

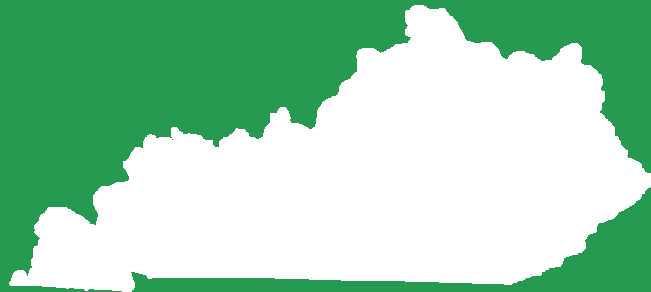


Defending Liberty
Pursuing Justice

**EVALUATING FAIRNESS AND ACCURACY IN
STATE DEATH PENALTY SYSTEMS:**

The Kentucky Death Penalty Assessment Report

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



"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

December 2011

AMERICAN BAR ASSOCIATION



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Lastly, 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 appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, (2) DNA testing, and the location, testing, and preservation of biological evidence, (3) law enforcement tools and techniques, (4) crime laboratories and medical examiner offices, (5) prosecutors, (6) defense services during trial, appeal, and state post-conviction and clemency proceedings; (7) direct appeal and the unitary appeal process, (8) state post-conviction relief proceedings, (9) clemency, (10) jury instructions, (11) judicial independence, (12) racial and ethnic minorities, and (13) mental retardation and mental illness.

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

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

II. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Kentucky's death penalty system, the Kentucky Death Penalty Assessment 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>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	<i>Compliance</i>					
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)					
<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: 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.

INTRODUCTION

GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

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

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

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

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

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

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

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

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, (2) DNA testing, and the location, testing, and preservation of biological evidence, (3) law enforcement tools and techniques, (4) crime laboratories and medical examiner offices, (5) prosecutors, (6) defense services during trial, appeal, and state post-conviction and clemency proceedings; (7) direct appeal and the unitary appeal process, (8) state post-conviction relief proceedings, (9) clemency, (10) jury instructions, (11) judicial independence, (12) racial and ethnic minorities, and (13) mental retardation and mental illness.

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

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

MEMBERS OF THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM¹

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

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

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

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

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

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

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CHAPTER ONE

AN OVERVIEW OF KENTUCKY'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF KENTUCKY DEATH ROW

A. *Historical Perspective*

The Commonwealth of Kentucky reenacted the death penalty in 1976.¹ Between 1976 and 2011, there have been eighty-two capital offenses for which seventy-eight defendants were sentenced to death in Kentucky.² During the same time period, the Commonwealth executed three individuals: Harold McQueen in 1997, Edward Lee Harper in 1999, and Marco Allen Chapman in 2008.³ Both Edward Lee Harper and Marco Allen Chapman “volunteered” for execution, each forgoing his right to seek further review of his death sentence.⁴ Seven death row inmates died awaiting appeal of their conviction or death sentence.⁵

State or federal courts have reversed a death sentence in fifty of the eighty-two capital cases as a result of serious error that occurred at trial.⁶ In addition, Kentucky Governors have commuted the death sentences of two death row inmates, Jeffrey Leonard and Kevin Stanford.⁷

B. *A Current Profile of Kentucky's Death Row*

As of November 17, 2011, Kentucky's death row houses thirty-five inmates, of whom thirty-four are male and one is female.⁸ Thirty of the inmates are white, and five are African-American.⁹ All three individuals who have been executed by the Commonwealth were white and were

¹ KY. REV. STAT. ANN. § 532.025 (West 1976) (originally enacted as 1976 Ky. Enact. Acts, ch. 15 § 2).

² See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix. Four of the seventy-eight persons (Epperson, Foley, Hodge, and St. Clair) were sentenced to death for two separate capital crimes occurring in Kentucky. *Id.* In total, 161 death sentences have been imposed on seventy-eight defendants since 1976. In some instances, defendants were re-sentenced to death following a court's reversal, and in other instances, multiple death sentences may have been handed down in a single case. *Id.*

³ *Id.*

⁴ *Id.* Harold McQueen was sentenced in Madison County, the 25th judicial circuits; Edward Lee Harper was sentenced in Jefferson County, the 30th judicial district; Marco Allen Chapman was sentenced in Boone County, the 54th judicial district. See *McQueen v. Commonwealth*, 669 S.W.2d 519 (Ky. 1984); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998); *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007); see also *Commonwealth's Attorneys by Judicial District*, OFFICE OF THE ATT'Y GEN. <http://www.ag.ky.gov/criminal/pac/commonwealths.htm> (last visited June 10, 2011). Harper withdrew his petition for habeas corpus review in federal court; Marco Allen Chapman did not file for state post-conviction or federal habeas corpus review of his conviction and death sentence. See *Harper v. Parker*, 177 F.3d 567, 573 (6th Cir. 1999) (affirming district court's determination that inmate was competent to waive his right to pursue further habeas corpus litigation); *Chapman*, 265 S.W.3d at 180–81 (finding that the defendant had the mental capacity to plead guilty, waive mitigation, and “seek[] the death penalty”).

⁵ See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix.

⁶ *Id.*

⁷ *Id.* See also Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003) (Commutation of Death Sentence); Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence).

⁸ See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix.

