

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 Team¹ 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.

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.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of Kentucky’s Death Penalty System

In this chapter, we examined the demographics of Kentucky’s death row, the statutory evolution of Kentucky’s death penalty scheme, and the progression of an ordinary death penalty case through Kentucky’s death penalty system from arrest to execution.

Chapter Two: Collection, Preservation, and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state’s laws and on its law enforcement agencies’ policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, we examined Kentucky’s laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether the Commonwealth complies with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Kentucky’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.⁴

Collection, Preservation, and Testing of DNA and Other Types of Evidence							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance⁵</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance⁶</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: The State should preserve all biological evidence for as long as the defendant remains incarcerated.					X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.				X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.				X			

⁴ Where necessary, the Recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

⁵ Given that a majority of the ABA’s Recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which Kentucky meets a portion, but not all, of the Recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁶ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Kentucky death penalty. The Project would welcome notification of any omissions or factual errors in this Report so that they may be corrected in any future reprints.

Collection, Preservation, and Testing of DNA and Other Types of Evidence (Cont'd)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i> ⁷	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> ⁸	<i>Not Applicable</i>
Recommendation						
Recommendation #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.					X	

The Kentucky Assessment Team on the Death Penalty commends the Commonwealth for adopting legislation which permits capital defendants and death row inmates to obtain post-conviction DNA testing on available biological evidence. Such testing should be granted when the inmate is able to show that a reasonable probability exists that s/he would have received a more favorable sentence should DNA testing yield favorable results.

In order for Kentucky to protect against wrongful conviction or execution of an inmate who should not have been subject to the death penalty, it is imperative that the Commonwealth properly preserve all biological evidence in capital cases. Kentucky, however, does not preserve evidence for as long as the defendant remains incarcerated, and there have been a number of instances where evidence sought for retesting during post-conviction proceedings has been lost or unavailable. In one case, a death row inmate was denied testing of two items admitted as evidence during the original trial because the items had gone missing and could not be found after a “substantial search” by the Commonwealth.

In fact, under some circumstances, Kentucky *permits* the destruction of biological evidence in criminal cases both before and after a death row inmate is convicted, irrespective of the value that such evidence could possess to solve cold cases or determine, with certainty, the guilt or innocence of a death row inmate awaiting execution. The possibility that evidence will be lost or misplaced may partly be attributed to the lack of uniform requirements on proper preservation, resulting in evidence storage in law enforcement facilities, courthouses, and even safe deposit boxes. Kentucky also appears to insufficiently fund evidence preservation and analysis. In some instances, the Commonwealth has requested the destruction of evidence because it is unable to store the evidence. The Kentucky State Police Forensic Laboratory also has extensive backlogs of DNA evidence waiting to be tested and analyzed.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentifications and false confessions are two of the leading causes of wrongful convictions. Eyewitness misidentifications and false confessions can mislead law enforcement

⁷ Given that a majority of the ABA’s Recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which Kentucky meets a portion, but not all, of the Recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁸ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Kentucky death penalty. The Project would welcome notification of any omissions or factual errors in this Report so that they may be corrected in any future reprints.

into focusing their efforts on one person, too often resulting in an erroneous conviction while the actual perpetrator remains unaccountable. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this chapter, we reviewed Kentucky’s laws, procedures, and practices on law enforcement identifications and interrogations, and we assessed whether those laws, procedures, and practices comply with the ABA’s policies on law enforcement identifications and interrogations.

A summary of Kentucky’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations is illustrated in the chart below.

Law Enforcement Identifications and Interrogations						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: Law enforcement agencies should adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the <i>American Bar Association’s Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures</i> .			X			
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.					X	
Recommendation #3: Law enforcement agencies and prosecutors’ offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and the continuing lessons of practical experience.			X			
Recommendation #4: Video-record the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.			X			
Recommendation #5: Ensure adequate funding for the proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.					X	

Law Enforcement Identifications and Interrogations (Cont'd)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.		X				
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.				X		
Recommendation #8: Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance, respectively.			X			
Recommendation #9: Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.			X			

The Commonwealth of Kentucky has undertaken certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example, law enforcement officers in Kentucky are required to complete a minimum of 640 hours of basic training and to complete forty hours of annual in-service training, which includes instruction on sound identification and interrogation techniques. In addition, at least six law enforcement agencies in Kentucky regularly record custodial interrogations. Furthermore, Kentucky trial courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

Despite these measures, Kentucky does not require law enforcement agencies to adopt specific guidelines on identifications and interrogations consistent with the *ABA Best Practices*. There are no statewide standards governing how lineups and photospreads should be conducted. Absent statewide policies or best practices, in some cases, there are also no internal law enforcement agency guidelines as to how lineups and photospreads should be conducted, including in some of the Commonwealth's largest law enforcement agencies.

