Two year assessment of death penalty procedures prompts call for suspension of executions in Kentucky

Report concludes ‘serious problem areas persist’

Poll shows majority of Kentuckians support suspension

FRANKFORT, Ky. – Kentucky should temporarily suspend executions until serious issues related to fairness and accuracy in the imposition of death sentences are addressed, according to a report resulting from a two-year review of capital punishment in the state.

The review by the Kentucky Assessment Team, which included attorneys, former Kentucky state Supreme Court justices and law school professors, produced such troubling findings as:

• Of the last 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.
• 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.
• 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.
• 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.
• 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.
• 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.
• 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.
• Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental disabilities.
• 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.

The team further cautioned that the ongoing fiscal crisis faced by the Commonwealth would undoubtedly lead to greater risk of error in death penalty cases.

The assessment team was established under a project of the American Bar Association that was created in 2001 to collect and monitor data on domestic and international death penalty developments. The Kentucky review, which began in late 2009, was the project’s ninth state-level assessment.

“I commend the Kentucky team for its thorough scholarship and detailed analysis of the Commonwealth’s capital punishment system,” said American Bar Association president and Kentucky native Wm. T. (Bill) Robinson III. “The team is comprised of some of Kentucky’s best lawyers and legal experts, all of whom are committed to assuring fairness in the administration of justice,” he added.

The assessments use as a benchmark ABA protocols covering key aspects of death penalty administration. Assessment team members are not required to support or oppose the death penalty, and Kentucky’s members have varying perspectives on capital punishment. All agreed, however, to use the ABA protocols as a framework for their review.

“It is the Assessment Team’s unanimous view that so 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,” the report noted.

“To this end, Kentucky has made substantial strides in several areas” including a statewide public defender system, a statute allowing post-conviction DNA testing and the adoption of a Racial Justice Act.

But the 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,” the report added, prompting the call for a suspension of executions.

“We came in to this with no real idea of what we would find,” said Linda Ewald, University of Louisville Louis D. Brandeis School of Law, who co-chaired the assessment team. “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.”

A recent poll shows that a majority of Kentuckians support a suspension of executions to allow time for problems within the system to be remedied. The November 30-December 4 survey of 405 most likely voters statewide found 62 percent support a temporary halt to executions. The support was consistent across the state: a majority of men, women, urban, suburban, and 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.

The team issued a series of recommendations to address the problems identified in the assessment. Among them:
• Kentucky must guarantee proper preservation of all biological evidence in capital cases, and courts should order DNA testing if the results could create a reasonable probability that a defendant should not have been sentenced to death.

• Law enforcement training and practices should comport with well-known best practices to promote apprehension of the guilty and prevent conviction of the innocent.

• Kentucky should adopt statewide standards governing the qualifications and training required of defense attorneys in capital cases.

• 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 a death penalty case.

• Guidelines governing the exercise of prosecutorial discretion in death penalty cases should be adopted for statewide application.

• Kentucky should establish a statewide clearinghouse to collect data on all death-eligible cases.

• 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.

• To improve death penalty juror comprehension, the state must revise the jury instructions typically given in capital cases.

• 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.

• Kentucky should adopt legislation exempting the severely mentally ill from the death penalty.

The other team co-chair was Michael J.Z. Mannheimer of the Northern Kentucky University Salmon P. Chase College of Law. Additional members were Michael Bowling, former state representative and an attorney with Steptoe & Johnson in Middlesboro; Allison Connelly of the University of Kentucky College of Law; former Supreme Court Justice Martin E. Johnstone of Prospect; former Supreme Court Justice James Keller of Lexington; Frank Hampton Moore Jr., an attorney with Cole & Moore in Bowling Green; and Marcia Milby Ridings, an attorney with Hamm, Milby & Ridings in London.

Under the ABA project, similar state assessment teams have examined the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania and Tennessee; the review has resulted in a recommendation for a moratorium on executions in five of the eight states.

The full report is available at: http://ambar.org/kentucky

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