⁹ *Id.*; *Profiles of Kentucky Death Row Inmates*, KY. DEP'T OF CORR., <http://www.corrections.ky.gov/inmateinfo/deathrow.htm> (last visited June 10, 2011).

sentenced to death for murdering a white victim.¹⁰ The thirty-five inmates on Kentucky's death row were sentenced to death in seventeen of Kentucky's 120 counties and in fifteen of Kentucky's fifty-seven circuit court districts.¹¹ Twenty-three percent of the inmates on Kentucky's death row were sentenced in Jefferson County (Louisville) and another twenty-three percent were sentenced in Fayette County (Lexington).¹²

II. THE STATUTORY EVOLUTION OF KENTUCKY'S DEATH PENALTY SCHEME

A. *Kentucky's Post-Furman Death Penalty Sentencing Scheme*

In the 1972 case *Furman v. Georgia*, the U.S. Supreme Court held that the death penalty statutes in various States constituted cruel and unusual punishment and therefore violated the Eighth and Fourteenth Amendments of the U.S. Constitution.¹³

In 1973, the Kentucky Supreme Court held Kentucky's death penalty scheme unconstitutional based on the *Furman* decision.¹⁴ The Kentucky General Assembly responded in 1974 with a new penal code that became effective on January 1, 1975.¹⁵ The new penal code included both a revised capital murder statute and capital sentencing statute mandating imposition of the death penalty in certain circumstances.¹⁶ In 1977, the Kentucky Supreme Court held this capital sentencing scheme unconstitutional in light of *Gregg v. Georgia* and its companion cases.¹⁷ In response to the Supreme Court's decision in *Gregg*, in 1976, by an Extraordinary Session of the General Assembly, a new "controlled discretion" capital sentencing scheme was adopted.¹⁸

1. Kentucky's 1974 Murder, Kidnapping, and Death Penalty Sentencing Statutes

a. 1974 Murder Statute

Although the 1974 capital sentencing scheme was found unconstitutional by the Kentucky Supreme Court, the 1974 murder statute, KRS 507.020, remained intact. The 1974 murder statute sets forth that a person is guilty of murder when, "with the intent to cause the death of another person, he causes the death of such person or of a third person" or "[u]nder circumstances manifesting extreme indifference to human life, he wantonly engages in conduct

¹⁰ NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 35 (Winter 2010), available at http://naacpldf.org/files/publications/DRUSA_Winter_2010.pdf;

¹¹ See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix.

¹² *Id.*

¹³ 408 U.S. 238, 239–40 (1972).

¹⁴ *Caine v. Commonwealth*, 491 S.W.2d 824, 831–32 (Ky. 1973).

¹⁵ See *Gully v. Kunzman*, 592 F.2d 283, 285 n.1 (6th Cir. 1979).

¹⁶ *Id.* at 285; see also KY. REV. STAT. ANN. § 532.030 (West 1976).

¹⁷ *Boyd v. Commonwealth*, 550 S.W.2d 507, 508 (Ky. 1977) ("[W]e have no choice but to . . . hold the mandatory death penalty to be unconstitutional.") (relying on *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976)).

¹⁸ KY. REV. STAT. ANN. §§ 532.025, 532.030, 532.035 (West 1976); see also *Gully*, 592 F.2d at 285; *Smith v. Commonwealth*, 599 S.W.2d 900, 909 (Ky. 1980).

which creates a grave risk of death to another person and thereby causes the death of another person.”¹⁹ The statute provided that murder is a capital offense in the following circumstances:

- (1) The defendant’s act of killing was intentional and was for profit or hire;
- (2) The defendant’s act of killing was intentional, and occurred during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;
- (3) The defendant’s act of killing was intentional and the defendant was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;
- (4) The defendant’s act of killing was intentional and the death was caused through use of a destructive device;
- (5) The defendant’s act or acts of killing were intentional and resulted in multiple deaths; or
- (6) The defendant’s act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties.²⁰

b. 1974 Kidnapping Statute

Under certain circumstances, kidnapping is considered a capital offense in Kentucky.²¹ In 1974, Kentucky revised and renumbered its kidnapping statute to KRS 509.040.²² Under this statute, a person is guilty of kidnapping when

he unlawfully restrains another person and when his intent is:

- (a) To hold him for ransom or reward;
- (b) To accomplish or to advance the commission of a felony;
- (c) To inflict bodily injury or to terrorize the victim or another;
- (d) To interfere with the performance of a governmental or political function;
- or
- (e) To use him as a shield or hostage.²³

In 2002, KRS 509.040 was amended to include a sixth intent, “[t]o deprive the parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor as the term ‘person exercising custodial control or supervision’ is defined in KRS 600.020.”²⁴

¹⁹ KY. REV. STAT. ANN. § 507.020(1)(a)–(b) (West 1974). The murder statute also provided that a person “shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was reasonable explanation or excuse” KY. REV. STAT. ANN. § 507.020(1)(a) (West 1974).

²⁰ KY. REV. STAT. ANN. § 507.020(2) (West 1974).

²¹ KY. REV. STAT. ANN. § 507.020 (West 1974).

²² Compare KY. REV. STAT. ANN. § 509.040 (West 1974), with KY. REV. STAT. ANN. § 435.140 (West 1962).

²³ KY. REV. STAT. ANN. § 509.040 (West 1974).

²⁴ KY. REV. STAT. ANN. § 509.040(f) (West 2002).

The 1974 statute divided kidnapping into three parts: a class B felony, a class A felony, and a capital offense.²⁵ Under the 1974 statute, kidnapping is a capital offense when

the victim is not released alive or when the victim is released alive but subsequently dies as a result of:

- (a) Serious physical injuries suffered during the kidnapping;
- (b) Not being released in a safe place; or
- (c) Being released in any circumstances which are intended, known or should have been known to cause or lead to the victim's death.²⁶

A person found guilty of capital kidnapping will be subject to the capital sentencing guidelines as described below.