Furthermore, full video- or audio-recording of custodial interrogations occurs in only a few law enforcement agencies within the Commonwealth, despite the fact that such a policy both helps ensure that innocent parties are not held responsible for crimes they did not commit and significantly conserves scarce law enforcement and judicial resources. Even when law enforcement agencies have promulgated guidelines on the issues addressed by the *ABA Best Practices*, the stated policy does not fully encompass all elements of the best practice meant to

protect against wrongful conviction. For example, in agencies where recording of custodial interviews does take place, it commences only when a suspect makes a confession rather than for the entirety of the custodial interview. Kentucky also prohibits use of a jury instruction to explain the factors to be considered in gauging lineup accuracy.

There are over 400 law enforcement agencies responsible for promulgating and enforcing policies to bring Kentucky into compliance with the ABA Recommendations, many of which are in small, rural areas. However, when the Team focused on the policies and practices of the largest law enforcement agencies in the Commonwealth that are most likely to investigate capital-eligible offenses—the Kentucky State Police, the Lexington Division of Police, and the Louisville Metro Police Department—it found that these agencies have no policies at all or, in those that have adopted policies, the policies are not uniformly enforced consistent with the *ABA Best Practices*.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Kentucky and assessed whether Kentucky’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

A summary of Kentucky’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.				X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.					X		

The Commonwealth of Kentucky does not require the accreditation of its forensic laboratories. However, since 2005, three of the six locations of the Kentucky State Police Forensic Laboratory (KSP Laboratory) have voluntarily obtained accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) under its *Legacy*

Accreditation Program. ASCLD/LAB now only grants new accreditation under its more rigorous *International Accreditation Program* and KSP Laboratory has submitted an application for accreditation under the *International Program*. While KSP Laboratory seeks to limit law enforcement involvement with forensic analysis, continued affiliation of the Commonwealth's only forensic laboratory with law enforcement causes KSP Laboratory to compete with other Kentucky State Police 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.

Like crime laboratories, Kentucky does not require accreditation of medical examiner offices or coroner offices. While one of the four offices of the statewide Medical Examiner Office (MEO) has obtained accreditation by the National Association Medical Examiners, none of the Commonwealth's 120 coroner offices has obtained voluntary accreditation.

Kentucky law requires certification of some, but not all, forensic analysts involved in the investigation of a capital case. However, according to KSP Laboratory, personnel at each of the agency's six crime laboratories possess a degree and specialized training relevant to his/her laboratory specialty. Certification is required of medical examiners; however, Kentucky does not impose any certification requirements on elected coroners or forensic laboratory analysts and technicians. Medical licensing is not required of medical examiners or coroners, and only four of the 120 elected coroners and four of the 313 deputy coroners are licensed physicians.

Testing backlogs in KSP Laboratory persist, despite the infusion of federal grant money to diffuse the problem year after year. Resource limitations are also evidenced by the MEO's inability to apply for accreditation of all four of its offices, as well as the MEO's inability to make needed upgrades to its facilities. Kentucky also funds its medical examiner and coroner systems below national averages.

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					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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.				X	
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.				X	
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.		X			
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.		X			
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.				X	
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.				X	

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							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)</i> —The Defense Team and Supporting Services					X		
Recommendation #2: Guideline 5.1 of the <i>ABA Guidelines</i> —Qualifications of Defense Counsel				X			
Recommendation #3: Guideline 3.1 of the <i>ABA Guidelines</i> —Designation of a Responsible Agency				X			
Recommendation #4: Guideline 9.1 of the <i>ABA Guidelines</i> —Funding and Compensation				X			
Recommendation #5: Guideline 8.1 of the <i>ABA Guidelines</i> —Training				X			

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 post-conviction 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 Seven: The Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and penalty phases of the trial were proper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly-situated defendants to ensure that the sentence is not disproportionate, is the primary method for preventing arbitrariness and bias at sentencing. In this chapter, we examined Kentucky’s laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA’s policies on the direct appeal process.

