OVERVIEW

A two-year review by a team of Kentucky legal experts found that “serious problems persist” in state death penalty procedures. The team unanimously recommended that Kentucky temporarily suspend executions until serious issues related to fairness and accuracy in the imposition of death sentences are addressed.

The review was conducted by the Kentucky Assessment Team on the Death Penalty, established under a project of the American Bar Association. The Kentucky review began in 2009 and was conducted by:

- Linda Ewald, Co-Chair, University of Louisville Louis D. Brandeis School of Law, Louisville, KY;
- Michael J. Z. Mannheimer, Co-Chair, Northern Kentucky University Salmon P. Chase College of Law, Highland Heights, KY;
- Hon. Michael Bowling, Steptoe & Johnson PLLC, Middlesboro, KY;
- Allison Connelly, University of Kentucky College of Law, Lexington, KY;
- Hon. Martin E. Johnstone, Kentucky Supreme Court (Retired), Prospect, KY;
- Hon. James Keller, Kentucky Supreme Court (Retired), Lexington, KY;
- Frank Hampton Moore, Jr., Cole & Moore, P.S.C., Bowling Green, KY; and
- Marcia Milby Ridings, Hamm, Milby & Ridings, London, KY.

The Report used as a framework ABA protocols covering key aspects of death penalty administration. Assessment team members were not required to support or oppose the death penalty, and Kentucky’s members have varying perspectives on capital punishment.

KEY FINDINGS

The review by the Kentucky Assessment Team produced a number of troubling findings:

**High Error Rate in Death Penalty Cases:** Of the 78 people sentenced to death in Kentucky, 50 have had a death sentence overturned on appeal by Kentucky or federal courts. That is an error rate of more than 60 percent.

**Inadequate Retention of Evidence:** Evidence in criminal cases is not required to be retained for as long as a defendant remains incarcerated, and the problem of lost evidence significantly diminishes the effectiveness of a state law that allows post-conviction DNA testing prior to execution. Such lost or missing evidence prevents exonerating innocent people and can prevent apprehension of the guilty.

**Law Enforcement Inadequately Protects Against Wrongful Conviction:** There are no uniform standards on eyewitness identifications and interrogations, and many of Kentucky's largest law enforcement agencies do not fully adhere to best practices to guard against false eyewitness identifications and false confessions, two of the leading causes of wrongful conviction nationwide.

**Inconsistent Application of Death Penalty:** There is no mechanism in place to guide prosecutors in deciding what charges to bring to support the non-discriminatory application of the death penalty across the state.

**Juror Confusion:** A survey of jurors serving in capital cases found a disturbingly high percentage failed to understand sentencing guidelines before deciding whether or not a defendant should be executed. This is not the fault of the jurors, but rather the failure to adequately instruct the jurors.

**Low Pay for Public Defenders:** Kentucky public defenders handling capital cases have caseloads that far exceed national averages and salaries that are 31 percent below those of similarly experienced attorneys in surrounding states. Private attorneys who take on representation of a person facing the death penalty make far less than other attorneys contracted by Kentucky to perform legal services on civil matters.

**Unqualified Defense Attorneys:** At least 10 of the 78 people sentenced to death were represented by defense attorneys who were subsequently disbarred. There are no statewide standards governing the qualifications and training of attorneys appointed to handle capital cases.

**Inadequate Protections for the Mentally Disabled:** Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental retardation or mental illness.

**Lack of Data:** There is a lack of data-keeping throughout the administration of the death penalty in Kentucky, making it impossible to guarantee that the system is operating fairly, effectively and efficiently.
PUBLIC SUPPORT

A recent poll conducted by the ABA shows that a majority of Kentuckians support a suspension of executions to allow time for problems within the system to be remedied.

The Nov. 30–Dec. 4, 2011 survey of 405 most likely voters statewide found a solid majority of Kentucky voters (62 percent) support a temporary halt to executions. The support was consistent across the state: a majority of men, women, urban, suburban, rural, Republican, Democratic, and Independent voters all favored a temporary halt to executions. The poll, with an error rate of plus or minus 4.9 percent, was conducted for the Kentucky Assessment Team by Lake Research Partners of Washington, D.C.

For More Information
The full report of the Kentucky Death Penalty Assessment Team, poll results, and other information is available at: www.ambar.org/kentucky.

RECOMMENDATIONS

Strengthen Preservation and Testing of Evidence:
Kentucky must guarantee proper preservation of all biological evidence in capital cases for as long as the defendant remains incarcerated. Courts should order DNA testing if the results could create a reasonable probability that a defendant should not have been sentenced to death.

Adopt Best Practices for Law Enforcement:
Law enforcement training and practices should comport with well-known best practices to promote apprehension of the guilty and prevent conviction of the innocent.

Standards for Defense Attorneys:
Kentucky should adopt statewide standards governing the qualifications and training required of defense attorneys in capital cases.

Improved Pay for Defense Counsel:
Kentucky should provide additional funding to ensure defense attorneys who represent indigent capital defendants are paid at a rate to ensure the high-quality provision of legal services in such complex and demanding cases as death penalty cases.

Uniform Standards for Use of Death Penalty:
Guidelines governing the exercise of prosecutorial discretion in death penalty cases should be adopted for statewide application.

Improve Data Collection:
Kentucky should establish a statewide clearinghouse to collect data on all death-eligible cases.

Enhance Error Correction by the Courts:
Kentucky’s post-conviction rules and practices should be amended to permit adequate development and consideration by the courts of an inmate’s claims of constitutional error.

Revise Jury Instructions:
To improve death penalty juror comprehension, the state must revise the jury instructions typically given in capital cases.

Amend Racial Justice Act:
Shortcomings of the Kentucky Racial Justice Act must be corrected to ensure that the Act serves as an effective remedy for racial discrimination in death penalty cases.

Protections for Mentally Ill and Disabled:
Kentucky should adopt legislation exempting the severely mentally ill from the death penalty and modernizing the definition of mental retardation.

"We came in to this with no real idea of what we would find. But at the close of our two-year deliberations, we were left with no option but to recommend that the Commonwealth halt executions until the problems we identified are remedied. This report is really about the administration of justice in Kentucky."

- Linda Ewald, University of Louisville
Louis D. Brandeis School of Law,
Kentucky Assessment Team Co-Chair