In 2001, the Kentucky General Assembly also classified use of a weapon of mass destruction in the first degree as a capital offense, provided “a person other than the defendant is killed.”²⁷ In 2004, the General Assembly classified “fetal homicide” in the first degree as a capital offense.²⁸

2. 1976 Amendments to Kentucky’s Death Penalty Scheme

Kentucky’s revised death penalty scheme, adopted in 1976, amended several statutes, including (1) the murder statute, delineating offenses constituting aggravated murder,²⁹ (2) the penalties statute, authorizing imposition of the death penalty and other penalties for felony convictions,³⁰ and (3) the death penalty sentencing statute, describing sentencing procedures for capital cases and enumerating statutory aggravating and mitigating circumstances.³¹

a. Kentucky’s 1976 Murder and Death Penalty Sentencing Statutes

The 1976 murder statute, KRS 507.020, did not amend the definition of murder; however, the aggravators listed in the previous statute were deleted and moved to a new death penalty sentencing statute.³² The 1976 murder statute now concludes with “[m]urder is a capital offense.”³³

The new death penalty sentencing statutes, KRS 532.025 and KRS 532.030, which now listed the aggravators, required a bifurcated trial with a separate sentencing hearing where the prosecution and defense may present “evidence in extenuation, mitigation and aggravation of punishment.”³⁴ The following aggravating circumstances were included in the 1976 statute:

²⁵ *Id.*

²⁶ *Id.*

²⁷ KY. REV. STAT. ANN. § 527.200(3) (West 2011) (enacted June 21, 2001).

²⁸ KY. REV. STAT. ANN. § 507A.020(2) (West 2011) (enacted Feb. 20, 2004).

²⁹ KY. REV. STAT. ANN. § 507.020 (West 1976).

³⁰ KY. REV. STAT. ANN. § 532.030 (West 1976).

³¹ KY. REV. STAT. ANN. § 532.025 (West 1976).

³² KY. REV. STAT. ANN. §§ 532.020, 532.025 (West 1976).

³³ KY. REV. STAT. ANN. § 507.020 (West 1976).

³⁴ KY. REV. STAT. ANN. § 532.025(1)(a) (West 1976).

- (1) The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
- (2) The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree, or sodomy in the first degree;
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;
- (5) The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;
- (6) The offender's act or acts of killing were intentional and resulted in multiple deaths; and
- (7) The offender's act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties.³⁵

Most of the aggravating circumstances above no longer required that the offender's act of killing be intentional, which had been required in the 1974 murder statute.³⁶ The first listed aggravating circumstance was also added.³⁷

In addition to the listed aggravating circumstances, the new capital sentencing statute delineated the following mitigating circumstances:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime;
- (3) The victim was a participant in the defendant's criminal conduct or consented to the criminal act;
- (4) The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral

³⁵ KY. REV. STAT. ANN. § 532.025(2)(a) (West 1976).

³⁶ Compare KY. REV. STAT. ANN. § 532.025(2)(a) (West 1976), with KY. REV. STAT. ANN. § 507.020(2) (West 1974).

³⁷ KY. REV. STAT. ANN. § 532.025(2)(a) (West 1976).

- justification or extenuation for his conduct are not sufficient to constitute a defense to the crime;
- (5) The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor;
 - (6) The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime;
 - (7) At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and
 - (8) The youth of the defendant at the time of the crime.³⁸

After the presentation of evidence at the sentencing phase, the jury was to be instructed to consider, in addition to any of the above listed statutory aggravating circumstances or mitigating circumstances, “any mitigating circumstances or aggravating circumstances otherwise authorized by law.”³⁹

In order for the trier of fact to sentence the defendant to death, it must find at least one aggravating circumstance beyond a reasonable doubt.⁴⁰ The foreman of the jury must designate, in writing, the aggravating circumstance(s) that were found.⁴¹

The 1976 penalty statute removed the mandatory death penalty requirement for capital offenses and instead provided that “[w]hen a person is convicted of a capital offense he shall have his punishment fixed at death or imprisonment.”⁴² The imprisonment term for a capital offense was either life or “a term of not less than twenty years.”⁴³

3. 1984 Amendments to Kentucky’s Capital Sentencing Scheme

The 1984 amendment to the capital sentencing statute, KRS 532.030, included specific terms of imprisonment available when a defendant is convicted of a capital offense, stipulating that the defendant may be sentenced to death, to life imprisonment without probation or parole for a minimum of twenty-five years, to a general term of life imprisonment, or to a minimum of twenty years.⁴⁴

³⁸ KY. REV. STAT. ANN. § 532.025(2)(b) (West 1976).

³⁹ KY. REV. STAT. ANN. § 532.025(2) (West 1976).

⁴⁰ KY. REV. STAT. ANN. § 532.025(3) (West 1976).

⁴¹ *Id.*

⁴² KY. REV. STAT. ANN. § 532.030 (West 1976).

⁴³ KY. REV. STAT. ANN. § 532.035 (West 1976).

⁴⁴ KY. REV. STAT. ANN. § 532.030(1) (West 1984).

The penalties statute was also amended to require the jury to recommend one of the punishments now described at KRS 532.030 after considering the “aggravating and mitigating limitations and requirements.”⁴⁵

4. 1998 Amendments to Kentucky’s Capital Sentencing Scheme

Another substantial change to the Kentucky capital sentencing scheme came in 1998 when the legislature adopted an eighth aggravating circumstance.⁴⁶ The new version of KRS 532.025 now permitted imposition of a death sentence if the prosecution could prove, beyond a reasonable doubt, that

[t]he offender murdered the victim when an emergency protective order or a domestic violence order was in effect, or when any other order designed to protect the victim from the offender, such as an order issued as a condition of a bond, conditional release, probation, parole, or pretrial diversion, was in effect.⁴⁷

The 1998 amendments also modified the wording of the seventh mitigating circumstance.⁴⁸ Originally, the mitigating circumstance provided that “[a]t the time of the capital offense the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.”⁴⁹ The 1998 amendment replaced “mental disease and defect” with “mental illness.”⁵⁰ Mental retardation was also added as a qualifying condition.⁵¹ This mitigating circumstance thus currently reads as follows:

At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of *mental illness or retardation* or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime.⁵²

The 1998 amendments also permitted juvenile court records to be introduced in the guilt phase of a capital trial as impeachment evidence, or in the sentencing phase of a capital trial, as long as (1) the juvenile was originally tried as an adult or is currently an adult; and (2) the offense would have been a felony if committed by an adult.⁵³

The Kentucky General Assembly also added additional penalty options for capital offenses in 1998. Under the new statute, a person convicted of a capital offense may be sentenced to either

⁴⁵ KY. REV. STAT. ANN. § 532.030 (West 1984).

