plea 'PLEASE HELP. DESPERATE.' The notice said nothing about qualifications to handle a capital case. The judge appointed two lawyers who responded. Not surprisingly, this method of selecting counsel did not produce a 'dream team.' The lead counsel, William Hagedorn, can charitably be described as well past his prime. He did not have an office, but practiced out of his home, where a large flashing Budweiser beer sign was prominently displayed. He had never previously handled a death penalty case. The police had recently pried up the boards in his living room floor and recovered stolen property. The telephone number he gave Wilson was for a bar called 'Kelly's Keg.' The other lawyer, John W. Foote, who had volunteered to assist lead counsel, had no felony trial experience. Mr. Wilson, realizing that the lawyers were not up to the task of defending a capital murder case, repeatedly objected to being represented by the lawyers. He repeatedly asked the judge that he be provided with a lawyer who was capable of defending a capital case. The judge refused and proceeded to conduct a trial that was a travesty of justice. Lead counsel was not even present for much of the trial. He cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom. Mr. Wilson was sentenced to death. "What more could Gregory Wilson do to enforce his Sixth Amendment right to counsel?", Bright asks in his article. "He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending a capital case. He asked for a real lawyer. But even these efforts were insufficient to enforce the right to counsel." On the 50th anniversary of the landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the U.S. Supreme Court unanimously established the right to assistance of counsel for indigent defendants, Mr. Bright wrote a law review article that discussed Gregory Wilson's case. Stephen B. Bright, *Gideon v. Wainwright* and the Lack of Commitment to Justice by Judges, Legislatures, Executives and the Bar, University of Louisville Law Review Online, Volume 52:7 (2013) (Mr. Wilson's case is discussed on pages 13-14).

In his critically acclaimed 1999 book entitled, No Equal Justice, Professor David Cole of the Georgetown University Law Center also highlighted Mr. Wilson's case as an example of gross ineffective assistance of counsel and the denial of due process of law to poor minorities (see attached excerpts).

The Second Grave, authored by Carl Wedekind in 1999, traces the long history of violence and the death penalty in Kentucky. The plight of Mr. Wilson is described as follows: "Gregory Wilson, a black man, and a co-defendant white woman were charged with murder, kidnapping, rape and robbery in Kenton County. Wilson's co-defendant employed an attorney, but Wilson, who had no funds, was unable to secure counsel. Just a few weeks before his scheduled trial, the judge posted a notice on the courtroom door 'desperately' seeking a lawyer to represent Wilson. Two local attorneys, neither of whom had ever before handled a death penalty case, responded to the plea. The one who became lead attorney, responsible for the handling of the case, was said to be a heavy drinker and had no established office from which to practice. He gave a bar known as 'Kelly's Keg' as his business address and telephone number. The two volunteers did little or no pre-trial investigation or preparation for the trial. No defense witnesses were called for Wilson and no mitigating evidence was presented on his

behalf during the penalty phase. The record on appeal shows there was evidence to present, including a statement of the co-defendant white woman admitting that she inflicted the fatal injury. But the jury heard none of this, only the prosecutor's side, and the jury recommended the death penalty. The attorney for Wilson's co-defendant did present evidence in her defense, and the jury recommended a life sentence for her. Wilson was selected to die. His co-defendant got a life sentence." (p. 136; see attached excerpt).

Additionally, Mr. Wilson and his case have received the attention and support of the Catholic Conference of Kentucky, including the Most Reverend William F. Medley, Bishop of the Diocese of Owensboro, as well as the Congregation of the Sisters of Charity of Nazareth, notably the recently deceased Sister Mary Ellen Doyle, SCN, who visited Mr. Wilson on death row in a wheelchair just weeks before her death. She was instrumental in converting Mr. Wilson to Catholicism decades ago following his imprisonment at the Kentucky State Penitentiary at Eddyville in 1988.

Commutation of Gregory Wilson's death sentence will undo a travesty

Gregory Wilson's plea for clemency is a request to correct an injustice. The bedrock foundation of the criminal justice system in America is that the rights of the accused must be jealously and consistently protected when the awesome power of the state is brought to bear against a citizen. A fair result is achieved and justice is done if the accused citizen is tried before a fair and impartial judge, if he faces a prosecutor who seeks justice, not merely a conviction, if he has effective counsel to assist in his defense, and (especially in a death penalty case) if he presents for the jury's consideration all evidence that in any way may mitigate the circumstances of the offenses and cause a jury to render a verdict less than death.

From the time that the death penalty was reinstituted in Kentucky (1976) until today -- a period of 43 years -- only two death row inmates have been granted gubernatorial clemency by having their death sentences commuted to life imprisonment. Both of those grants of clemency came during the two administrations that directly preceded Governor Steven Beshear's administration, who ignored documented inequities and failed to show mercy to any death row inmates during his time in office. Each of the governors prior to him exercised his power as he left office. Specifically, in December 2003, outgoing Governor Paul Patton commuted the death sentence of Kevin Stanford. In December 2007, outgoing Governor Ernie Fletcher commuted Jeffrey Leonard's death sentence. Governor Patton acted because he believed that the justice system had "perpetuated an injustice" in Kevin Stanford's case. Governor Fletcher granted clemency because of the inadequate representation that Jeffrey Leonard had received from the lawyer who represented him at trial. Gregory Wilson was represented by trial attorneys who did an abysmal job. No court has ever done a comprehensive merits review of the performance of those attorneys, and for this reason, the justice system has perpetuated an injustice in Mr. Wilson's case.

Gregory Wilson's case is deserving of your discretionary power to grant clemency because the jury verdict and, ultimately, the sentence of death were lacking in justice, fairness and racial equality. A trial should always be a search for the truth, and the verdict and sentence must always be imbued with the confidence that they are the correct decisions. In Mr. Wilson's trial, the jurors never heard the whole truth, and thus their decision lacked the reliability that our criminal justice system demands.

Accordingly, commutation of Mr. Wilson's death sentence to a sentence of life without parole for 25 years, the maximum non-death punishment in effect at the time of his trial, would go a long way in correcting this shameful travesty of justice. Mr. Wilson's death sentence cannot stand if our criminal justice system is to have any credibility.

Respectfully submitted,

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cc: M. Stephen Pitt, Esq.
General Counsel

*N.B. In 2001, the American Bar Association undertook a project to assist capital punishment jurisdictions in comprehensively examining their death penalty systems. In 2009, Kentucky became the ninth state to evaluate its system. An Assessment Team was duly assembled and began an in-depth study. The Kentucky Assessment Team Members were well-known and respected jurists, attorneys and legal scholars, including Professor Linda Sorenson Ewald and Professor Michael J. Zydney Mannheimer, Co-Chairs; Justice Martin E. Johnstone; Justice James F. Keller; Professor Allison Connelly; Marcia Milby Ridings; Michael D. Bowling; and Frank Hampton Moore, Jr, (bios included in the Report).

In December 2011, the Kentucky Death Penalty Assessment Team completed its analysis and evaluation of the fairness and accuracy of the death penalty in Kentucky and issued a 438-page Report (a Summary of the Report is attached; a thumb drive containing the entire Report and Appendix with recommendations is enclosed). Of particular relevance to Mr. Wilson's case are Chapters *Five* (Prosecutorial Professionalism); *Six* (Defense Services); *Nine* (Clemency); and *Twelve* (Racial and Ethnic Minorities) – highlights of each are attached.

The inescapable conclusion from the findings in the Report is that the death penalty is not being administered fairly and accurately in Kentucky, and it cannot be properly imposed until the identified problems are addressed:

> "The Kentucky Assessment Team is concerned about the expenditure of Commonwealth resources to administer what the Assessment Team has found to be a system with insufficient safeguards to ensure fairness and prevent execution of the innocent. The

gravity and breadth of the issues summarized above and described in detail throughout this Report compel the Assessment Team to recommend a temporary suspension of executions until the issues identified in this Report have been addressed and rectified. Through this temporary suspension, all branches of the Commonwealth's government will be better able to examine thoughtfully and thoroughly these concerns, implement the necessary reforms, and ensure the fairness and accuracy of its death penalty system." [Executive Summary, p. xiii]

In the 8 years since its publication, none of the issues has been meaningfully reviewed and none of the recommendations have been implemented.

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ATTACHMENTS

Affidavit of John W. Foote, co-counsel (with William Hagedorn) at trial.

Courier-Journal article about Kevin McNally dated November 9, 2003.

Excerpt from the Annual Survey of American Law, New York University School Of Law, 1997 Volume, Issue 4, "Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake", Stephen B. Bright.

Excerpt from No Equal Justice, "Race and Class in the American Criminal Justice System," David Cole.

Excerpt from The Second Grave, Carl Wedekind (1999).

*THE KENTUCKY DEATH PENALTY ASSESSMENT REPORT (December 2011)

COURT OF JUSTICE
KENTON CIRCUIT COURT
FIRST DIVISION
NO. 87-CR-166

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

GREGORY WILSON DEFENDANT

AFFIDAVIT

* * * * *

Comes now the affiant, the Honorable John W. Foote, and after first being duly sworn, states as follows:

1. I am a duly licensed attorney and was admitted to the Kentucky Bar in 1981.

2. In response to a notice posted by Judge Raymond Lape, I volunteered to be second chair in the Gregory Wilson case. I wish to make it absolutely clear that I became involved in the case with the understanding that I would do only "leg work." I had limited criminal defense experience and no felony jury trial experience whatsoever. Judge Lape asked me about my experience in criminal cases and I told him directly that I had none. My role in this case was simply to do leg work and assist the lead counsel, William Hagedorn. William Hagedorn was appointed to be the lead in the case. He was the captain of the ship. I was relying on Mr. Hagedorn to provide effective assistance of counsel.

3. It is my understanding that Bill Hagedorn was a friend of Judge Lape. They appeared to know each other well. Judge

Lape apparently trusted Mr. Hagedorn to do what was necessary to try this case on the scheduled trial date without further delay. I know Judge Lape was very appreciative of the fact that Mr. Hagedorn and I had volunteered. When I volunteered, I knew Hagedorn was going to be lead counsel and I was under the impression that Hagedorn was a competent and seasoned criminal defense attorney.

4. After I was appointed to the case, I learned that Bill Hagedorn did not have an up-to-date law office. He used an area in his house as office space. He did not have a functional copying machine. He had no computer equipment. He had no secretary except for a live-in girlfriend who sometimes worked as his typist. There were some outdated law books at the house, but I never saw the Kentucky Revised Statutes or the Rules of Criminal Procedure. There was nothing in the way of a law library. Indeed, there was none of the equipment or resources you would expect a competent practicing attorney to have who was responsible for handling a major felony trial. I began to question how any lawyer could effectively represent anyone without the resources and supporting cast necessary for competent representation.

5. Although Bill Hagedorn was lead counsel and the captain of the ship, he provided no real direction. In fact, he did virtually no work on the case. Hagedorn claimed to have met with Gregory Wilson one time. Assuming they did meet, I saw no evidence of it. I personally never visited Wilson in jail, either before or during trial. Hagedorn did not file any

pretrial motions, except one pleading which attempted to address the issue of where the crime had occurred. Other than that one pleading, he filed nothing. He told me pretrial motions were a waste of time. Hagedorn never interviewed key witnesses such as Beverly Finkenstead, Willis Maloney, Brenda Stith, or Lisa Mains. He never obtained a copy of Maloney's record. Hagedorn and I had no meaningful discussions prior to trial about who would question which witnesses, who would conduct voir dire, what questions would be asked during voir dire, who would open or who would close. I could only assume that Mr. Hagedorn, as lead counsel, planned to undertake the examination of all witnesses. Hagedorn undertook virtually no investigation. The only investigation done on the case, I initiated. I had an investigator go to Crawfordsville and interview witnesses at the Holiday Inn who allegedly saw Gregory Wilson and Brenda Humphrey. To my knowledge, that was the only significant investigation done in the case. As noted, there was no attempt to interview such key witnesses as Stith, Finkenstead, Maloney, or other crucial figures in this case. He did absolutely nothing to prepare a penalty phase. He did not interview or attempt to interview members of Wilson's family, relatives, or anyone who would have ever known Gregory Wilson. Regarding a penalty phase, he did absolutely nothing. Although monies had been allocated for experts, he did not use funds for experts. Hagedorn never articulated to me any reason why he didn't use any money or experts.

6. As I stated, Hagedorn was lead counsel and was supposed to be in charge, yet I was the only person who did any work on the case. To the extent that anything was done, I did it. For example: I was the one who obtained the voir dire forms the day before trial began. I remember going over those forms at 4:00 a.m., hours before the trial was scheduled to start, thinking that this should have been done much earlier. The point is this: I was only supposed to be doing leg work. Bill Hagedorn was assigned the task of leading the defense and, unfortunately, he did nothing to lead the defense. He did nothing to prepare the case. He did nothing to investigate it. As best I could tell, Bill Hagedorn's trial file consisted of a note pad with scribbling on it. He did not prepare this case.

7. Moreover, I began to question whether Hagedorn was capable mentally of representing anybody. I would go over to his house at night during the summer of 1988. While Hagedorn claimed to be a reformed alcoholic, I saw beer in his refrigerator. I also observed partially filled whiskey bottles in the house. I suspect Bill Hagedorn was drinking both before and during trial. Even if he was not drinking, he, unfortunately, still manifested all the signs of a burned-out alcoholic. Specifically, he would ramble and digress. At times he appeared disoriented. He did not make sense. He seemed unable to complete a task or to concentrate. He would go off on tangents. He seemed incapable of having any meaningful discussion about the case. Normally when I met with

him at nights, he would not discuss the case, but when he did he did not make any sense.