A summary of Kentucky’s overall compliance with the ABA’s policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been but was not sought.				X			

While Commonwealth law requires the Kentucky Supreme Court to determine, on direct appeal, “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant,” the Kentucky Supreme Court limits its proportionality review to only those cases in which the death penalty actually was imposed. The Court does not consider cases in which the death penalty was sought but not imposed, or cases in which the death penalty could have been sought but was not. Without a review mechanism to ensure that similar sentences are imposed in similar cases on similar defendants, there is no guarantee of internal consistency within Kentucky’s application of the death penalty. For example, death sentences have been imposed on defendants for crimes in which a co-defendant received only a term of years. The Kentucky Supreme Court has held that the sentences of co-defendants are not relevant in determining the validity of a death sentence.

Furthermore, the Court’s existing proportionality review typically offers minimal analysis of the similarities between the facts of the case at bar and previous cases in which a death sentence was imposed. While the Kentucky Supreme Court has reviewed the death sentences imposed on seventy-eight defendants per this statutorily-mandated proportionality review, it never has vacated a death sentence on this ground.⁹

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, discovery in criminal trials is limited, and some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this

⁹ The Kentucky Supreme Court has reversed thirty-eight death sentences on direct appeal. See *Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011*, *infra* Appendix. In some of these cases, the Court will not reach the issue of proportionality review if it found a separate basis upon which to overturn the death sentence.

reason, all post-conviction proceedings should permit the adequate development and judicial consideration of all claims. In this chapter, we examined the laws, procedures, and practices in the Commonwealth of Kentucky relevant to state post-conviction proceedings, and we assessed whether they comply with the ABA’s policies on state post-conviction.

A summary of the Commonwealth’s overall compliance with the ABA’s policies on state post-conviction proceedings is illustrated by the following chart:

State Post-Conviction Proceedings						
		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation	Compliance					
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.			X			
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X		
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X		
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.		X				
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.				X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in a capital case.				X		

State Post-Conviction Proceedings (Cont'd)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resource centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and expert.			X			
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.			X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.				X		
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.		X				
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.						X

Although the Commonwealth of Kentucky should be applauded for some aspects of its post-conviction review process, the several deficiencies that the Kentucky Assessment Team identified in that process are cause for concern, as they may prevent a court from reviewing a death row inmate's claims of serious, constitutional error.

Some Commonwealth rules and practices do not permit adequate development and judicial consideration of death row inmates' claims of constitutional error. For example, while Kentucky imposes a three-year statute of limitations for the filing of a post-conviction petition, this has

been characterized as the “outer limit” of time permitted for the filing of such claims. Therefore, in instances in which an execution date is set *prior* to the expiration of the three-year period, the time for development and filing of a claim is significantly curtailed. Inmates *not* awaiting execution do not face a similar time constraint. Furthermore, trial courts have dismissed initial motions for post-conviction relief without conducting an evidentiary hearing, even when an evidentiary hearing would have facilitated full judicial consideration of an inmate’s petition. Kentucky also does not authorize discovery in state post-conviction proceedings and prohibits inmates from using the Open Records Act to obtain materials possessed by law enforcement that may be essential for establishing a death row inmate’s constitutional claims. Moreover, the lack of discovery during post-conviction review makes it more likely that 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. Taken together, these aspects of the Commonwealth’s post-conviction proceedings significantly impede an inmate’s ability to present thoroughly his/her claims.

Furthermore, Kentucky post-conviction courts will not entertain a claim of constitutional error if an inmate failed to raise, or improperly raised, the issue at trial or on direct appeal—not even in rare circumstances for exceptional reasons. Instead, even the most egregious constitutional defect must be argued as an ineffective assistance of counsel claim, which imposes an additional burden on the inmate to show that counsel’s performance was deficient *and* that this deficient performance affected the outcome of the case.

In addition, Kentucky has not always given full retroactive effect to U.S. Supreme Court decisions. Moreover, until 2010, the Kentucky Supreme Court did not recognize a constitutional claim of ineffective assistance of appellate counsel, despite the U.S. Supreme Court’s recognition of this right in 1985.