⁴⁶ KY. REV. STAT. ANN. § 532.025(2)(a)(8) (West 1998).

⁴⁷ *Id.*

⁴⁸ KY. REV. STAT. ANN. § 532.025(2)(b)(7) (West 1998).

⁴⁹ KY. REV. STAT. ANN. § 532.025(2)(b)(7) (West 1984).

⁵⁰ Compare KY. REV. STAT. ANN. § 532.025(2)(b)(7) (West 1998), with KY. REV. STAT. ANN. § 532.025(2)(b)(7) (West 1994).

⁵¹ KY. REV. STAT. ANN. § 532.025(2)(b)(7) (West 1998).

⁵² *Id.* (emphasis added).

⁵³ KY. REV. STAT. ANN. § 532.025(1)(a) (West 1998).

life without benefit of probation or parole, or a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence, or to a sentence of life, or to a term of not less than twenty (20) years nor more than fifty (50) years.⁵⁴

5. 2001 Amendments to Kentucky's Capital Sentencing Scheme

In 2001, the Kentucky General Assembly modified the wording of the third aggravating circumstance in KRS 532.025 to include weapons of mass destruction. The current statute now reads as follows:

The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a *weapon of mass destruction*, weapon, or other device which would normally be hazardous to the lives of more than one (1) person.⁵⁵

B. *Kentucky's Death Penalty Appeals Procedures*

Review procedures for capital sentences, found at KRS 532.075, were included in the 1976 enactments and have not been altered since.⁵⁶ Under the 1976 statute, the Kentucky Supreme Court must review the punishment at the same time that any other grounds for appeal are reviewed in the condemned offender's case.⁵⁷ In determining whether the sentence of death is appropriate, the court must determine

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's or judge's finding of statutory aggravating circumstances as enumerated in KRS 532.025(2), and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.⁵⁸

In order to assess whether the sentence was proportionate to the crime and the defendant, the Kentucky Supreme Court must examine all cases in which the death penalty was imposed after January 1, 1970.⁵⁹ Following the sentence review and any direct appeal, the Court will "render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."⁶⁰

The Kentucky Supreme Court is also required, in any case in which a death sentence was imposed, to include within its decision a reference to all similar cases it considered in its

⁵⁴ KY. REV. STAT. ANN. § 532.030 (West 1998).

⁵⁵ KY. REV. STAT. ANN. § 532.025(2)(a)(3) (West 2011) (emphasis added).

⁵⁶ Compare KY. REV. STAT. ANN. § 532.075 (West 1976), with KY. REV. STAT. ANN. § 532.075 (West 2011).

⁵⁷ KY. REV. STAT. ANN. § 532.075(1)–(2) (West 1976).

⁵⁸ KY. REV. STAT. ANN. § 532.075(3) (West 1976).

⁵⁹ KY. REV. STAT. ANN. § 532.075(6)(a) (West 1976).

⁶⁰ KY. REV. STAT. ANN. § 532.075(8) (West 1976).

proportionality review.⁶¹ If the Court finds the death sentence to be disproportionate, it may set the sentence aside and remand the case for resentencing by the trial court.⁶²

C. Restrictions on the Death Penalty

1. Age Restriction and *Stanford v. Kentucky*⁶³

In 1986, Kentucky enacted KRS 640.040, which prohibited any “youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) at the time of the offense” from being sentenced to death.⁶⁴ The maximum penalty a juvenile aged sixteen or under could receive upon conviction of a capital offense was life imprisonment without the benefit of probation or parole for twenty-five years.⁶⁵

In 1989, the U.S. Supreme Court reviewed whether the Eighth Amendment prohibited Kentucky from executing sixteen and seventeen-year-old offenders.⁶⁶ In *Stanford v. Kentucky*, the Court held that Kentucky’s use of capital punishment for juveniles was constitutional.⁶⁷ However, in 2005 the Court reversed itself and prohibited the execution of juvenile offenders by finding that a Missouri statute similar to Kentucky’s allowing for the execution of juveniles violated the Eighth Amendment of the U.S. Constitution.⁶⁸

2. Kentucky’s Treatment of Mentally Retarded Offenders

On July 13, 1990, thirteen years before the U.S. Supreme Court specifically banned the execution of offenders with mental retardation in *Atkins v. Virginia*,⁶⁹ Kentucky prohibited the execution of mentally retarded offenders under KRS 532.140.⁷⁰ A full description of Kentucky’s treatment of mentally retarded offenders is found at Chapter Thirteen on Mental Retardation, Mental Illness, and the Death Penalty.

3. Kentucky’s Racial Justice Act

⁶¹ KY. REV. STAT. ANN. § 532.075(5) (West 1976). *But see* *Hunt v. Commonwealth*, 304 S.W.3d 15, 52 (Ky. 2009) (stating that KRS § 532.075(5) requires the Kentucky Supreme Court to “simply compare[] one death penalty case with all the other cases in which the death sentence was imposed . . .”) (citing *Epperson v. Commonwealth*, 197 S.W.3d 46, 63 (Ky. 2006)).

⁶² KY. REV. STAT. ANN. § 532.075(5) (West 1976).