8. At one point, Bill Hagedorn did summarize what his defense would be at trial. The defense, as outlined to me, was as follows: Gregory Wilson and Brenda Humphrey ran into Deborah Pooley on the street. Deborah Pooley suggested they get some beer and volunteered the use of her credit cards. Pooley became attracted to Wilson and they began to engage in consensual sex. This so enraged Brenda Humphrey that she became angry and killed Deborah Pooley. When Hagedorn first mentioned this so-called defense, I thought he was joking. I believed he was kidding because there was never any proof that Pooley voluntarily let others use her credit cards, or had engaged in consenual sex with anyone. The facts were clear. Pooley had been abducted and murdered. The issue was who did it. Therefore, I thought Hagedorn's theory was incomprehensible, off-the-wall, and bizarre. Nonetheless, that was Hagedorn's theory of the case and it became clear to me that he was not joking, that he was dead serious.

9. In short, Hagedorn, prior to trial, did virtually no preparation, prepared no cross-examinations, and seemed mentally incapable of discussing the case in a rational way.

10. The situation did not improve once trial began. During trial, I would go over to Hagedorn's house at night. There would be people there watching baseball and drinking beer. Hagedorn was not working on the case. He would not discuss the case with me. There was no brain-storming as to

what to do the next day, or what motions to file, or who would handle the next witness. Hagedorn would ramble, digress, and go off on tangents. There was no substantive discussion of the trial. When we were in court, Hagedorn rarely spoke to Wilson. When he did so, it was not about the case. There were times during the trial when Hagedorn was not even present. I guess he left to take care of other business. There were times I had to leave to handle other cases, and during those times Hagedorn was left alone to represent Wilson.

11. Trial was an extremely tense time for me. To relieve the tension and fill the time, I would do drawings on paper cups. I was tense and afraid because I feared that I would be called upon to do something and, if I was, I was not prepared to do anything. Again, I was strictly on this case to do leg work. I was strictly second chair. I had no felony jury trial experence. I was not prepared to conduct any part of the trial. Therefore, I was always afraid that I might be called upon to do something and I knew I would not know how to do it. I was also tense because I feared what Bill Hagedorn might do. I feared that he might start rambling. I feared that he might spout off one of his bizarre theories about Pooley and Wilson engaging in consensual sex. All my fears were realized when Hagedorn, out of the presence of the jury, gave his opening statement. This statement was totally bizarre. In his opening statement, Hagedorn implicated Wilson in a second homicide. Because I was not prepared to do anything, and because Bill Hagedorn was not prepared to do anything, and because I was

also afraid that Bill Hagedorn might start spouting off irrational and bizarre theories, I was extremely tense as I set in the courtroom during trial.

12. During the trial, it appeared that the prosecutor, the Honorable Donald Buring, felt that he needed to make the trial look like a normal trial - that is, that there existed an adversary process in which lawyers on the prosecution and the defense were fighting for their respective sides. Unfortunately, in this case there was no such fight. I was not in a position to contest the prosecution's case against Mr. Wilson. There was no adversary process.

13. After trial was over, I learned much more about Will Hagedorn. I recall going to his house. I saw correspondence from the bar association charging him with ethical violations. I observed a letter on his refrigerator. That letter was a bar complaint that had been filed against Mr. Hagedorn. I learned that he had stolen the house he had lived in from a client who had severe mental problems. There was overwhelming evidence that Hagedorn had forged signatures on a deed and other documents. The client filed a lawsuit and summary judgment was granted against Bill Hagedorn. Hagedorn had told me, while the Wilson case was pending, that he had been suspended from the bar for failoure to obtain CLE credits and that he was required to attend classes to regain his license. Having said that, I did not know during the Wilson case the extent of Mr. Hagedorn's prior unethical behavior. I do recall Robert Carran filing affidavits and documents showing that Hagedorn had

received stolen property and committed other improprieties. Those allegations upset Hagedorn. Having said that, I did not know what an unethical attorney William Hagedorn was until after trial had conlcuded and after I learned other facts about Mr. Hagedorn. Knowing what I know now, I would not have taken the assignment to do leg work for Mr. Hagedorn. I would not have agreed to volunteer for the case. Knowing what I know now about Bill Hagedorn, I would not have wanted him to represent me. Indeed, I would not have wanted Bill Hagedorn to represent anyone in any serious criminal matter.

14. In summary, Bill Hagedorn did nothing of any significance to represent Gregory Wilson. He did not try to work with Wilson. He did not try to represent him. Unfortunately, he was mentally incapable of preparing a meaningful defense or providing meaningful representation. Bill Hagedorn was a burned-out alcoholic who no longer could act as a competent lawyer. All Gregory Wilson wanted was a competent lawyer to represent him. Bill Hagedorn was an incompetent, unethical lawyer who did not represent Gregory Wilson and was incapable of doing so. The best analogy I can give is this - as lead counsel, Hagedorn was captain of the ship. I kept waiting for him to have a plan. I kept waiting for him to have a strategy. I kept waiting for him to lead the way. He never did. Ultimately, it dawned on me that he had no strategy, he had no plan, he had no goal. William Hagedorn did

not effectively represent Gregory Wilson and did not have the capability of effectively representing anybody.

FURTHER, THE AFFIANT SAYETH NOT.

John W. Foote

JOHN W. FOOTE

COMMONEALTH OF KENTUCKY)
)
COUNTY OF KENTON)

SUBSCRIBED AND SWORN to before me, a Notary Public, by John W. Foote, Affiant, on this 27th day of August, 1996.

Mary D. Goodell

NOTARY PUBLIC

My Commission Expires: 2-3-97

Headline: McNally among criminal defense elite

Wolfson, Andrew. **Courier - Journal** [Louisville, Ky] 09 Nov 2003: A.1

Abstract

McNally, 54, has represented clients in 50 capital cases and, as one of three appointed members of the 11-year-old Federal Death Penalty Resource Counsel Project, has advised hundreds of lawyers and their clients in federal death penalty cases.

Full Text

SubHead: Frankfort lawyer is dean

of death penalty opponents

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Frankfort lawyer Kevin McNally has advised and counseled mass murderers, the deranged, a serial killer and a hit man - people whose misdeeds could fill an encyclopedia of evil.

There was Oklahoma City bomber Timothy McVeigh, whom he helped find a lawyer, and tried, unsuccessfully, to talk out of abandoning his appeals. There was the "Doctor of Death" - Michael Swango - a physician who may have murdered up to 35 patients from 1983 to 1997 as he moved from hospital to hospital in the United States and Africa.

And in Kentucky, there was LaFonda Fay Foster, whom he saved from execution after she was initially sentenced to death for her role in a 1986 Lexington killing rampage in which five people were shot, stabbed, run over and set on fire.

McNally - an avowed death penalty opponent - acknowledges that "going into denial" is sometimes the only way he can deal with his clients' unspeakable acts, whether alleged or proven.

"You can't think about what your client did when you talk to somebody like Tim McVeigh," he said. "It would be like a heart surgeon saying, 'I can't do this operation because there is blood everywhere.'"

Twenty-five years after McNally tried his first death penalty case as an assistant public advocate, the fiery and combative criminal defense attorney now stands at the pinnacle of that high-pressure specialty.

McNally, 54, has represented clients in 50 capital cases and, as one of three appointed members of the 11-year-old Federal Death Penalty Resource Counsel Project, has advised hundreds of lawyers and their clients in federal death penalty cases. He and the two other project members recommend qualified defense lawyers to federal judges in such cases and then advise those attorneys. McNally also has emerged as one of the leading and most vocal critics of the man who authorizes every federal capital prosecution - U.S. Attorney General John Ashcroft. He has condemned Ashcroft for seeking the death penalty disproportionately against minorities; for authorizing it in jurisdictions such as Michigan and Puerto Rico, where local law bars it; and for overruling U.S. attorneys 30 times when they sought more lenient dispositions.

McNally - now the go-to source for national news organizations - also has disclosed in interviews that federal prosecutors failed to persuade juries to impose the death penalty in 22 of the past 23 cases in which they sought it, including three cases that ended in acquittals. McNally and other critics say those results show Ashcroft has authorized capital prosecutions too often and too indiscriminately.

"If they were a corporation," McNally told The New York Times in June, "there would be an investigation."

McNally's skills as a strategist and in the courtroom earn high marks from allies and adversaries. Acclaimed litigator and law professor Michael Tigar, himself best known for persuading a jury to spare the life of McVeigh's co-defendant, Terry Nichols, said, "Nobody knows more about the federal death penalty statute than Kevin McNally." McNally has conducted training sessions on the death penalty in 30 states, Tigar said, and is considered the leading expert on jury selection in death cases.

Prestonsburg lawyer Ned Pillersdorf, who has defended more than 20 capital cases, said that while McNally can come across as arrogant and abrasive, "his advice on (the) death penalty is the most sought after in the country. He is a master strategist."

And assistant Kentucky Attorney General David Smith, who has tangled with McNally on appeals through six administrations, said: "I have never gone up against anybody tougher or craftier. He is an extremely dangerous lawyer for anybody on our side of the fence."

In Kentucky, McNally may still be best known for helping killer Todd Ice avoid the death penalty. Ice, once the youngest person on death row, was 15 in 1978 when he stabbed a 7-year-old Powell County neighbor to death and cut her mother's throat in a crime that kindled sharp emotions in Eastern Kentucky.

McNally and his wife, Gail Robinson, who is also a lawyer, won Ice a new trial, a lesser conviction for manslaughter, and ultimately, in 1993, his freedom.

In what other lawyers call his most remarkable triumph, McNally also won a new trial, and an acquittal, for an Arizona man, Bobby Cruz, who had twice been sentenced to death and had spent 14 years on death row for allegedly orchestrating the 1980 contract killing of a Phoenix print shop owner and his mother.

In Chicago, McNally is best known for a case he lost - as attorney for Harry Aleman, whom the Chicago Tribune once called "the mob's killing machine."

Aleman, who was acquitted of murder 25 years ago, became the only American retried after an acquittal when it was shown that the judge in his first trial had been paid a $10,000 bribe.

For his second trial, in 1997, Aleman hired McNally on the recommendation of Cruz, his cousin. But Aleman didn't fare as well - he was convicted of murder and was sentenced to 100 to 300 years in prison.

In an ominous postscript, Cruz disappeared after the trial and has not been seen since. In a book about the case, "Everybody Pays," Tribune reporters Maurice Possley and Rick Kogan suggest Cruz vanished because he had recommended McNally. Both McNally and Aleman insist that is ridiculous.

In a letter to The Courier-Journal from a prison in Dixon, Ill., Aleman said he still admires and respects McNally. "Lawyers on the whole are sharks," Aleman said. "Kevin is not."

McNally said he was never scared of Aleman or his associates.

"Generally speaking," McNally said, "the mob doesn't kill the lawyer who loses the case."

A trial by fire

for rookie lawyers

As a fledgling public defender in 1978, McNally tried his first death penalty case before trying his first misdemeanor.

Larry Otis Bendingfield, convicted of murder and kidnapping and sentenced to death when he was represented by private counsel, was so impressed that two public advocates - McNally and his then-girlfriend Robinson - won him a new trial that he insisted they defend him at retrial, though they were practically rookies, recalled their supervisor in the Department of Public Advocacy, Vince Aprile.

Aprile drove to Louisville in October 1978 to watch McNally's closing argument.

He remembers McNally telling the jury in his summation: "You probably wonder why Mr. Bendingfield wore the same suit every day. Well, it wasn't his suit, it was my suit. He doesn't have a suit. And if you take away his life, he will have nothing."

"The jurors were crying," Aprile said. "It was wonderful."

Bendingfield was convicted again but this time got the minimum sentence of 75 years in prison.

Twenty-five years later, McNally gestures toward the closet in his Frankfort law office and says he still has that suit, although, "I just can't fit it in any more."

McNally says his position on the death penalty is simple: H e is morally opposed to it for any crime - a belief he said he came by as a boy, studying to become a priest at St. Pius Preparatory Seminary in

Uniondale, N.Y.

"Going to church every day I spent a lot of time focusing on a man being executed at the altar," McNally remembered.

He changed career plans, he said, upon discovering girls and what he considers the Catholic Church's poor record on civil rights; he is no longer a practicing Catholic.

McNally said some of the clients he has counseled have been "manipulative, unattractive or plain crazy." Even so, other capital defense lawyers say he spends an extraordinary amount of time with them, which McNally says is often the key to saving their lives.

"You have to get your client to trust you enough to get them to agree to be put in a cage for their rest of their life with no hope for parole," he said. "Most of my victories are won not from juries, but in dingy meeting rooms in the bowels of prisons" - with clients who agree to plea bargains rather than taking a chance at trial, where they could be sentenced to death.

Some critics, including Aprile, say McNally and other death penalty "abolitionists" are too quick to pressure clients into taking deals that get the death penalty off the table.

McNally makes no apologies.

"I am proud to be a cop-out artist when it comes to the death penalty," he said. "It's always the client's choice, but these are people who haven't usually made the best decisions in life."