The Commonwealth’s public defender entities voluntarily have represented death row inmates during state post-conviction, federal habeas corpus, and clemency proceedings. However, Kentucky does not require the appointment of post-conviction counsel to assist death row inmates in the preparation and presentation of their initial post-conviction petitions.

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.

Clemency						
		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Compliance						
Recommendation						
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.			X			
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.			X			
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.					X	
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.			X			
Recommendation #5: Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.					X	
Recommendation #6: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .			X			
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.			X			
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.				X		
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.				X		

Clemency (Cont'd)						
Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
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.					X	
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.					X	

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 commuted 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 Ten: Capital Jury Instructions

In capital cases, jurors possess the “awesome responsibility” of deciding whether another person will live or die. Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed. Sometimes, however, jury instructions are poorly written and poorly conveyed, leading to confusion among jurors as to the applicable law and the extent of their responsibilities. In this chapter, we reviewed Kentucky’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

A summary of Kentucky’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists, and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.				X		
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.		X				
Recommendation #3: Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors’ questions about applicable law.			X			

Capital Jury Instructions (Cont'd)					
Recommendation	Compliance				
	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.		X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.		X			
Recommendation #6: Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.			X		

In its review of the Commonwealth's approach to jury instructions in capital cases, the Kentucky Assessment Team identified several areas of concern. First, there is no indication that the Commonwealth has undertaken a thorough evaluation of the extent to which jurors understand the instructions they are given in capital cases. The imperative for such an evaluation cannot be doubted. Disturbingly high percentages of Kentucky capital jurors 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 a reasonable doubt," and 83.5% did not understand that they need not have been unanimous on findings of mitigation. Despite this evidence of juror miscomprehension, the Kentucky Supreme Court has held that jurors need not be supplied with a definition of "mitigating circumstances."

The Kentucky Supreme Court also has prohibited trial testimony regarding parole practices even though many jurors, concerned with erring on the side of leniency, opt to recommend a sentence of death when they otherwise would not. Trial courts also need not clarify for jurors that they may recommend a life sentence regardless of their finding on aggravation and mitigation.

Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. In addition, judges' decisions in individual cases sometimes are, or appear to be, improperly influenced by electoral pressures. This increases the possibility that judges will be selected, elevated, and retained by a process that ignores the larger interests of justice and fairness, focuses narrowly on the issue of capital punishment, and undermines society's confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Kentucky's laws, procedures, and practices on the election and appointment of judges and on judicial decision-making processes and assessed whether they comply with the ABA's policies on judicial independence.

A summary of Kentucky's overall compliance with the ABA's policies on judicial independence is illustrated in the following chart.

Judicial Independence							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.				X			
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.						X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases, educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, and publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.				X			
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.					X		
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.					X		

Judicial Independence (Cont'd)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.					X	

While some Kentucky entities and even judicial candidates have sought to promote and educate the public on the importance of an independent and impartial judiciary, the Commonwealth has not examined the fairness of its statewide judicial selection process. Meanwhile, campaign rhetoric in the Commonwealth’s judicial election system raises significant questions about both the fairness of judicial selection in Kentucky and the independence of judges. For example, there have been numerous instances where judicial candidates have stated their view on capital punishment and/or campaigned on a “tough on crime” platform, including criticizing an incumbent judge for the percentage of cases in which the judge had ruled in favor of criminal defendants. Judicial candidates’ assertion of their party affiliation is likely to increase since the U.S. Court of Appeals for the Sixth Circuit invalidated the portion of the Kentucky Code of Judicial Conduct that prohibited judges and judicial candidates from publicly disclosing their party affiliation. Furthermore, the current operation of the Commonwealth’s appointment process for vacancies on the bench permits the Governor to wield undue influence in the appointment of judges.

Since the death penalty was reinstated in 1976, death sentences have been imposed on seventy-eight defendants in Kentucky. Fifty of these defendants' cases have seen a reversal of a death sentence by the state or federal courts due to trial court errors, prosecutorial misconduct, or ineffective assistance of counsel. The prevalence of reversals of death sentences in the Commonwealth demonstrates that trial courts are not always taking effective action to ensure that capital proceedings are fair. Finally, while full or open file discovery may occur via agreement, it is not required, and Commonwealth trial judges need only ensure that parties adhere to the Kentucky rules of discovery. The Commonwealth does not permit discovery in capital post-conviction proceedings. Kentucky courts are under no obligation to ensure to discovery in this context.