⁶³ 492 U.S. 361 (1989). In 2003, Kevin Stanford’s sentence was commuted by then Governor Paul Patton. *See* Henry Weinstein, *Death Sentence Commuted for Ky. Man Who Killed at 17*, L.A. TIMES, June 22, 2003, <http://articles.latimes.com/2003/jun/22/nation/na-commute22> (last visited June 20, 2011).

⁶⁴ KY. REV. STAT. ANN. § 640.040(1) (West 1986). *See also* *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984) (upholding Kentucky’s juvenile death penalty, but stating that an offender’s age of fifteen “is an important factor . . . that should have been given serious consideration at both the transfer hearing in juvenile court and as a mitigating circumstance at the sentencing phase in circuit court. But it is not a constitutional distinction.”).

⁶⁵ KY. REV. STAT. ANN. § 640.040(1) (West 1986).

⁶⁶ *Stanford*, 492 U.S. at 361.

⁶⁷ *Id.*

⁶⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁹ 536 U.S. 304 (2002).

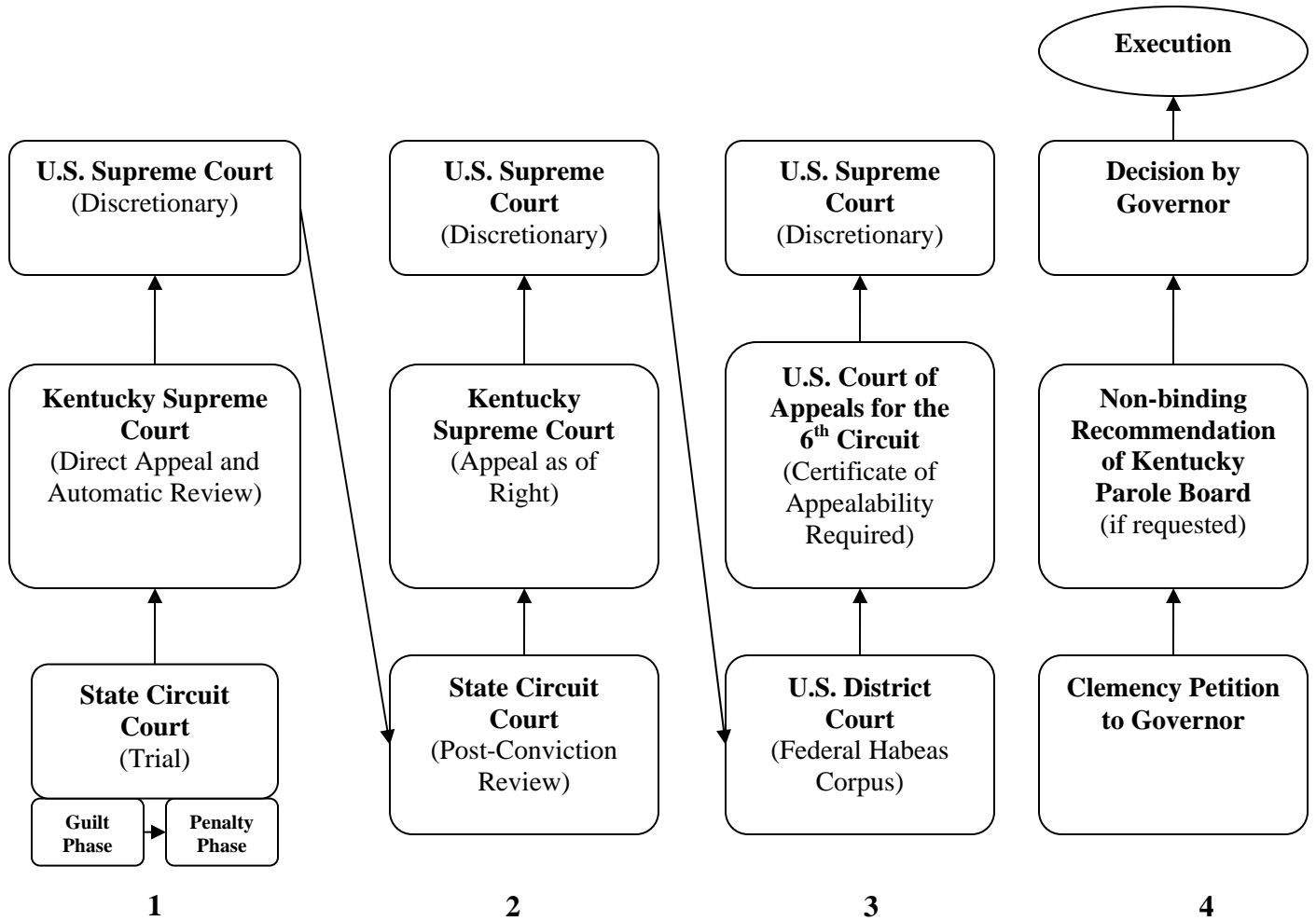
⁷⁰ KY. REV. STAT. ANN. §§ 532.130, 532.135, 532.140 (West 1990).

On March 30, 1998, Kentucky became the first state to adopt a Racial Justice Act [KRJA] under statute KRS 532.300.⁷¹ The KRJA provides that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race.”⁷² For a full discussion of the KRJA, see Chapter Twelve on Racial and Ethnic Minorities.

⁷¹ KY. REV. STAT. ANN. § 532.300 (West 1998).

⁷² KY. REV. STAT. ANN. § 532.300(1) (West 1998).