At the same time, McNally also is known as one of the first lawyers in capital cases to reach out to the families of victims, said Nancy Ruhe-Munch, executive director of the Cincinnati-based Parents of Murdered Children.

"They were initially ready to stone him," Ruhe- Munch said of her members, "but he opened a dialogue which helped reduce their trauma."

David Bruck, a lawyer from Columbia, S.C., who also serves on the Death Penalty Resource Counsel Project, said McNally's outreach sometimes has persuaded victims' families to support plea bargains that averted capital prosecutions.

At the center of federal

death-penalty cases

Portraits of Nelson Mandela and Thurgood Marshall hang on the walls of McNally's office, which is also the nerve center for the defense of federal death penalty cases in the United States.

By marshaling data on the 305 cases in which the U.S. Justice Department has sought the death penalty in federal courts since the sentence was enacted in 1988, McNally has emerged as an authority on Attorney General Ashcroft's pursuit of the federal death penalty.

Justice Department critics, including former federal prosecutor Jamie Orenstein, who advised Attorney General Janet Reno on death penalty prosecutions, say the figures compiled by McNally show that Ashcroft is "swinging at the wrong pitches" - seeking the death penalty in too many cases and not deferring to local prosecutors who know their cases best.

The Justice Department declined to respond to questions about McNally, but a spokeswoman has

said that the process through which Ashcroft reviews and approves death penalty prosecutions is designed to ensure "consistency and fairness."

Capital defense experts, however, say the government's recent poor track record in part reflects the success of McNally and the other two lawyers who are paid $110 an hour and work part time for the resource project, which was founded in 1992.

"They have made sure that people accused in federal death cases are represented by competent counsel - you don't have farcical trials where lawyers are drunk or asleep or totally incompetent," said Stephen Bright, a Danville, Ky., native who is director of the Atlanta-based Southern Center for Human Rights.

George Kendall, former counsel for the NAACP Legal Defense and Education Fund, said, "One of the reasons there are so few people on federal death row in this country" - there are 26 - "is because of Kevin's many skills and hard work."

Last year, representing an alleged heroin dealer accused of murdering a government informant, McNally won a ruling from a federal judge in New York throwing out the federal death penalty on the grounds that erroneous convictions have shown capital punishment is "tantamount to foreseeable, state-sponsored murder of innocent human beings." Although the ruling was reversed on appeal, death penalty opponents predict it may someday form the basis for the U.S. Supreme Court to abolish the death penalty.

Prosecutors and judges say McNally prevails by dint of intense trial preparation, rather than fire-and-brimstone courtroom oratory.

For example, retired Superior Court Judge Michael Dann of Phoenix, Ariz., cites pretrial legwork as one of the reasons for McNally's victory for Cruz in the Arizona death penalty case.

McNally still has a poster that Cruz gave him before his trial that quotes former Indiana University basketball coach Bobby Knight: "The will to win," it says, "is not nearly as important as the will to prepare to win."

Understanding defeats,

regrets, big victories

McNally has lost three death penalty cases at trial, although two of those defendants, including Foster, who was convicted in the Lexington murders, later won lesser sentences.

None of his own clients have been executed, although one is on Kentucky's death row - David "Little Britches" Smith of Pike County, now 55, who was convicted in 1983 of the Pike County murders of his teen age girlfriend, her daughter, the girlfriend's mother and the girlfriend's sister. McNally calls that case his most agonizing defeat.

He also says his biggest regret so far is leaving a capital defendant in the lurch in 1988, when he resigned after 12 years from the state Department of Public Advocacy, saying he was burned out after representing "the worst of the worst with no resources." McNally had agreed to represent at trial Gregory Wilson, who was charged with murder and kidnapping in Kenton County; instead Wilson ended up with two last-minute volunteers, one of whom previously had showed up for court while intoxicated and practiced out of a tavern. Wilson, who was sentenced to death, is still fighting his conviction on the grounds that he had ineffective counsel.

"I thought the system was going to come to the rescue, and it didn't," McNally said.

He said his most his most gratifying results were preserving the lives of Foster and Ice, in part because he had developed a relationship with them.

Foster's crimes were "terrible and pointless," McNally said, "but she had been physically and sexually abused by a dozen men yet was still a compassionate person and a life worth saving." In a letter to The Courier-Journal from the Kentucky Correctional Institution for Women, where she is serving life without parole, Foster said McNally's unwavering opposition to the death penalty and belief that life is "precious and valuable" dissuaded her from taking her own life and convinced her that no person is born evil.

"He saved me from homicide and suicide," she said.

Ice's case ended as tragically as it began. Once a straight-A student and church-camp counselor with no criminal record, he deteriorated in prison as he served out a 20-year sentence, growing increasingly mentally ill and delusional until he finally threatened to kill the lawyers who had saved him.

After he was released from prison, Robinson found herself forced to testify in favor of the involuntary hospitalization of the client she and McNally had fought so hard to free, and Ice was briefly committed before finally being released to the streets in another state.

"Gail's testimony broke her heart, but it had to be done," McNally said. "It was just awful."

Two top death penalty

lawyers in same family

McNally and his wife met in a criminal law class at the University of Louisville's law school. They have three sons, the youngest of whom is named for the late Supreme Court Justice William Douglas, whom McNally describes as among his heroes.

"He believed in the Constitution and in protecting the most hated in society with the same rights everybody else enjoys," McNally said.

Many lawyers say McNally is only the second-best capital defense attorney in the family; Robinson, a longtime assistant public advocate, won an acquittal last year for 22-year-old Larry Osborne, who became the first person in Kentucky on death row to be found innocent since the state reinstated the death penalty in 1976; Osborne was acquitted at a retrial ordered by the state Supreme Court.

McNally said his wife "reeks of character and credibility in front of jury and I don't think I do," although he added, "I can do the Darth Vader thing better on cross than she can."

Colleagues in the defense bar say McNally can come across as abrasive.

"He is so knowledgeable that he can be intimidating," said Lexington lawyer Russell Baldini, who added that it doesn't help that he is a "Yankee."

Pillersdorf, who describes McNally as "unquestionably committed and brilliant," said he could be overzealous in defending clients at risk of death when he ran the capital unit of the Department for Public Advocacy.

Pillersdorf, who worked for McNally, recalled one case in which Pillersdorf represented one of two defendants charged with killing a busboy at Columbia Steak House in Lexington in 1986. Pillersdorf said that when the judge ordered him and the other defendant's lawyer not to consult with each other on juror challenges, "I told Kevin and he said, 'Defy the order! They are trying to kill your client.'

"I wouldn't do that," Pillersdorf said.

McNally said he didn't recall making that recommendation and that it doesn't sound like something he would urge.

But he said "death is different" and that death penalty defense lawyers can't worry about offending others or embarrassing themselves.

"To get an acquittal, somebody has to be lying," he said. "And if you're embarrassed to say that in the courtroom, you better get another

McNALLY'S CASES

Here are highlights of some of Frankfort lawyer Kevin McNally's cases:

U.S. vs. Mims, 2003. Won acquittal of Kentucky State University Professor Steve Mims, who was charged with aiding and abetting illegal shipments of paddlefish caviar. Mims, who faced up to five years in prison and a $250,000 fine if convicted, was acquitted by a federal jury in Owensboro that deliberated less than an hour.

U.S. vs. Swango, 2001. Co-counsel for Dr. Michael Swango, a serial killer who may have murdered up to 35 patients in the U.S. and Africa, according to James Stewart's "Blind Eye: The Story of a Doctor who Got Away with Murder." Helped negotiate plea agreement in federal court on Long Island that spared Swango the death penalty - and extradition for prosecution in Zimbabwe - in exchange for his sentence to life without parole for killing three patients at a Veterans Affairs hospital. McNally also helped negotiate a plea for Swango on a state murder charge in Columbus, Ohio.

U.S. vs. Stewart, 2001. Won a ruling from U.S. District Judge Joseph H. McKinley Jr. of Owensboro that prosecutors waited too long to seek the death penalty against Charles L. Stewart, the alleged mastermind behind a murder-for-hire scheme. Several other federal capital prosecutions have since been blocked on the same grounds. Stewart was later convicted and sentenced to life for kidnapping, bank fraud and conspiring to commit the murder for hire of two men.

U.S. vs. Benton, 1997. With London lawyer Warren Scoville, won acquittal of former Kentucky State University student Gary Benton, who was accused of abducting three people from a Wal-Mart parking lot and executing one of them. The government claimed Benton stole the victim's car to drive home to St. Louis for the holidays.

Buchanan vs. Kentucky, 1987. Lost case in which U.S. Supreme Court held that a defendant not facing death penalty may be tried by a jury that has agreed to consider a death sentence for a co-defendant. Represented David Buchanan, who was convicted of murder of gas-station attendant Baerbel Poore and sentenced to life; co-defendant Kevin Stanford was sentenced to death.

Carter vs. Kentucky, 1981. Won U.S. Supreme Court ruling that juries must be instructed

in every criminal case that the defendant isn't compelled to testify and their refusal to do so can't be used to infer guilt. Represented Lonnie Joe Carter, who was convicted of burglary of a Hopkinsville hardware store.

Caption: BY MARY ANN GERTH, THE COURIER-JOURNAL

"You can't think about what your client did when you talk to somebody like Tim McVeigh," Kevin McNally, a top death-penalty lawyer, said.

Caption: Swango

Caption: Stewart

Caption: photos BY MARY ANN GERTH, THE COURIER-JOURNAL

Bobby Cruz of Arizona, one of Kevin McNally's clients, gave him this sign with a quote from former Indiana University basketball coach Bobby Knight.

Caption: McNally prepares rigorously for his capital trials. Some of his books in the foreground, in his Frankfort office, concern death-penalty issues.

Details

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Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake

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NEITHER EQUAL NOR JUST:
THE RATIONING AND DENIAL OF LEGAL SERVICES TO THE POOR WHEN LIFE AND LIBERTY ARE AT STAKE

By Stephen B. Bright*

New York University School of Law *Annual Survey of American Law*
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[Footnotes appear at the end of the document]

The ration of legal services for the poor person accused of a crime has been remarkably thin in most of the United States. Despite the constitutional right to counsel established over thirty-five years ago in *Gideon v. Wainwright*,[1] many states have yet to provide capable lawyers to represent the accused, and the resources necessary to conduct investigations and present a defense. A poor person may be without counsel when bail is set or denied, and during critical times for pretrial investigation. He or she may receive only perfunctory representation--sometimes nothing more than hurried conversations with a court-appointed lawyer outside the courtroom or even in open court-- before entering a guilty plea or going to trial. The poor person who is wrongfully convicted may face years in prison, or even execution, without any legal assistance to pursue avenues of post-conviction review. While in prison, he or she may endure practices and conditions which violate the Constitution, but have no access to a lawyer to seek remedies for those violations.

In contrast, the person with adequate resources may secure a lawyer who will make a case for and perhaps obtain release on bail, work closely with the client in conducting an immediate and thorough investigation, present a vigorous defense at trial, pursue all available avenues of post-conviction relief, and challenge any constitutional violations that occur in prison. Attorney General Janet Reno recently observed that if justice is available only to those who can pay for a lawyer, "that's not justice, and that does not give people confidence in the justice system."[2] Yet little is being done to remedy this denial of equal justice. Indeed, the situation is deteriorating in many parts of the country.

This article examines the availability and quality of legal services for poor persons accused of crimes at each stage of the criminal justice process--from arrest through trial, appeal, and post-conviction proceedings--and for those convicted of crimes, who languish in prisons and jails in need of access to the courts for protection of their constitutional rights. It will discuss the indifference to injustice on the part of judges, lawyers, legislators, and a public that allows a country with over a million lawyers to leave many of those most in need of legal assistance without counsel at all, and too often with grossly inadequate counsel when any is provided. Finally, it discusses the need for law schools and the legal profession to respond to these grave deficiencies in the system of justice and see that we do not give up on the unfulfilled quest for equal justice.

violation of the Constitution. Smith's lawyers were not aware that underrepresentation of women in the jury pools violated the Sixth Amendment's guarantee that juries be composed of a fair cross section of the population.[58] The lawyers for Smith's codefendant, tried separately in the same county, were aware of the law, raised the issue, and won a new trial.[59] At the new trial, a jury which fairly represented the community sentenced that codefendant to life imprisonment.[60] The federal courts refused to consider the identical issue in Smith's case[61] because his lawyers, unaware of the law, had not preserved it.[62] A switch of the lawyers for the two defendants would have resulted in Smith having his conviction overturned and the codefendant being executed.

While defendants may pay with their lives or liberty for the ineptness of the lawyers assigned to defend them, the lawyers are seldom sanctioned. To the contrary, judges, perhaps resigned to the fact that capable lawyers will not defend cases for the small amounts paid, continue to assign the same lawyers to represent other indigent defendants.

3. The Most Fundamental Right, Unenforceable

The right to counsel is clearly the most fundamental constitutional right for a poor person charged with a crime. An attorney is needed to protect the client's rights and marshal the evidence necessary for a fair and reliable determination of guilt or innocence and, if guilty, a proper sentence. But who enforces the right to counsel?

The lawyer who submits the lowest bid for a county's indigent defense business is not necessarily capable of defending criminal cases. However, the indigent defendant represented by an incapable lawyer may not even know that he or she has a right to something better than the lowest bidder, the lawyer who hurries through cases like "greased lightening," or a lawyer so undercompensated, so overworked, or so incompetent that adequate representation is impossible. Even those who recognize that their lawyers are inadequate may not complain, out of fear that the quality of the representation will deteriorate even further if they offend their lawyers by voicing a complaint, but the judge does not replace the lawyer. There is the equally valid fear that the next lawyer appointed by the same judge may be even worse.