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					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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.		X			
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.			X		
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.		X			
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.				X	
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.		X			
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.		X			
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.		X			

Racial and Ethnic Minorities (Cont'd)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
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.					X		
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.						X	
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.					X		

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.

Chapter Thirteen: Mental Retardation and Mental Illness

Mental Retardation

In *Atkins v. Virginia*, the U.S. Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. In this chapter, we reviewed Kentucky's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Kentucky's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<p>Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Intellectual and Developmental Disabilities. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.</p>				X		
<p>Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death row inmates.</p>			X			
<p>Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client’s mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.</p>			X			
<p>Recommendation #4: For cases commencing after <i>Atkins v. Virginia</i> or the state’s ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.</p>		X				
<p>Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.</p>		X				
<p>Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.</p>					X	

Mental Retardation (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.				X	

Since 1990, Kentucky has prohibited the execution of offenders with mental retardation, well before the U.S. Supreme Court’s decision in *Atkins*. In compliance with the ABA Recommendations, the Commonwealth requires capital offenders to prove mental retardation by a preponderance of the evidence. Furthermore, some of the Commonwealth’s practices facilitates the identification of mental retardation in capital defendants and death row inmates, such as the training of capital defense counsel on identification of mental retardation in their clients and litigation of this issue before the courts. Trial counsel in Kentucky also has access to needed expert resources to determine accurately and prove the mental capacities of capital defendants.

However, some procedures and practices adopted by the Commonwealth to identify mental retardation in capital defendants and death row inmates fall short of the ABA Recommendations in several important respects. For example,

- 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.
- Kentucky courts also have required that a capital defendant have been IQ-tested prior to the age of eighteen, which often places an unattainable burden of proof on the offender since such individuals have rarely taken standardized assessments of intelligence or adaptive behavior functioning before adulthood.
- Kentucky’s procedural rules could permit a death row inmate who is mentally retarded to be executed when the inmate have failed to effectively raise the issue of his/her mental retardation before trial. 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.

Mental Illness

We also reviewed Kentucky’s laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge,

prosecutor, or jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

A summary of Kentucky’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

Mental Illness					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.		X			
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X	
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.		X			
Recommendation #4: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert’s prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert’s current or past status with the state.				X	

Mental Illness (Cont'd)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well-trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.		X			
Recommendation #6: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
Recommendation #7: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences, or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case, that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society, and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
Recommendation #9: Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.			X		

Mental Illness (Cont'd)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #10: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his/her capacity to make a rational decision.		X			
Recommendation #11: The jurisdiction should stay post-conviction proceedings where a prisoner under a sentence of death has a mental disorder or disability that significantly impairs his/her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.			X		
Recommendation #12: The jurisdiction should provide that a death row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.				X	
Recommendation #13: Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.	X				

Many actors within the Kentucky criminal justice system, including law enforcement, corrections personnel, and, most notably, capital defense counsel, receive training on recognizing mental illness in capital defendants and death row inmates. As in the case with mental retardation, public defenders undergo training on recognizing mental illness and proving their clients' mental capabilities, although training is not required of all attorneys who represent a capital defendant or death row inmate. Furthermore, trial courts in Kentucky often grant trial counsel's ex parte requests for funding to hire qualified mental health experts to assist the defense confidentially.

Despite these efforts, the Commonwealth's death penalty system does not adequately protect the rights of individuals with severe mental illness. Kentucky is one of only a few states that permit a finding of "guilty but mentally ill," but Kentucky courts cannot exclude the death penalty as a sentencing option for defendants found guilty but mentally ill. Furthermore, while the Commonwealth does prohibit execution of mentally retarded offenders, as described above, 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. In addition, Kentucky 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.

Kentucky does not require jurors 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 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.

Finally, it does not appear that Kentucky courts will toll the statute of limitations imposed in post-conviction proceedings if an inmate suffers from a mental disorder or disability that affected the inmate's ability to file a timely petition for post-conviction relief. There is also no provision of Kentucky law that permits a "next friend" to pursue available remedies on a death row inmate's behalf if the inmate wishes to forgo further legal proceedings as a result of a mental disorder or disability that significantly impairs his/her capacity to make a rational decision.