III. THE PROGRESSION OF A KENTUCKY DEATH PENALTY CASE FROM ARREST TO EXECUTION



A. *The Pretrial Process*

1. Commencement of a Prosecution for a Capital Offense

An individual arrested for the commission of a crime in Kentucky must be taken “without unnecessary delay before a judge” for an initial appearance.⁷³ If the person is arrested without a warrant, the officer making the arrest must file with the clerk of the court a post-arrest complaint specifying the offense charged and the facts constituting probable cause.⁷⁴

At the initial hearing, unless waived by the defendant,⁷⁵ the judge must inform the defendant

- (1) Of the nature of the charges against him/her;
- (2) That s/he has a right to a preliminary hearing or trial;
- (3) That s/he has a right to retain counsel;
- (4) That s/he has the right to appointed counsel at no expense if s/he is financially unable to employ counsel;
- (5) Of his/her privilege against self-incrimination; and
- (6) Of the amount and conditions of bail.⁷⁶

Prior to the determination of bail, the judge must allow the defendant reasonable time and opportunity to consult with counsel.⁷⁷

The determination of the defendant’s indigency must be made no later than the defendant’s first appearance in court.⁷⁸ If the defendant is found to be indigent, the court must assign counsel.⁷⁹ The appointment will continue for the entire trial, sentencing, and direct appeal.⁸⁰

2. Preliminary Hearing

A defendant charged with a capital crime in Kentucky is entitled to a preliminary hearing, unless s/he is indicted by a grand jury before the preliminary hearing commences.⁸¹ A preliminary hearing must occur within ten days of the initial appearance if the defendant is in custody and within twenty days of the initial appearance if the defendant is at-large, unless the preliminary hearing is waived by the defendant or the defendant is indicted.⁸² The purpose of the preliminary hearing is for the court to determine whether there is probable cause that the charged

⁷³ KY. R. CRIM. P. 3.02(1).

⁷⁴ KY. R. CRIM. P. 3.02(2).

⁷⁵ *See Bischoff v. Commonwealth*, 96 S.W. 538, 541 (Ky. 1906) (discussing waiver of arraignment).

⁷⁶ KY. R. CRIM. P. 3.05(1).

⁷⁷ *Id.* *But see* KY. CONST. § 16 (“All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great . . .”).

⁷⁸ KY. REV. STAT. ANN. § 31.120 (West 2011).

⁷⁹ KY. R. CRIM. P. 3.05(2).

⁸⁰ *Id.*

⁸¹ KY. R. CRIM. P. 3.07.

⁸² KY. R. CRIM. P. 3.10(1)–(3). Failure to commence the preliminary hearing within the specified time will result in the defendant being discharged from custody. KY. R. CRIM. P. 3.10(2).

offense occurred and whether the defendant committed the charged offense.⁸³ The defendant is entitled to be present, to be represented by counsel, to cross-examine witnesses and to introduce any evidence relevant to the probable cause determination or conditions of pretrial release.⁸⁴

3. Grand Jury Indictment and Information

An individual accused of a capital felony in Kentucky has a constitutional right to be prosecuted upon a grand jury indictment.⁸⁵ For an indictment to be returned, at least nine of the twelve grand jurors must reach consensus.⁸⁶ If the grand jury does not return an indictment, the accused will be released from custody.⁸⁷ An indictment obtained prior to the preliminary hearing will suffice as the probable cause determination.⁸⁸

If the accused waives his/her right to be tried upon an indictment, a prosecution for a capital offense may proceed upon the filing of an information.⁸⁹ An information is a written statement by the Commonwealth's Attorney charging an individual with a criminal offense.⁹⁰

4. Notice of Intent to Seek the Death Penalty

If the prosecution intends to seek the death penalty, it must provide a notice of aggravating circumstances prior to the commencement of the trial.⁹¹ The notice must be provided to the defense with "reasonable time and opportunity for preparation," although the notice need not be in writing.⁹² Inadequate notice has been determined to be grounds for the reversal of a death sentence.⁹³

5. Arraignment and Pleas

After the service of indictment or information, the defendant is entitled to an arraignment.⁹⁴ During the arraignment, in open court, the court must read or state the substance of the charge and the defendant must plead in response to the charge.⁹⁵

The defendant may plead not guilty, guilty, or guilty but mentally ill (GBMI).⁹⁶ Prior to accepting a plea of guilty or GBMI, the court must determine that the plea was made "voluntarily

⁸³ KY. R. CRIM. P. 3.14(1).

⁸⁴ KY. R. CRIM. P. 3.14(2); *see also* Commonwealth v. Wortman, 929 S.W.2d 199, 200 (Ky. Ct. App. 1996).

⁸⁵ KY. CONST. § 12; KY. R. CRIM. P. 6.02.(1)

⁸⁶ KY. CONST. § 248; KY. REV. STAT. ANN. § 29A.200 (West 2011).

⁸⁷ KY. R. CRIM. P. 5.22(1).

⁸⁸ KY. R. CRIM. P. 3.10(1).

⁸⁹ KY. R. CRIM. P. 6.02(1). This waiver must be a written notice filed with the circuit court. *Id.*

⁹⁰ KY. R. CRIM. P. 6.04.

⁹¹ KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011).

⁹² Smith v. Commonwealth, 845 S.W.2d 534, 537 (Ky. 1993).

⁹³ *Id.* at 538; Commonwealth v. Maricle, 15 S.W.3d 376, 378-79 (Ky. 2000).

⁹⁴ KY. R. CIV. P. 5.05(1) ("All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter."); KY. R. CRIM. P. 8.02.