The difficulty of enforcing the right to counsel is illustrated by the plight of, Gregory Wilson, an African-American man who faced the death penalty in Covington, Kentucky. Wilson had no counsel because the state public defender program would not handle the case and the local indigent defense program could not find a lawyer because compensation for defense counsel in capital cases at that time was limited by statute to $2500.[63]

When the head of the local indigent defense program urged the judge to order compensation beyond the statutory limit in order to secure a lawyer qualified for such a serious case, the judge refused and suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio river to raise money for the defense.[64] The judge eventually obtained counsel by posting a letter in the courthouse asking any member of the bar to take the case with the plea "PLEASE HELP.

DESPERATE."[65] The notice said nothing about qualifications to handle a capital case. The judge appointed three lawyers who responded, but one later withdrew.[66]

Not surprisingly, this method of selecting counsel did not produce a "dream team." The lead counsel, William Hagedorn, can charitably be described as well past his prime. He did not have an office or support staff, but practiced out of his home, where a large flashing Budweiser beer sign was prominently displayed.[67] He had never previously handled a death penalty case.[68] The other lawyer who responded to the judge's plea for help had never before handled a felony case.[69] That lawyer found that Hagedorn "manifested all the signs of a burned-out alcoholic. . . . [H]e would ramble and digress. At times he appeared disoriented. He did not make sense. . . . He seemed incapable of having any meaningful discussion about the case."[70] The attorney who administered the county's indigent defense system strongly objected to the appointments, saying that they were "unworkable" and the two lawyers could not provide "the quality of representation that is needed in this the most serious of all cases."[71]

Wilson became concerned. Almost any consumer of legal services, even one who wanted a lawyer only to prepare a will or an uncontested divorce, would be concerned if he or she found that one lawyer who was to provide those services did not have a law office and had never provided the services before.

Wilson became even more concerned upon learning that the police had recently executed a search warrant and recovered stolen property in garbage bags from beneath Hagedorn's floor;[72] that Hagedorn had engaged in unethical conduct, including forging a client's name to a check;[73] and that Hagedorn was a "heavy drinker," who had appeared in court drunk on occasion, and was consistently to be found at a bar known as "Kelly's Keg." Mr. Hagedorn had even given the name and telephone number of Kelly's Keg as his business address and telephone number.[74] It is hard to fault Wilson for his concern. Most people would be reluctant to trust even a minor legal matter to such a lawyer.

But, unlike those with resources, Wilson could not afford another lawyer. Wilson repeatedly objected to being represented by the lawyers appointed by the court.[75] He asked the judge that he be provided with a lawyer who was capable of defending a capital case.[76] The judge refused and proceeded to conduct a trial that was a travesty of justice. Hagedorn was not even present for parts of the trial.[77] He cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom.[78] Wilson was sentenced to death.

What more could Gregory Wilson have done to enforce his Sixth Amendment right to counsel? He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending a capital case. He asked for a real lawyer. Even these efforts were insufficient to enforce the right to counsel. On direct appeal, the Kentucky Supreme Court attributed Hagedorn's performance to Wilson's supposed lack of cooperation.[79]

In theory, the right to counsel can be protected after trial by the defendant's assertion of a claim of ineffective assistance. The Catch-22 for most poor people, however, is that they need a

lawyer to litigate this claim in post-conviction proceedings, but the Supreme Court has held that there is no right to a lawyer at that stage of the process.[80] Even if the state provides a lawyer to raise a claim of ineffectiveness, there is no guarantee that the new lawyer will be any more competent than trial counsel.

A few states provide inmates with representation in post-conviction proceedings even though this practice is not constitutionally required. Public interest programs and volunteer lawyers provide representation to inmates facing the death penalty in some states. But most poor people convicted of crimes who are not faced with a death sentence, and even some who are, lack any access to lawyers to file post-conviction petitions challenging the effectiveness of the representation they received. For them, there is simply no remedy for the denial of their most fundamental right.

B. The Lack of Legal Assistance to Challenge Convictions in Post-Conviction Proceedings

The rations of legal services run out altogether in many states after one appeal. Post-conviction proceedings -- habeas corpus review -- in the state and federal courts have historically provided an important means of reviewing constitutional claims.[81] The Supreme Court, however, has held that the state is not required to provide counsel to poor people in post-conviction proceedings,[82] and many states do not. In fact, the Supreme Court concluded in *Murray v. Giarratano* that the states are not required to provide counsel even in capital cases.[83] It upheld Virginia's refusal to provide a lawyer for condemned defendants, saying: "Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys to capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated in collateral attack."[84]

The Court was apparently unaware that Virginia had decided not to concentrate its resources at either end of the criminal justice system, but instead on highways, parks, and other functions. It was only in the mid-1980s that Virginia removed a limit of $600 per case for lawyers defending capital cases, the lowest in the nation, and placed the establishment of the fee within the discretion of the trial judge.[85] Even after this change, the average payment to court-appointed lawyers in capital cases in Virginia in 1985 was only $784.56 per case.[86] The Supreme Court has trusted the states to assure legal assistance for the poor, but many states, like Virginia, have betrayed that trust.

The Supreme Court has held that inmates may have access to law libraries instead of counsel to prepare their own post-conviction pleadings or challenges to conditions.[87] However, the Court gave state legislators and prison administrators "wide discretion" in fulfilling this constitutional mandate.[88] As previously discussed, state legislators have repeatedly breached the trust the Court has placed in them. Prison officials, who may be the targets of suits brought by inmates, have little incentive to provide access to libraries or other legal assistance.

For example, Georgia's Commissioner of Corrections cut off funding in 1996 to a program at the University of Georgia School of Law, which employed fourteen attorneys to work with law

under-representation of women contrary to *Duren v. Missouri*, 439 U.S. 357 (1979), and *Taylor v Louisiana*, 419 U.S. 522 (1975)).

60. *See* Smith, 715 F.2d at 1476 (Hatchett, J., concurring in part and dissenting in part).

61. *See id.* at 1469 (because Smith and his codefendant were tried within a few weeks of each other in the same county, their juries were drawn from the same unconstitutional jury pool).

62. *See id.* at 1469-72; *see also id.* at 1476 (Hatchett, J., concurring in part and dissenting in part).

63. *See* KY. REV. STAT. ANN. § 31.170(4) (Michie 1985).

64. See Transcript of July 5, 1988 Hearing, at 15, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

65. American Bar Ass'n, *supra* note 55, at 76-77 n.196.

66. *See* Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992).

67. *See* Affidavit of Robert Carran on inspection of William Hagedorn's office, Aug. 24, 1988, Record at 580-81 (Vol. 4), Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.)

68. *See id.* at 580.

69. *See* Transcript of July 5, 1988 Hearing at 18-20, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

70. Affidavit of John W. Foote, Feb. 3, 1997, at 4, P 7, Wilson v. Commonwealth, No. 87-CR-166 (Kenton Cir. Ct., Ky.) [hereinafter Foote Affidavit] (filed as Defendant's Exhibit 1 in post-conviction proceedings).

71. *See* Transcript of July 5, 1988 Hearing at 19, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

72. *See* Affidavit of Robert Carran on recovery of stolen property, Aug. 24, 1988, Record at 565-68 (vol. 4), Commonwealth v. Wilson, No. 87-CR- 166 (Kenton Cir. Ct., Ky.).

73. *See id.* at 574-75.

74. *See id.*

75. *See* Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992) (noting that "[a]t many

points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson's words, 'unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience'").

76. See id. at 883 (quoting transcript in which Wilson asks for "competent counsel"); *see also id.* at 884 (noting Wilson's "insistence that the court appoint him an attorney who met Wilson's specifications as a death penalty expert").

77. *See* Foote Affidavit, *supra* note 70, at 6, 10 ("There were times during the trial when Hagedorn was not even present.").

78. *See* Transcript of Evidence and Proceedings at 204-08, (Vol. 2), Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky. filed June 28, 1989) (cross-examination of Dr. Dean Hawley by Mr. Alerding).

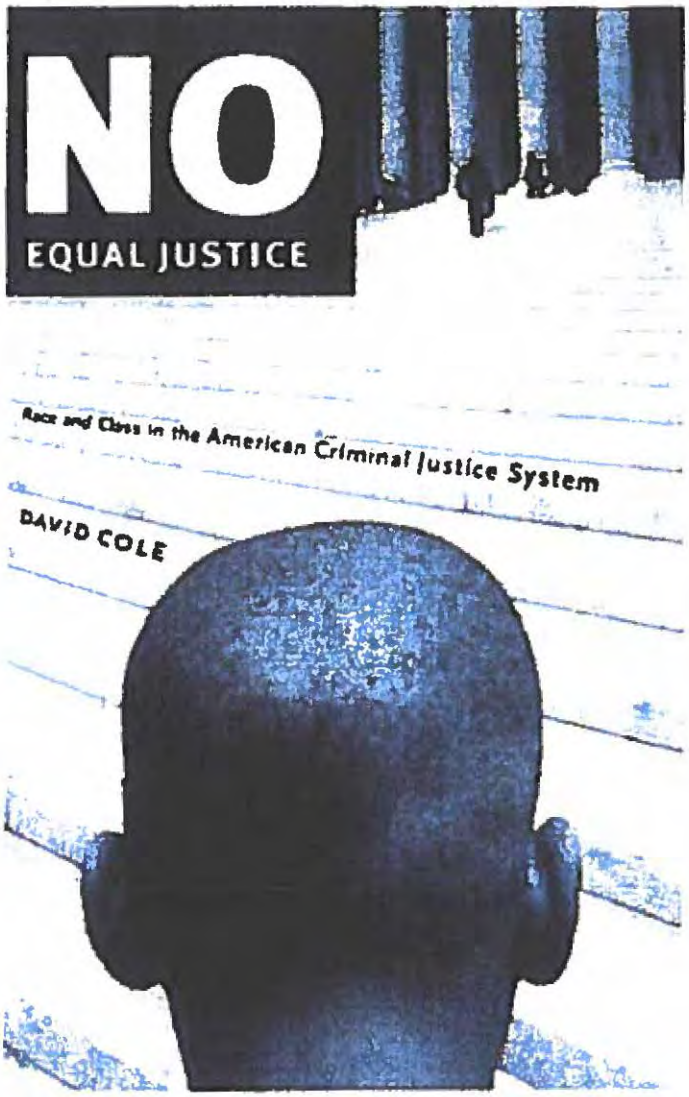
79. *See* Wilson, 836 S.W.2d at 879.

80. *See* Murray v. Giarratano 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987); *see also infra* notes 82-83, 87-88, 93-150 and accompanying text.

81. *See* Fay v. Noia, 372 U.S. 391, 394-426 (1963) (describing the history and role of habeas corpus); Smith v. Bennett, 365 U.S. 703, 712-13 (1961) (describing the writ of habeas corpus as the common law world's "freedom writ" and, quoting Bowen v. Johnson, 306 U.S. 19, 26 (1939), saying "there is no higher duty than to maintain it unimpaired"); Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

82. In *Ross v. Moffitt*, 417 U.S. 600 (1974), the Supreme Court refused to extend the right to counsel to discretionary appeals after an initial appeal. In *Finley*, 481 U.S. at 551, the Court ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the state to provide counsel for indigent prisoners seeking state post-conviction relief.

83. 492 U.S. at 10. The Mississippi Supreme Court has held that those condemned do die have a constitutional right to counsel in state post- conviction proceedings. See Jackson v. State, 1999 WL 33904 (Miss. Jan. 28, 1999). However, other courts have held that there is no exception to Murray v. Giarratano for inmates who have no source of representation and have their first opportunity to present certain claims in state post-conviction review. *See* Gibson v. Turpin, 1999 WL 79655 (Ga. Feb. 22, 1999) (denying Gibson's application for certificate of probable cause to appeal); Mackall v. Angelone, 131 F.3d 442, 449 n.13 (4th Cir. 1997). With the comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(4)(B), as amended, 21 U.S.C. § 848(q)(4)(B) (West 1998), Congress created a statutory right to counsel in *federal* habeas corpus proceedings for prisoners sentenced to death. *See* McFarland v. Scott, 512 U.S. 849, 849 (1994). However, counsel's



No Equal Justice

Race and Class in the American Criminal Justice System

David Cole

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mance and prejudice. On the issue of deficient performance, the Court stressed that reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and mandated a "highly deferential" standard. Insisting that the Sixth Amendment was not designed to "improve the quality of legal representation," the Court held that a defendant must show that his attorney's performance was "outside the wide range of professionally competent assistance."

Even if a defendant is able to defeat the strong presumption that his lawyer was competent, he must also show he suffered prejudice, which the Court defined in *Strickland* as a "reasonable probability that the result would have been different." Ordinarily, where a defendant shows that a constitutional violation occurred, the burden shifts to the government to prove that the error was "harmless beyond a reasonable doubt." For ineffectiveness claims, however, the Court placed the burden on the defendant to show both that his attorney performed deficiently, and that the deficiency probably affected the outcome. Who should shoulder the burden of proof is no technical matter. Indeed, where the burden lies will often be determinative when the question is the necessarily speculative one of whether an error, often an omission, affected the result of a trial.

The *Strickland* standard has proved virtually impossible to meet. Courts have declined to find ineffective

assistance where defense counsel slept during portions of the trial,[40] where counsel used heroin and cocaine throughout the trial,[41] where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime,[42] where counsel stated prior to trial that he was not prepared on the law or facts of the case, [43] and where counsel appointed in a capital case could not name a single Supreme Court decision on the death penalty.[44] In one case, a capital murder defendant's attorney was found effective even though he "consumed large amounts of alcohol each day of the trial ... drank in the morning, during court recess, and throughout the evening ... [and] was arrested [during jury selection] for driving to the courthouse with a .27 blood-alcohol content."[45]

evening ... [and] was arrested [during jury selection] for driving to the courthouse with a .27 blood-alcohol content."[45]

Consider Gregory Wilson, on death row in Kentucky. Kentucky pays so little to lawyers defending indigents in capital punishment cases that the judge responsible for appointing a lawyer for Wilson hung a notice on the courthouse door that read, in capital letters, "PLEASE HELP—DESPERATE."[46] Local lawyer William Hagedorn responded. Wilson might well have been better off without him. Hagedorn had never tried a death penalty case before. He had no office, and only a few out-of-date law books. He worked out of a room in his house that prominently featured a lighted "Budweiser" sign. A prosecution witness described Hagedorn as "a well-known drunk." Hage-

dorn filed only one pretrial motion, made no closing argument, didn't interview any of the other side's witnesses, and hired no experts. During the most crucial testimony in the case—that of the pathologist—Hagedorn wasn't even in the courtroom. Yet to date the courts have found Hagedorn's representation "effective."

How do courts ratify such woefully deficient representation? In *Strickland,* the Supreme Court stressed that attorneys must have wide leeway to make "tactical" decisions, and that the ineffectiveness test should not be an occasion for second-guessing such judgments. As *Strickland* itself illustrated, however, almost any deficiency in performance can in hindsight be described as "tactical"; Strickland's attorney justified his failure to investi-

trated, however, almost any deficiency in performance can in hindsight be described as "tactical"; Strickland's attorney justified his failure to investigate Strickland's background thoroughly as a strategic decision not to invite negative counter-evidence from the state. In another case, the defendant's lawyer made no opening statement to the jury, and did not object when the prosecutor introduced evidence of the defendant's prior criminal convictions, which are generally inadmissible. Although the attorney was suffering from Alzheimer's disease during the trial, the court held that these lapses were not ineffective assistance, but "tactical decisions."[47] As one court has explained, "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that

no reasonable lawyer, in the circumstances, would have done so."[48]

Courts also routinely deny ineffectiveness claims by finding that the defendant failed to demonstrate "prejudice." Assessing the damage that an incompetent attorney has done is extremely difficult, because the damage often will not show up on a cold record. The consequences of an attorney's failure to pursue a line of investigation, argument, or cross-examination are by definition speculative. And as capital defense attorney Stephen Bright has argued, the difference a good lawyer makes often shows up in such things as rapport with a defendant's family and witnesses, negotiating skills that may bring a favorable plea agreement, skilled judgments about prospective jurors, and pursuit of investigative leads—none of which will be apparent from the trial record.[49] It is particularly difficult to demonstrate prejudice where juries apply open-ended standards, as they do when they balance "mitigating" against "aggravating" evidence in deciding whether to impose a death sentence. How is a court to determine whether the jury might have struck a different balance if the attorney had introduced a particular piece of mitigating evidence? As Justice Alan Handler of the New Jersey Supreme Court has noted, "as a judgment becomes more subjective, the task of assessing the extent to which that judgment might have been influenced by more competent representation becomes more difficult."[50] Courts routinely reject ineffectiveness

THE SECOND GRAVE

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A Case for the Abolition of the Death Penalty

Carl Wedekind

Published by
THE KENTUCKY COALITION TO
ABOLISH THE DEATH PENALTY

3. Discrimination in capital sentencing.

4. Execution of the mentally retarded, and persons who were minors at the time of their offense.

Do these problems exist in the Kentucky experience to warrant our concern? Let's look at some of the men currently on death row in Kentucky and see what we find.[7]

Gregory Wilson, a black man, and a co-defendant white woman were charged with murder, kidnapping, rape and robbery in Kenton County. Wilson's co-defendant employed an attorney, but Wilson, who had no funds, was unable to secure counsel. Just a few weeks before his scheduled trial, the judge posted a notice on the courtroom door "desperately" seeking a lawyer to represent Wilson.

Two local attorneys, neither of whom had ever before handled a death penalty case, responded to the plea. The one who became lead attorney, responsible for the handling of the case, was said to be a heavy drinker and had no established office from which to practice. He gave a bar known as "Kelly's Keg" as his business address and telephone number.

The two volunteers made little or no pre-trial investigation or preparation for the trial. No defense witnesses were called for Wilson and no mitigating evidence was presented on his behalf during the penalty phase. The record on appeal shows there was evidence to present, including a statement of the co-defendant white woman admitting that she inflicted the fatal injury. But the jury heard none of this, only the prosecutor's side, and the jury recommended the death penalty. The attorney for Wilson's co-defendant did present evidence in her defense, and the jury recommended a life sentence for her. Wilson was selected to die. His co-defendant got a life sentence.

Roger Epperson was charged with being an accomplice

7 The facts of the cases discussed in this section are obtained from the archives of the Kentucky Department of Public Advocacy

Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Kentucky Death Penalty Assessment Report

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

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

December 2011

AMERICAN BAR ASSOCIATION

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EXECUTIVE SUMMARY

I. INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments, conducts analyses of governmental and judicial responses to death penalty administration issues, publishes periodic reports, encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions, convenes conferences to discuss issues relevant to the death penalty, and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and minimize the risk of executing the innocent. It undertook assessments examining the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee and released reports on these states' capital punishment systems from 2006 through 2007. A summary report was also published in 2007 in which the findings of the eight reports completed to date were compiled. Due in large part to the success of the state assessments produced in the eight jurisdictions described above, the Project began a second round of assessments in late 2009. In addition to this report on Kentucky, the Project also plans to release reports in, at a minimum, Missouri, Texas, and Virginia.

The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. Past state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for new legislative and court rule changes on the administration of the death penalty, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of their state's death penalty system.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments in 2006: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, (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) mental retardation and mental illness.

The findings of each assessment team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations, impose reforms, or in some cases, impose moratoria. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Kentucky Death Penalty Assessment Team. The body of this Report sets out these findings and proposals in more detail, followed by an Appendix. The Project and the Kentucky Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Kentucky death penalty. The Project would appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

II. HIGHLIGHTS OF THE REPORT

A. Overview of the Kentucky Death Penalty Assessment Team's Work and Views

To assess fairness and accuracy in Kentucky's death penalty system, the Kentucky Death Penalty Assessment Team[1] researched the twelve issues that the ABA identified as central to the analysis of the fairness and accuracy of a state's capital punishment system. The Kentucky Death Penalty Assessment Report devotes a chapter to each of the following areas: (1) overview of the Commonwealth's death penalty; (2) collection, preservation, and testing of DNA and other types of evidence; (3) law enforcement identifications and interrogations; (4) crime laboratories and medical examiner offices; (5) prosecutorial professionalism; (6) defense services; (7) the direct appeal process; (8) state post-conviction proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.[2] Chapters begin with an introduction to provide a national perspective of the issues addressed by each chapter, followed by a "Factual Discussion" of the relevant laws and practices in Kentucky. The final section of each chapter, entitled "Analysis," examines the extent to which Kentucky is in compliance with the ABA Protocols.

While members of the Kentucky Assessment Team have varying perspectives about the death penalty and the weight to be afforded to individual ABA Protocols contained in this Report, all Assessment Team members agreed to use the ABA Protocols as a framework through which to examine the death penalty in Kentucky.

It is the Assessment Team's unanimous view that, as long as Kentucky imposes the death penalty, it must be reserved for the worst offenders and offenses, ensure heightened due process, and minimize risk of executing the innocent. To this end, Kentucky has made substantial strides in several areas, including creation of a statewide public defender responsible for representing the Commonwealth's indigent capital defendants and death row inmates. Kentucky also has sought to minimize risk of executing the innocent by adoption of a post-conviction DNA testing statute, which permits a death row inmate to request testing at any time prior to execution. Finally, Kentucky was the first state in the nation to adopt a Racial Justice Act, recognizing both the historical unfairness in the application of the death penalty and a commitment to eliminating racial and ethnic bias in the application of the death penalty in the Commonwealth.

The Assessment Team has concluded, however, that Kentucky fails to comply or only is in partial compliance with many of the Protocols contained in this Report, and that many of these shortcomings are substantial. The Team, therefore, unanimously agrees to endorse key proposals that address these shortcomings. The next section highlights some of the most important findings of the Team and is followed by a summary of its recommendations and observations.

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[1] The membership of the Kentucky Death Penalty Assessment Team is included *infra* on page 3 of the Kentucky Death Penalty Assessment Report.

[2] This report is not intended to cover all aspects of a state's capital punishment system, and, as a result, it does not address a number of important issues, such as the treatment of death row inmates while incarcerated or method of execution.

B. Major Areas for Reform

The Kentucky Death Penalty Assessment Team has identified a number of areas in which Kentucky's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures and minimize the risk of executing the innocent. While we have identified a series of individual problems within Kentucky's death penalty system, which standing alone may not appear to be significant, we caution that their harms are cumulative. The capital system has many interconnected parts; problems in one area may undermine sound procedures in others. With this in mind, the Kentucky Death Penalty Assessment Team unanimously agrees that the following areas are most in the need of reform:

Inadequate Protections to Guard Against Wrongful Convictions (Chapters 2, 3, 4). Kentucky laws and procedures do not sufficiently protect the innocent, convict the guilty, and ensure the fair and efficient enforcement of criminal law in death penalty cases.

- Evidence in criminal cases, including capital cases, is not required to be retained for as long as the defendant remains incarcerated, despite the possibility of wrongful conviction. Kentucky law and practice also permits destruction of evidence in a variety of instances, including, in some cases, when the perpetrator remains at large (Chapter 2).
- While the Commonwealth's post-conviction DNA testing statute permits post-trial testing of biological evidence prior to execution under some circumstances, the problem of lost evidence significantly diminishes the utility of the statute. Death row inmates who are otherwise eligible for testing under the statute have been denied a motion for relief because evidence in their case is missing. Inmates also are required to comply with stringent pleading requirements before any testing is granted. Courts must order testing in only limited circumstances and can deny a death row inmate's request for testing even when the results may be exculpatory (Chapter 2).
- While there are over 400 law enforcement agencies in Kentucky, some of the Commonwealth's largest law enforcement agencies have no policies that are consistent with the *ABA Best Practices* on eyewitness identifications and interrogations. In those agencies that have adopted policies, the policies are not uniformly enforced. Full video- or audio-recording of the entirety of custodial interrogations occurs in only a few of Kentucky's law enforcement agencies, even though such a policy helps ensure that innocent parties are not held responsible for crimes they did not commit and also significantly conserves scarce law enforcement and judicial resources (Chapter 3).
- Three of the six locations of the Kentucky State Police Forensic Laboratory (KSP Laboratory) and one office of the statewide Medical Examiner (MEO) have voluntarily obtained national accreditation. However, Kentucky does not require the accreditation of its forensic laboratories, MEO, or any of the 120 county coroner offices. Other KSP Laboratory branches or smaller law enforcement agencies conducting limited forensics are not accredited by any national accrediting body. Kentucky also funds its medical examiner and county coroner systems at levels far below the national average. Testing backlogs persist at KSP Laboratory causing delays in all criminal cases. Finally, KSP Laboratory's continued affiliation with law enforcement requires the laboratory to compete with other KSP divisions for a portion of the State Police's fixed budget and causes non-law enforcement entities, like the Department of Public Advocacy and its Innocence Project, to seek biological testing out-of-state (Chapter 4).

Inconsistent and Disproportionate Capital Charging and Sentencing (Chapter 5).[3] With fifty-seven Commonwealth's Attorneys offices in Kentucky, there are conceivably fifty-seven different approaches to the decision to seek capital punishment. In some instances, it appears that the Commonwealth's Attorney will charge every death-eligible case as a capital case. While the vast majority of Commonwealth's Attorneys may seek to exercise discretion in death penalty cases to support the fair, efficient, and effective enforcement of law, there is no mechanism in place to guide prosecutors in their charging decisions to support the even-handed, non-discriminatory application of the death penalty across the Commonwealth.

Deficiencies in the Capital Defender System (Chapter 6). All Kentucky public defenders handling capital cases retain caseloads that far exceed national averages and recommended maximum caseloads. In some cases, Kentucky public defenders provide capital representation while carrying caseloads of over 400 non-capital cases each year. Support staff members, including investigators and mitigation specialists, are routinely overworked and underpaid, carrying caseloads ranging from twelve to twenty-five capital cases at any given time. A 2011 study found that Kentucky public defenders who handle death penalty cases make 31% less than similarly-experienced attorneys in surrounding states constituting the lowest average salaries of examined jurisdictions. Furthermore, the hourly rates and maximum caps on compensation available for contract counsel in death penalty cases are inadequate to ensure high quality legal representation and are far below the rates available to attorneys performing contractual work for the Commonwealth on civil matters. Low wages and compensation caps also may deter individuals with the necessary qualifications from undertaking the demanding responsibilities and complex nature of a death penalty case.