⁹⁵ *Id.*

⁹⁶ KY. R. CRIM. P. 8.08. A plea of not guilty by reason of insanity is included under a general plea of not guilty. KY. REV. STAT. ANN. § 504.020 (West 2011).

with understanding of the nature of the charge.”⁹⁷ If the defendant refuses to enter a plea, or if the court refuses to accept a plea of guilty or GBMI, the court must enter a plea of not guilty on the defendant’s behalf.⁹⁸ At any time prior to the final judgment, the court may permit a defendant to withdraw a plea of guilty or GBMI and substitute a plea of not guilty.⁹⁹

6. Pretrial Conference and Pretrial Motions

After the grand jury returns an indictment or the Commonwealth’s Attorney files an information, the court, on its own motion or in response to a motion by either party, may order one or more pretrial conferences.¹⁰⁰ The purpose of a pretrial conference is to consider procedural matters that promote “a fair and expeditious trial.”¹⁰¹ At the close of the pretrial conference, the court must prepare and file an order noting the matters agreed upon by the parties.¹⁰²

Prior to trial, the defendant may raise “any defense or objection which is capable of determination without the trial of the general issue.”¹⁰³ Motions alleging a defect in the institution of the prosecution and motions alleging a defect in the indictment or information, “other than that it fails to show jurisdiction in the court or to charge an offense,” must be made prior to entering a plea, or the court may permit such motion to be made within a “reasonable time thereafter.”¹⁰⁴ In addition, requests for discovery¹⁰⁵ and motions for a severance of defendants or offenses must be raised prior to trial.¹⁰⁶ Failure to raise any of these defenses or objections within the specified time limits will generally constitute a waiver.¹⁰⁷

If the defendant wishes to introduce expert testimony concerning any mental condition related to his/her guilt or punishment, s/he must provide written notice to the Commonwealth’s Attorney and file a copy of the notice with the clerk of the court.¹⁰⁸ The court, sua sponte or upon the prosecution’s request, may order a mental evaluation of the defendant.¹⁰⁹ The defendant, through a pretrial motion, may also raise the issue of mental retardation as a bar to execution.¹¹⁰ The trial judge will make the determination as to whether the defendant is “seriously mentally retarded” and thus ineligible for the death penalty.¹¹¹

⁹⁷ KY. R. CRIM. P. 8.08.

⁹⁸ *Id.*

⁹⁹ KY. R. CRIM. P. 8.10.

¹⁰⁰ KY. R. CRIM. P. 8.03.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ KY. R. CRIM. P. 8.16.

¹⁰⁴ KY. R. CRIM. P. 8.18, 8.20.

¹⁰⁵ KY. R. CRIM. P. 7.24(1)–(2).

¹⁰⁶ KY. R. CRIM. P. 9.16.

¹⁰⁷ KY. R. CRIM. P. 8.18, 8.20. The court may, however grant relief from the waiver for cause shown. *Id.*

¹⁰⁸ KY. R. CRIM. P. 7.24(B)(i). The notice must be provided at least twenty days prior to trial, but upon demonstrating cause, the court may permit the notice to be filed late or grant a continuance for the parties to prepare for trial. *Id.*

¹⁰⁹ KY. R. CRIM. P. 7.24(B)(ii); KY. REV. STAT. ANN. § 504.070(2) (West 2011) (relating to mental health evaluation when defendant seeks to present evidence of his/her mental illness or insanity); KY. REV. STAT. ANN. § 504.100(1) (West 2011) (relating to mental health evaluation to determine defendant’s competency to stand trial).

¹¹⁰ KY. REV. STAT. ANN. §§ 532.130(2), 532.135(1), 532.140(1) (West 2011).

¹¹¹ KY. REV. STAT. ANN. §§ 532.135(1), 532.140(1) (West 2011).

B. *The Capital Trial*

Kentucky divides a capital trial into two phases: the first phase determines the guilt or innocence of the defendant and, if the defendant is convicted of the capital charge, the second phase will concern only the defendant's sentence.¹¹²

1. Guilt Phase

All individuals charged with a capital offense have the right to a trial by jury.¹¹³ However, a defendant may waive his/her right to a jury trial provided s/he waives this right in writing and receives the consent of the court and the prosecution.¹¹⁴

A capital jury is composed of twelve persons.¹¹⁵ In selecting a jury for a capital trial, both the prosecution and the defendant are entitled to eight peremptory challenges,¹¹⁶ but the trial court may, in its discretion, grant the defendant additional peremptory challenges.¹¹⁷

During the guilt phase, the prosecution must present witnesses and other evidence to support the charged offense.¹¹⁸ The defendant may then present witnesses and other evidence in support of his/her defense.¹¹⁹ At the discretion of the court, the parties may present rebuttal evidence.¹²⁰ Additionally, the parties are entitled to opening statements and closing arguments.¹²¹ At the conclusion of this phase, the jury must decide whether the prosecution has proven beyond a reasonable doubt that the defendant is guilty of the capital offense.¹²²

The jury must render its verdict unanimously and in open court.¹²³ Upon request by either party, the jury will be polled following the return of the verdict.¹²⁴ If, at such time, the jury is no longer unanimous in its decision, the court may not receive the verdict.¹²⁵ If the jury finds the defendant guilty of the capital offense, the case will proceed to the sentencing phase.¹²⁶

¹¹² KY. REV. STAT. ANN. § 532.025 (1)(a)–(b) (West 2011).

¹¹³ KY. CONST. § 7; KY. REV. STAT. ANN. § 29A.270(1) (West 2011); KY. R. CRIM. P. 9.26(1).

¹¹⁴ KY. R. CRIM. P. 9.26(1).

¹¹⁵ KY. REV. STAT. ANN. § 29A.280(1) (West 2011).

¹¹⁶ KY. R. CRIM. P. 9.40(1).

¹¹⁷ *See, e.g.,* Bowling v. Commonwealth, 873 S.W.2d 175, 177–78 (Ky. 1993) (the trial court gave the defendant “more than twice” the amount of peremptory strikes as required by rule); *but see* Epperson v. Commonwealth, 197 S.W.3d 46, 64–65 (Ky. 2006) (“The trial judge was not required to grant additional peremptory challenges beyond the number authorized by RCr 9.40 [T]he decision on whether to grant additional peremptory challenges is within the sound discretion of the trial judge, even in a death penalty case.”).

¹¹⁸ KY. R. CRIM. P. 9.42(c).

¹¹⁹ KY. R. CRIM. P. 9.42(d).