Furthermore, at least ten of the seventy-eight people sentenced to death since 1976 were represented by defense counsel who were subsequently disbarred. While Kentucky's public defender agencies seek to enforce internal standards governing the proper provision of counsel in all death penalty cases assigned to their agencies, Kentucky has not adopted any statewide standards governing the qualifications and training of attorneys appointed to handle capital cases at trial, on appeal, and during post-conviction proceedings. With only self-enforcement of internal agency guidelines and without certification of all lawyers who undertake capital representation, a real risk exists that capital defendants and death row inmates will be represented by lawyers unqualified to handle the complexities and gravity of a capital case.

Inadequacies in Post-Conviction Review (Chapters 8, 13). Kentucky rules and practices may impair adequate development and judicial consideration of death row inmates' claims of constitutional error. When an execution date is set prior to the expiration of the three-year statute of limitations imposed for filing a post-conviction petition, it has the effect of significantly curtailing the time that a death row inmate has to prepare and file his/her petition for post-conviction relief. Inmates *not* under a death sentence do not face a similar time constraint. Kentucky also does not authorize discovery in state post-conviction proceedings and prohibits inmates from using the Kentucky Open Records Act to obtain materials possessed by law enforcement that may be essential for establishing a death row inmate's constitutional claims. The lack of discovery during post-conviction review makes it all the more likely that

[3] *See infra* page vii on Kentucky agencies' and entities' participation in the Assessment process.

death row inmates will be unable to develop viable claims of constitutional error in light of the truncated time period in which they must prepare their petitions. Furthermore, Kentucky post-conviction courts typically do not authorize any funding for mental health experts to assist potentially mentally retarded death row inmates to accurately determine and prove their mental capacities.

Capital Juror Confusion (Chapter 10). Kentucky capital jurors are not always given adequate guidance while undertaking the "awesome responsibility" of deciding whether another person will live or die. A disturbingly high percentage of Kentucky capital jurors who were interviewed by the Capital Jury Project failed to understand the guidelines for considering aggravating and mitigating evidence. For example, 45.9% of jurors failed to understand that they could consider mitigating evidence at sentencing, 61.8% failed to understand that they need not find mitigation "beyond reasonable doubt," and 83.5% of jurors did not understand that they need not have been unanimous on findings of mitigation. Furthermore, due to confusion on the meaning of available alternative sentences, Kentucky jurors may opt to recommend a sentence of death when they otherwise would not.

Imposition of a Death Sentence on People with Mental Retardation or Severe Mental Disability (Chapter 13). While the Commonwealth prohibited the execution of people with mental retardation in 1990, Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant or death row inmate with mental retardation. Kentucky's statutory definition of mental retardation creates a bright-line maximum IQ of seventy, which fails to comport with the modern scientific understanding of mental retardation. Furthermore, Kentucky courts may require that a capital defendant have been IQ-tested prior to the age of eighteen, which often places an unattainable burden on the offender since such individuals have rarely taken standardized assessments of intelligence or adaptive behavior functioning before adulthood. Finally, Kentucky's procedural rules could permit a death row inmate who is mentally retarded to be executed when the inmate failed to effectively raise the issue of his/her mental retardation before trial.

However, Kentucky does *not* prohibit execution of offenders with mental disabilities similar to mental retardation, such as dementia or traumatic brain injury, but which manifest after the age of eighteen. Kentucky also does not prohibit imposition of a death sentence or execution of an individual who, at the time of his/her offense, had a severe mental illness, disorder, or disability that significantly impaired his/her capacity to appreciate the nature, consequences or wrongfulness of his/her conduct, to exercise rational judgment in relation to conduct, or to conform his/her conduct to the requirements of the law.

Lack of Data. Finally, there were also many issues regarding use of the death penalty in Kentucky that the Assessment Team attempted to evaluate, but was unable to obtain sufficient information to do so. The Assessment Team has encountered a great deal of difficulty in obtaining data on all death-eligible cases in the Commonwealth, including those in which the death penalty was sought, but not imposed, and those in which the death penalty could have been sought, but was not. The lack of data collection and reporting on the overall use of capital punishment renders it impossible for the Commonwealth to guarantee that such a system is operating fairly, effectively, and efficiently. Specifically,

- The Kentucky Supreme Court cannot engage in meaningful proportionality review to determine if a death sentence is proportionate in comparison to similar cases and offenders. It does not appear that the relevant data on capital charging practices has been maintained to permit the Court to undertake a searching proportionality review. A thorough review requires the Court to consider cases in which a death sentence could have been imposed, but was not, or cases in which a death sentence could have been sought, but was not. The universe of cases currently examined by the Court during proportionality review is too limited for it to ensure that Kentucky's death penalty is administered in a fully rational, non-arbitrary manner (Chapter 7).
- Kentucky cannot determine what effect, if any, its Racial Justice Act (KRJA) has had on ameliorating racial discrimination in capital cases. While the Assessment Team applauds the work that has been conducted by various Commonwealth entities investigating racial discrimination within the criminal justice system, the KRJA appears to have a number of restrictions limiting its effectiveness at identifying and remedying racial discrimination in the administration of the death penalty. Without a statewide entity that collects data on all death-eligible cases in the Commonwealth, Kentucky cannot determine the extent of racial or geographic bias in its capital system (Chapter 12).

Finally, in order to complete the Kentucky Assessment Report, the Assessment Team sought information from various Kentucky state agencies and entities. Information obtained from the Office of the Governor, the Kentucky Court of Justice, Kentucky law enforcement, the state crime laboratory and medical examiner's offices, public defenders, and many others greatly aided us in the preparation of the Report. However, we sought, but were unable to obtain, information from Commonwealth prosecutors regarding their role in the administration of the death penalty. This lack of involvement is troubling given that prosecutors are the cornerstone of the death penalty system. Prosecutors possess broad discretion to decide what crime to charge, whether to seek the death penalty, and whether to negotiate and accept a plea agreement. The Assessment Team was able to obtain little information on Kentucky prosecutors' approaches to the decision to seek the death penalty, how each office ensures compliance with discovery obligations to protect against conviction of the innocent, and whether and how each office disciplines prosecutors who engage in misconduct—particularly in serious cases where the defendant could be executed. Commonwealth's Attorney offices also may face many of the same resource constraints experienced by other statewide entities. However, we were unable to obtain from prosecutors information on their budgets, training, or compensation.

C. Kentucky Death Penalty Assessment Team Recommendations

As noted above, each chapter of this Report includes several ABA Recommendations or "Protocols," which the Kentucky Death Penalty Assessment Team used as a framework to analyze Kentucky's death penalty laws and procedures. While Assessment Team members expressed divergent views about the weight placed on the various ABA Recommendations, the entire Kentucky Death Penalty Assessment Team endorses several measures to bring the Commonwealth in compliance with the ABA Recommendations, as well as state-specific proposals, to ameliorate the problems identified throughout this Report.

Prevention of Wrongful Convictions (Chapters 2, 3, 4, 5).

- Kentucky must guarantee proper preservation of all biological evidence in capital cases as long as the defendant remains incarcerated and must designate an appropriate governmental entity responsible for the proper preservation of all evidence in a criminal case.
- Kentucky courts should order DNA testing of biological evidence if the results of testing or retesting of the evidence could create a reasonable probability that the person is innocent of the offense, did not have the culpability necessary to subject the person to the death penalty, or did not engage in aggravating conduct. A stay of execution should be ordered during the pendency of a petition for post-conviction DNA testing.
- Kentucky should adopt legislation that requires accreditation of any forensic science laboratory and certification for all forensic specialists operating in the Commonwealth. Furthermore, the Commonwealth's crime laboratory system should be housed as a separate department under the Justice and Public Safety Cabinet, operating wholly independent of the Kentucky State Police. By creating a forensic laboratory system independent of law enforcement, the Commonwealth can reduce undue external or internal pressure, which could otherwise affect the integrity, validity, and reliability of forensic analysis.
- Kentucky should adopt the *ABA's Practices for Promoting the Accuracy of Eyewitness Identification Procedures* as statewide policy. Kentucky law enforcement agencies should also incorporate advances in social science into their guidelines, particularly given the lack of uniformity among the Commonwealth's law enforcement agencies. Kentucky also should require recording of the entirety of custodial interviews, particularly in homicide investigations, and should include an appropriate remedy for law enforcement's failure to record. Full recordings of custodial interviews also would foreclose the need to litigate in many cases whether a confession had been legally obtained.
- The Kentucky Law Enforcement Council should require law enforcement training school curricula to include specific training on the proper collection and preservation of biological evidence. The Commonwealth should require that all law enforcement agencies involved in the investigation of potential capital cases be accredited in order to ensure that each agency has adopted and enforces written policies governing the preservation of biological evidence. These policies should ensure that evidence is preserved for as long as the person remains incarcerated.
- The Kentucky Rules of Court should be amended to provide a jury instruction, whenever identity is a central issue at trial, on the factors to be considered in gauging eyewitness identification.
- Kentucky prosecutors should be required to provide open file discovery at trial and during post-conviction proceedings.
- Kentucky should adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a capital trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.

Improvement of Defense Services (Chapter 6).

- Kentucky should adopt statewide standards governing the qualifications and training required of defense counsel and ancillary services in capital trial, appeal, and post-conviction proceedings in conformance with the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Capital Cases* (*ABA Guidelines*). This requires that the caseload of any public defender who undertakes capital representation must be limited and sufficient funding made available to support the use of needed investigative, expert, and other ancillary services during all stages of the proceedings. Kentucky also should designate the Department of Public Advocacy as the appointing authority for representation in death penalty cases and ensure that it is equipped with the resources to certify the qualifications and monitor the performance of all attorneys who provide representation in capital cases.
- Kentucky should provide additional funding to ensure defense counsel who undertake representation of an indigent capital defendant or death row inmate are compensated at a rate commensurate with the salary scale of prosecutors' offices in the jurisdiction, as set forth in the *ABA Guidelines*. Kentucky also should ensure sufficient funding to the public defender agencies so that the public defender may remove the compensation cap placed on payments to counsel who undertake representation of an indigent capital defendant on a contractual basis. Hourly rates available for contract counsel should be representative of the prevailing rates for private counsel sufficient to attract individuals with the necessary qualifications to undertake the demanding responsibilities of a death penalty case.
- Kentucky law should guarantee the assistance of counsel to a death row inmate during the claim development stage of post-conviction and clemency proceedings.

Ensuring Proportionality in Capital Charging and Sentencing (Chapters 5, 7).

- Kentucky should adopt guidelines governing the exercise of prosecutorial discretion in death penalty cases. The Attorney General should promulgate these guidelines, in consultation with experts on capital punishment—including prosecutors, defense attorneys, and judges—in order to ensure that each decision to seek the death penalty occurs within a framework of consistent and even-handed application of Kentucky's capital sentencing laws. Each Commonwealth's Attorney office must adopt policies for implementation of the guidelines, subject to approval by the Attorney General. If, however, an office fails to promulgate and maintain such a policy, the Attorney General shall set the policy for the office.
- The Kentucky Supreme Court should employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases but also cases in which the death penalty was sought but not imposed or could have been sought but was not.
- Kentucky should establish a statewide clearinghouse to collect data on all death-eligible cases, including data on the race of defendants and victims, on the circumstances of the crime, and on all aggravating and mitigating circumstances. These data should be made available to the Kentucky Supreme Court for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines. Kentucky must designate an entity responsible for the

collection of the data, such as the Administrative Office of the Courts or the Criminal Justice Council.

Error Correction During Post-Conviction Review (Chapters 8, 13). Kentucky should reform its laws, procedures, and practices to permit the adequate development and judicial consideration of claims of constitutional error.

- Kentucky should adopt a rule or law requiring trial courts to hold an evidentiary hearing with respect to all claims in capital post-conviction proceedings, absent clear evidence that the claim is frivolous or not supported by existing law or that the record undisputedly rebuts the claim.
- Kentucky should permit adequate time for counsel to fully research and prepare all meritorious post-conviction claims at least equivalent to that afforded to inmates not awaiting execution.
- Kentucky should amend its statutes and court rules to permit inmates to obtain meaningful discovery to better develop the factual bases of their claims prior to filing a post-conviction motion or petition. The Commonwealth must amend its Open Records Act to allow these petitioners to use the public records laws to obtain materials in support of their post-conviction claims. Kentucky trial courts should authorize funding for investigative, mitigation, and expert services to assist in the claim development stage of a death row inmate's post-conviction petition.
- Kentucky should provide a mechanism for a death row inmate to file a second or successive petition for post-conviction relief permitting the court to review the inmate's claim of mental retardation, or other issue of constitutional magnitude, unless the inmate has knowingly and intelligently waived the constitutional claim.
- Kentucky's Rules of Criminal Procedure should be amended to clarify that any constitutional error found harmless must be found harmless beyond a reasonable doubt, in conformance with *Talbott v. Commonwealth.*

Gubernatorial Clemency Powers (Chapter 9). Given that clemency is the final safeguard available to evaluate claims that may not have been presented to or decided by the courts, as well as to evaluate the fairness and judiciousness of a death sentence, death row inmates petitioning for clemency should be guaranteed counsel. Moreover, the Commonwealth should adopt specific procedures that should be followed for application and consideration of a death row inmate's petition for clemency. No impediment, such as denial of access to prison officials, should be erected by the Commonwealth to thwart inmates' ability to develop and present a clemency petition. Furthermore, Kentucky Governors should exercise their ability to empower the Parole Board to issue a recommendation in capital clemency cases, given the expertise of the Board, and assuming it will use procedures at least as transparent as those available in non-capital cases.

Improved Juror Instruction and Comprehension (Chapter 10). Given the documented evidence of confusion of Kentucky jurors regarding their roles and responsibilities in capital cases

- Kentucky must revise the instructions typically given in capital cases. Kentucky should commission attorneys, judges, linguists, social scientists, psychologists, and jurors to 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;

- Kentucky trial courts also should permit, upon the defendant's request during the sentencing phase, parole officials or other knowledgeable witnesses to testify about parole practices in the Commonwealth to clarify jurors' understanding of alternative sentences; and
- Kentucky capital jurors should be specifically instructed that a mental disorder or disability is a mitigating, not an aggravating factor, that evidence of mental disability should not be relied upon to conclude that the defendant represents a future danger to society, and that jurors be instructed to distinguish between the affirmative defense of insanity and a defendant's subsequent reliance on similar evidence to demonstrate a mental disorder or disability as a mitigating factor.

Racial and Ethnic Minorities (Chapter 12).

- Shortcomings of the Kentucky Racial Justice Act (KRJA) must be fixed so that the Act serves as an effective remedy for racial discrimination in death penalty cases. This includes
  - Retroactive application so that the provisions of the KRJA are available to inmates who were sentenced to death prior to the Act's adoption in 1998;
  - Availability of the KRJA for claims of racial discrimination affecting the decision to *impose* the death penalty;
  - Application of the KRJA on appeal and during post-conviction proceedings;
  - Elimination of the high burden of proof imposed by the KRJA which currently requires petitioners to prove racial discrimination by "clear and convincing evidence"; and
  - Elimination of the requirement that a KRJA petitioner prove racial discrimination in his/her individual case as such evidence will almost never be overt; instead, relief under the Act also should be available if the capital defendant or death row inmate is able to demonstrate that racial considerations played a significant part in the decision to seek or impose a death sentence in the county, judicial district, or in the Commonwealth.
- Kentucky should commission an evaluation of the effectiveness of the KRJA at remedying racial discrimination in capital charging and sentencing.

Treatment of Persons with Mental Retardation and Severe Mental Illness (Chapter 13).

- The Commonwealth should adopt legislation defining mental retardation in conformance with the American Association on Intellectual and Developmental Disabilities' definition, which should (1) reject a bright-line IQ maximum for a determination of mental retardation; (2) calculate IQ scores by incorporating the five-point margin of error and the Flynn effect; and (3) permit presentation of other evidence of adaptive behavior deficits that occurred before the defendant reached age eighteen, particularly where no IQ testing had been conducted during the defendant's childhood, in order for the defendant to prove s/he has mental retardation.
- Kentucky should forbid imposition of a death sentence on offenders with severe mental illness. The prohibition is applicable to offenders who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and

adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury. Kentucky also should bar the death penalty for offenders who, at the time of their offense, had a severe mental disorder or disability that significantly impaired their capacity to appreciate the nature, consequences, or wrongfulness of their conduct, exercise rational judgment in relation to conduct, or conform their conduct to the requirements of the law. Kentucky also should preclude imposition of the death penalty in cases where a defendant is found guilty but mentally ill.

- Kentucky should adopt a rule or law providing that, if a court finds that a prisoner under sentence of death who wishes to forego or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his/her capacity to make a rational decision, the court shall permit a "next friend" acting on the prisoner's behalf to initiate or pursue available remedies to set aside the death sentence.

Kentucky legislators previously have introduced legislation that would exempt severely mentally ill individuals from the death penalty based upon the Recommendations contained in this Report, as well as permit a tolling of the statute of limitations in post-conviction cases due to a death row inmate's mental incompetence. The Kentucky Assessment Team recommends that the Commonwealth adopt such legislation.

D. Final Thoughts and Recommendations

The Kentucky Assessment Team examined all death sentences imposed in the Commonwealth since 1976. As of November 2011, seventy-eight people have been sentenced to death. Fifty-two of these individuals have had a death sentence overturned on appeal by Kentucky or federal courts, or been granted clemency. This is an error rate of approximately sixty percent. Furthermore, 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.

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

Conclusion

Kentucky undoubtedly has made progress in seeking to achieve fairness and accuracy in its administration of the death penalty, by, for example, establishing a statewide capital defender

and adopting of a Racial Justice Act. However, serious problem areas persist in the operation of the death penalty in Kentucky.

The Kentucky Assessment Team is concerned about the expenditure of Commonwealth resources to administer what the Assessment Team has found to be a system with insufficient safeguards to ensure fairness and prevent execution of the innocent. The gravity and breadth of the issues summarized above and described in detail throughout this Report compel the Assessment Team to recommend a temporary suspension of executions until the issues identified in this Report have been addressed and rectified. Through this temporary suspension, all branches of the Commonwealth's government will be better able to examine thoughtfully and thoroughly these concerns, implement the necessary reforms, and ensure the fairness and accuracy of its death penalty system.

INTRODUCTION

GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments, conducts analyses of governmental and judicial responses to death penalty administration issues, publishes periodic reports, encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions, convenes conferences to discuss issues relevant to the death penalty, and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and minimize the risk of executing the innocent. It undertook assessments examining the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee and released reports on these states' capital punishment systems from 2006 through 2007. A summary report was also published in 2007 in which the findings of the eight reports completed to date were compiled. Due in large part to the success of the state assessments produced in the eight jurisdictions described above, the Project began a second round of assessments in late 2009. In addition to this report on Kentucky, the Project also plans to release reports in, at a minimum, Missouri, Texas, and Virginia.

The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. Past state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for new legislative and court rule changes on the administration of the death penalty, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of their state's death penalty system.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments in 2006: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, (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) mental retardation and mental illness.

The findings of each assessment team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations, impose reforms, or in some cases, impose moratoria. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Kentucky Death Penalty Assessment Team. The body of this Report sets out these findings and proposals in more detail, followed by an Appendix. The Project and the Kentucky Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Kentucky death penalty. The Project would appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

MEMBERS OF THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM[1]

Professor Linda Sorenson Ewald, Co-Chair, is a Professor of Law at the University of Louisville Louis D. Brandeis School of Law. Professor Ewald's current teaching interests are family law, the legal profession, and ethics. She helped develop the Greenebaum Public Service Program, the Brandeis Inn of Court Partners in Professionalism, and the law school's in-house clinic which serves low income individuals and victims of domestic violence in Jefferson County. Her professional activities include service as a member of the Kentucky Bar Foundation Board, the Kentucky Judicial Nominating Commission, the KBA Ethics 2000 Commission, and the Louisville and Jefferson County Public Defender Board. Professor Ewald is a graduate of the University of Louisville (J.D.) where she was an associate editor of the Journal of Family Law. She also is a graduate of New York University School of Law, where she received an L.L.M. degree.

Professor Michael J. Zydney Mannheimer, Co-Chair, is a Professor of Law at the Northern Kentucky University Salmon P. Chase College of Law. Professor Mannheimer teaches courses on criminal law and procedure, death penalty policy and procedure, and evidence. He served as a law clerk for the Honorable Sidney H. Stein of the U.S. District Court for the Southern District of New York, and then for the Honorable Robert E. Cowen of the U.S. Court of Appeals for the Third Circuit. He has represented clients at every level of the state and federal judiciaries, from handling sentencing proceedings, motions, and hearings in the New York trial courts to filing a petition for a writ of certiorari in the U.S. Supreme Court. Professor Mannheimer received his J.D. in 1994 from Columbia Law School, where he was a Harlan Fiske Stone Scholar all three years and served as Writing & Research Editor of the Columbia Law Review.

Michael D. Bowling is Of Counsel to the law firm Steptoe & Johnson P.L.L.C. He concentrates his practice in the areas of governmental affairs and lobbying, county and municipal law, construction law, environmental law, and products liability. Mr. Bowling has served as chairman of the Blue Ribbon Panel in Support of Public Advocacy of the Kentucky Bar Association; board attorney of the Bell County Board of Education; Middlesboro City Attorney; State Representative, 87th Legislative District; and chairman of the House Judiciary Committee of the Kentucky Legislature. He received his B.A. from the University of Kentucky and his J.D. from Northern Kentucky University Salmon P. Chase College of Law.

Professor Allison Connelly is an associate professor of law at the University of Kentucky College of Law. She joined the University of Kentucky faculty in 1996 as the first Director of the College's Legal Clinic. Prior to joining the law school, she spent 13 years as a Kentucky public defender providing direct representation, including death penalty representation, to needy individuals at all levels of the criminal justice system. She became the first female Public Advocate, the head of Kentucky's statewide public defender system, and has more than twelve published appellate decisions to her credit. She received her B.A. degree from the University of Kentucky and her J.D. degree from the University of Kentucky College of Law.

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[1] The affiliations of each member are listed for identification purposes only. Each Team member has acted in his/her personal capacity. The content and views expressed in this Report do not necessarily reflect those of any listed affiliations.

Justice Martin E. Johnstone is a retired Kentucky Supreme Court Justice who served from November 1996 until his retirement in 2006. He was the first judge in Kentucky to have been elected to all levels of the Court of Justice, having served as a Judge in the Third Magisterial District, a District Judge in Jefferson County, a Circuit Judge of Jefferson County Circuit Court, a judge of the Kentucky Court of Appeals, and lastly a Kentucky Supreme Court Justice. Justice Johnstone has received numerous awards for his professional service and is also actively involved in several professional organizations. He received his B.A. from Western Kentucky University and his J.D. from the University of Louisville Louis D. Brandeis School of Law.

Justice James E. Keller is a retired Associate Justice of the Kentucky Supreme Court. He served for 22 years as Circuit Judge for Fayette County, during which time he served two terms as the Chief Circuit Judge, was Co-Chair of the First Fayette Family Branch of the Fayette Circuit Court, and volunteered as a Drug Court Judge. After retiring from the Kentucky Supreme Court in 2005, Justice Keller joined the firm Gess Mattingly & Atchison P.S.C. He received his B.A. from Eastern Kentucky University and his J.D. from the University of Kentucky College of Law.

Frank Hampton Moore Jr. is a partner with the Bowling Green firm Cole & Moore, P.S.C. His practice areas include trial practice, insurance defense, administrative, medical malpractice defense, employment, business, and commercial law. He has served as the President of the Bowling Green-Warren County Bar Association and is a member of several other professional organizations including the Kentucky Bar Association, Kentucky Bar Foundation, and the International Association of Defense Counsel. For twelve years, Mr. Moore has served as a Board Member and Chairman of the Bowling Green Independent Schools. Mr. Moore received his B.S. from Western Kentucky University and his J.D. from the Northern Kentucky University Chase College of Law.

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HIGHLIGHTS OF RELEVANT CHAPTERS:

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion in deciding whether or not to seek the death penalty. In this chapter, we examined Kentucky's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism. A summary of Kentucky's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

Prosecutorial Professionalism

Recommendation #1: Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.

Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or

mitigating evidence.

Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

Recommendation:

The Kentucky Assessment Team was unable to determine whether the Commonwealth complies with several of the Recommendations contained in this chapter. The Kentucky Assessment Team submitted a survey to the Kentucky Prosecutors Advisory Council (Council) requesting that the survey be distributed to Kentucky's fifty-seven elected Commonwealth's Attorneys. The survey requested general data regarding the death penalty in each prosecutor's jurisdiction, as well information on training and qualification requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices. The Council declined to provide information, stating that the Council had voted "1. to address the ABA study as the representative body of the Commonwealth's prosecutors; 2. not to circulate the study to the Commonwealth's prosecutors; and 3. not to provide responses to the survey questions."

After receiving this response, the Kentucky Assessment addressed all further inquiries to the Council and subsequent efforts to obtain information from the Council were unsuccessful. Kentucky imposes no requirement on Commonwealth prosecutors to maintain written policies governing the exercise of prosecutorial discretion in capital cases, nor must prosecutors maintain policies for evaluating cases relying upon eyewitness identification, confessions, or jailhouse snitch testimony—evidence that constitutes some of the leading causes of wrongful conviction. Death sentences imposed in cases in which the prosecution has significantly relied upon this sort of evidence underscores the need for prosecutors to adopt policies or procedures for evaluating the reliability of such evidence.

While the vast majority of prosecutors are ethical, law-abiding individuals who seek justice, our research revealed inefficient and disparate charging practices among some Commonwealth's Attorneys, as well as instances of reversible error due to prosecutorial misconduct or error in death penalty cases. In addition, the large number of instances in which the death penalty is sought as compared to the number of instances in which a death sentence is actually imposed calls into question as to whether current charging practices ensure the fair, efficient, and effective enforcement of criminal law. This places a significant burden on Commonwealth courts, prosecutors, and defenders to treat as capital many cases that will never result in a death sentence, taxing the Commonwealth's limited judicial and financial resources. In 2007, for example, Kentucky's public defender agencies reportedly undertook representation in ninety-seven death penalty cases. However, in the over thirty years since Kentucky reinstated the death penalty, Kentucky courts have sentenced to death only seventy-eight defendants, and only three executions have taken place in the Commonwealth. There is also geographic disparity with respect to capital charging practices and conviction rates in Kentucky. Since 2003, fifty-three percent of Fayette County murder cases have gone to trial compared to twenty-five percent in Jefferson County.

Kentucky has erected a framework that requires prosecutors to fully and timely disclose to the defense all information, documents, and tangible objects before and during a capital trial. However, some Kentucky prosecutors still fail to comply with discovery requirements. Moreover, the lack of discovery in post-conviction proceedings impedes the ability of death row inmates' to present viable claims of innocence as such individuals may be unable to learn of possible exculpatory information that was not disclosed at trial by the prosecution—even if such information was not disclosed inadvertently.

Finally, the high percentage of reversals and citations of prosecutorial misconduct or error in death penalty cases acutely demonstrates the need for appropriate discipline to deter and prevent reoccurrence of such conduct, particularly when a life is at stake. Of the seventy-eight persons sentenced to death in the Commonwealth since the reinstatement of the death penalty, at least fifty defendants' death sentences have been overturned by Kentucky state or federal courts. Of these fifty reversals, fifteen have been based, in whole or in part, on prosecutorial misconduct or error. The instance of reversible error reinforces the need for effective training and professional development of death penalty prosecutors. However, it appears that Kentucky's recent and ongoing fiscal crisis will adversely affect the availability of funds for this purpose.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to lawyers who undertake capital cases, and sufficient resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this chapter, we examined Kentucky's laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA's policies on defense services. A summary of Kentucky's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services

Recommendation #1: Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*—The Defense Team and Supporting Services

Recommendation #2: Guideline 5.1 of the *ABA Guidelines*—Qualifications of Defense Counsel

Recommendation #3: Guideline 3.1 of the *ABA Guidelines*—Designation of a Responsible Agency

Recommendation #4: Guideline 9.1 of the *ABA Guidelines*—Funding and Compensation

Recommendation #5: Guideline 8.1 of the *ABA Guidelines*—Training

Recommendation:

Kentucky is one of only eleven states that provide representation to capital defendants through a statewide public defender system. Specialized capital units within the Commonwealth's statewide public defender agencies—the Department of Public Advocacy (DPA) and the Louisville Metro Public Defender's Office (Metro Defender)—coupled with these agencies' monitoring of the qualifications and performance of capital counsel under their supervision, significantly improves the quality of representation available to Kentucky's indigents in death penalty cases. The Commonwealth's public defender agencies seek to voluntarily comply with several components of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*), for example:

- DPA and the Metro Defender appoint two attorneys to each indigent capital defendant during pre-trial proceedings and continue to provide representation to death row inmates at trial, direct appeal, state post-conviction and federal habeas proceedings, clemency, and through execution.
- Counsel for an indigent capital defendant may seek expert, investigative, and other ancillary professional services through ex parte proceedings and may hire experts and investigators who are independent of the Commonwealth.
- Approximate parity exists between death penalty prosecutors and public defenders in Jefferson County. Likewise, approximate parity exists between the Attorney General and the Public Advocate.

Although the provision of counsel for indigent capital defendants and death row inmates in the Commonwealth is to be commended, Kentucky's system nonetheless falls short of complying with the *ABA Guidelines* for a number of reasons:

- While Kentucky public defender agencies seek to comply with the *ABA Guidelines*, the Commonwealth has not adopted any standards governing the qualifications, training, or compensation required of counsel in a capital trial, on appeal, or during post-conviction proceedings, nor does it guarantee that two attorneys be assigned to the defense of a death penalty case. Public defender agencies self-enforce any internal guidelines on capital representation, which does not guarantee that capital defendants and death row inmates will be represented by attorneys who possess qualifications required by the *ABA Guidelines*. This also subjects capital defendants and death row inmates to a real risk that financial constraints of the public defender agencies will affect the quality of representation afforded to them as Kentucky must provide defense services in a growing number of cases with fewer resources.
- Although Kentucky's public defender system historically has provided representation to all death row inmates during post-conviction proceedings, Kentucky does not require the appointment of post-conviction counsel until *after* an inmate has filed his/her postconviction petition *and* a Commonwealth court determines that the petition sets forth sufficient evidence to warrant a hearing. Kentucky does not authorize funding for investigative, mitigation, and expert services to assist in the claim development stage of a death row inmate's post-conviction petition, and, a court, in its discretion, may deny access to expert services even when it has determined that a post-conviction hearing is

warranted.

- A 2011 study found that Kentucky public defenders who handle death penalty cases make 31% less than similarly experienced attorneys in surrounding states, constituting the lowest average salaries of examined jurisdictions plus the Kentucky federal defender. Elected Commonwealth's Attorneys who prosecute and try capital cases in many circuits also earn substantially more than their public defender counterparts. The annual salaries of DPA's most experienced capital defense attorneys range from $75,810 to $86,131 while the elected Commonwealth Attorney in each judicial district earns an annual salary of $110,346.

While the public defender agencies may contract with private counsel to handle a death penalty case, the hourly rates and maximum caps on compensation available for contract counsel may serve as a deterrent to attracting individuals with the needed qualifications to undertake the demanding responsibilities and complexities of a death penalty case. Furthermore, the hourly compensation rates available for attorneys contracted by other Kentucky agencies for civil legal matters is far greater than that available for attorneys contracted by the public defender to represent a capital defendant or death row inmate.

Despite efforts to combat excessive caseloads, including contracting with local, private counsel to provide representation, caseloads for Kentucky public defenders continue to rise. Approximately forty-four DPA regional trial branch attorneys provide capital representation in addition to carrying caseloads of over 400 non-capital cases each year, far exceeding national averages and recommended maximum caseloads. Metro Defender capital attorneys handle approximately double the capital caseload of their counterparts at DPA. Additionally, while DPA and the Metro Defender attempt to assign an investigator and mitigation specialist to every death penalty case, these staff members are routinely overworked and underpaid, carrying caseloads ranging from twelve to twenty-five capital cases at any given time. Furthermore, insufficient numbers of support staff have resulted in attorneys performing support staff functions.

Finally, no Commonwealth entity is vested with the authority to certify the qualifications or monitor the performance of attorneys who provide representation in capital cases. At least ten of the seventy-eight individuals who were sentenced to death in Kentucky since the Commonwealth reinstated capital punishment were represented at trial by attorneys who were later disbarred. The importance of certification is illustrated by the case of Gregory Wilson who was sentenced to death after a trial in which the trial court sought representation for him by hanging a sign on the courtroom door that read "PLEASE HELP. DESPERATE. THIS CASE CANNOT BE CONTINUED AGAIN." One of the two attorneys who agreed to take the case had never tried a felony and the other was a "semi-retired" lawyer who volunteered to serve as lead counsel for free, "though he had no office, no staff, no copy machine and no law books." Without a certification process that ensures that only highly qualified attorneys take on representation of a capital client, Kentucky fails to guard against capital defendants receiving representation by such unqualified attorneys in future cases.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision-making. In this chapter, we reviewed Kentucky's laws, procedures, and practices

concerning the clemency process and assessed whether they comply with the ABA's policies on clemency. A summary of Kentucky's overall compliance with the ABA's policies on clemency is illustrated in the following chart.

Recommendation #1: The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.

Recommendation #2: The clemency decision-making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.

Recommendation #3: Clemency decision-makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.

Recommendation #4: Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.

Recommendation #5: Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.

Recommendation #6: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*.

Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative, and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.

Recommendation #8: Clemency proceedings should be formally conducted in public and

presided over by the Governor or other officials involved in making the determination.

Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with petitioners.

Recommendation #10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

Recommendation:

Of the three persons who have been executed since Kentucky reinstated the death penalty in 1976, only one sought clemency immediately prior to his execution. In addition, since 1976, two death row inmates' sentences have been commutated to life without the possibility of parole. With each grant of clemency, the Kentucky Governor provided a statement of reasons for the commutation of the inmate's sentence. In Kevin Stanford's case, Governor Paul Patton commuted the sentence because Stanford was seventeen at the time of the offense; in the second case, Governor Ernie Fletcher commuted Jeffrey Leonard's sentence due to the poor representation afforded to Leonard at the time of his capital trial. In both of these cases, the courts had rejected the issue upon which clemency was ultimately granted. However, it does not appear that the Governor files a similar statement of reasons when an inmate's petition for clemency is denied, although section 77 of the Kentucky Constitution requires that the Governor file with each application for clemency a statement of reasons for his decision.
Generally, there are few laws, rules, or guidelines governing the clemency filing and decision-making process, which leads to inconsistent practices and an unpredictable process. In most instances, inmates have filed a petition for clemency following the Governor's issuance of a death warrant, which may come at any time after the inmate's first appeal has become final. While some Governors' may wait to sign a death warrant until the inmate's state and federal appeals are exhausted, in contrast, other Kentucky Governors may issue a death warrant before the statute of limitations placed on filing appeals has lapsed. Thus, in some cases, counsel must file a clemency petition that is not ripe for review and is never then reviewed by the Office of the Kentucky Governor. Conversely, an execution date may be set quickly causing a hastily prepared or incomplete petition for clemency to be filed on behalf of the condemned inmate. Furthermore, while the Kentucky Governor possesses the sole constitutional and statutory power to grant or deny clemency, s/he may request an investigation and a non-binding recommendation

from the Kentucky Parole Board (Board). Board members must meet certain experience and training requirements to serve. Since the reinstatement of the death penalty, however, no Kentucky Governor has requested the Board's participation in a death row inmate's clemency determination. It is possible there will be no hearing or meeting with the death row inmate prior to execution. In contrast, in non-capital cases, the Kentucky Parole Board conducts an in-person meeting with inmates seeking parole. Finally, while Kentucky's public defender agencies seek to provide counsel to each death row inmate petitioning for clemency, the right to counsel is not guaranteed. Moreover, a death row inmate may be denied access to prison officials who would support the inmate's application for commutation of a sentence. Prison officials are often the only individuals with whom a death row inmate interacts and are therefore uniquely able, if amenable, to support an inmate's application for clemency. The Commonwealth's denial of access to such individuals unnecessarily frustrates a death row inmate's ability to develop and present relevant information that could result in a sentence less than death.

Chapter Twelve: Treatment of Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified, and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Kentucky's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies. A summary of Kentucky's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Racial and Ethnic Minorities

Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases. The data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.

Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a prima facie case is established, the state should have the burden of rebutting it by substantial evidence.

Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.

Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during voir dire.

Recommendation #8: Jurisdictions should require jury instructions that it is improper for jurors to consider any racial factors in their decision making and that jurors should report any evidence of racial discrimination in jury deliberations.

Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.

Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state

proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.

Recommendation

Numerous empirical studies, including one commissioned by the Kentucky General Assembly, have shown that the Commonwealth is more likely to seek the death penalty when the offender is black and the victim is white, and that a death sentence is more likely to be imposed on black offenders convicted of killing a white victim. In response to such findings, in 1998, Kentucky became the first state in the United States to adopt a Racial Justice Act (KRJA), which permits capital defendants to raise, during pretrial proceedings, a claim that the Commonwealth sought the death penalty against the defendant based, in part, on the race of the defendant and/or race of the victim. The Act requires the trial court to remove the death penalty as a sentencing option if the defendant is successful under the KRJA.

While the adoption of the KRJA is laudable, the Act appears to have a number of limitations. For example, the KRJA

- is not applicable retroactively and, therefore, is unavailable to inmates who were sentenced to death prior to the Act's adoption in 1998;
- does not to permit a capital defendant or death row inmate to raise a claim of racial discrimination in the decision to *impose* the death penalty;
- requires a capital defendant to raise a KRJA claim before trial rather than permitting an inmate to raise the claim at any stage of the capital proceedings, including on appeal or during post-conviction proceedings;
- requires a capital defendant to prove racial discrimination by clear and convincing evidence, rather than by a preponderance of the evidence; and
- does not permit a capital defendant or death row inmate to prevail under the KRJA if s/he is able to demonstrate that racial considerations played a significant part in the decision to seek or impose a death sentence in the county, judicial district, or the Commonwealth; instead, the KRJA requires the defendant to demonstrate evidence of racial discrimination in the defendant's individual case.

Furthermore, like claims under the KRJA, claims challenging the Commonwealth's use of peremptory challenges on the basis of race (*Batson* challenges) and claims challenging the racial composition of the jury pool are procedurally barred on appeal unless raised prior to trial.

In addition, no entity within the Commonwealth collects and maintains data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases. Without these data, Kentucky cannot guarantee that its system ensures proportionality in charging or sentencing, nor can it determine the extent of racial or ethnic bias in its capital system. This lack of data collection and reporting on the overall use of capital punishment in Kentucky makes it impossible for the Commonwealth to determine whether such a system is operating effectively, efficiently, and without bias.

Since the adoption of the KRJA, the Commonwealth has undertaken a number of investigations into racial disparities in the criminal justice system and perceptions of racial bias in the judicial system by court-users. However, Kentucky has not investigated or adopted any specific remedial or preventative strategies to address racial disparities in capital charging or sentencing since the 1998 adoption of the KRJA.

The Commonwealth's public defenders and conflict counsel contracted by the public defenders are trained to identify and develop racial discrimination claims in capital cases and to identify biased jurors during voir dire. However, because there are no training requirements that apply to all capital defense counsel in the Commonwealth, there is no assurance that such counsel are trained on litigating KRJA claims or other issues of racial discrimination that may arise in a capital case.