¹²⁰ KY. R. CRIM. P. 9.42(e).

¹²¹ KY. R. CRIM. P. 9.42(a)–(b), (f). The Kentucky Rules permit defense counsel or the defendant to make an opening statement. KY. R. CRIM. P. 9.42(d).

¹²² KY. R. CRIM. P. 9.56(1).

¹²³ KY. R. CRIM. P. 9.82(1).

¹²⁴ KY. R. CRIM. P. 9.88.

¹²⁵ *Id.*

¹²⁶ KY. REV. STAT. ANN. § 532.025(1)(a)–(b) (West 2011); KY. R. CRIM. P. 9.84(2).

2. Sentencing Phase¹²⁷

For a defendant convicted of a capital offense, the sentencing phase determines the appropriate penalty: death, life imprisonment without the benefit of probation or parole, life imprisonment without the benefit of probation or parole for a minimum of twenty-five years, life imprisonment, or imprisonment for a term of not less than twenty years and not more than fifty years.¹²⁸ At this phase, both parties may present evidence in “extenuation, mitigation and aggravation of punishment.”¹²⁹ As in the guilt phase, both parties are afforded opportunities to present witnesses and other evidence, and to make opening statements and closing arguments.¹³⁰

Before a death sentence may be imposed, the prosecution must prove beyond a reasonable doubt at least one aggravating circumstance, and the jury must unanimously agree on the presence of at least one of these aggravating circumstances.¹³¹ The statutorily enumerated aggravating circumstances at KRS 532.025 are

- (1) The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
- (2) The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree;
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a weapon of mass destruction, weapon, or other device which would normally be hazardous to the lives of more than one (1) person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;
- (5) The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;
- (6) The offender’s act or acts of killing were intentional and resulted in multiple deaths;
- (7) The offender’s act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties; and

¹²⁷ The KRS refers to the second stage of a capital trial as the *presentencing* stage. KY. REV. STAT. ANN. § 532.025 (West 2011) (emphasis added). The trial court will impose the sentencing decision of the trier of fact. *Id.*

¹²⁸ KY. REV. STAT. ANN. § 532.030(1) (West 2011).

¹²⁹ KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011).

¹³⁰ *Id.*

¹³¹ KY. REV. STAT. ANN. §§ 532.025(2)–(3), 29A.280(3) (West 2011). This requirement also applies to sentences of life imprisonment without the benefit of probation or parole, or life imprisonment without the benefit of probation or parole for a minimum of twenty-five years. KY. REV. STAT. ANN. § 532.025(3) (West 2011).

- (8) The offender murdered the victim when an emergency protective order or a domestic violence order was in effect, or when any other order designed to protect the victim from the offender, such as an order issued as a condition of a bond, conditional release, probation, parole, or pretrial diversion, was in effect.¹³²

Although the jury must find at least one of the statutory aggravating circumstances listed above in order to sentence the defendant to death, Kentucky also permits jurors to consider aggravating circumstances “permitted by law” but not enumerated in KRS 532.025.¹³³

Prior to trial, the prosecution must notify the defense of the aggravating evidence it intends to present at sentencing.¹³⁴ While the KRS does not provide a time requirement for when notice must be filed or what form that notice must take, the Kentucky Supreme Court has held that the notice must be given with “reasonable time and opportunity for preparation.”¹³⁵ While only those aggravators which are noticed by the prosecution may be submitted to the jury, other evidence of the defendant’s character and circumstances of the crime may also be presented.¹³⁶ The Kentucky Supreme Court has interpreted KRS 532.025 to “allow evidence of all relevant and pertinent information so that the jury can make an informed decision concerning the appropriate sentence in a particular case.”¹³⁷ The jury also may consider any testimony presented in regard to the character of the victim and the impact of the murder on any relevant persons.¹³⁸

The jury must also consider any mitigating circumstances authorized by law and any statutory mitigating circumstances supported by the evidence.¹³⁹ Kentucky’s eight statutory mitigating circumstances are as follows:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime;

¹³² KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011).

¹³³ *Harris v. Commonwealth*, 793 S.W.2d 802, 805 (Ky. 1990). In *Harris* the court found that the victim’s murder was an acceptable aggravator for capital kidnapping, even though murder during the course of a kidnapping is not listed as one of the statutorily enumerated aggravating circumstances in KRS 532.025. *Id.*

¹³⁴ KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011).

¹³⁵ *Smith v. Commonwealth*, 845 S.W.2d 534, 537 (Ky. 1993) (holding that six days notice of intent to seek the death penalty was inadequate when the Commonwealth’s Attorney had previously “implied” that he would not seek the death penalty); *see also Commonwealth v. Maricle*, 15 S.W.3d 376, 378–79 (Ky. 2000) (finding that the trial court did not abuse its discretion in holding that forty-six days was inadequate notice of the Commonwealth’s intent to seek the death penalty).

¹³⁶ *Templeman v. Commonwealth*, 785 S.W.2d 259, 260 (Ky. 1990) (“The jury should not sentence in a vacuum . . .”).

¹³⁷ *Id.*

¹³⁸ KY. REV. STAT. ANN. § 421.520(1) (West 2011). Relevant persons include members of the victim’s family. KY. REV. STAT. ANN. § 421.500(b) (West 2011).

¹³⁹ KY. REV. STAT. ANN. § 532.025(2) (West 2011); *Stanford v. Commonwealth*, 734 S.W.2d 781, 790 (Ky. 1987).

- (3) The victim was a participant in the defendant's criminal conduct or consented to the criminal act;
- (4) The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime;
- (5) The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor;
- (6) The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime;
- (7) At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and
- (8) The youth of the defendant at the time of the crime.¹⁴⁰

If the jury determines an aggravating circumstance has been proven beyond a reasonable doubt, and has considered all mitigating circumstances allowed by law, the jury must submit to the court, in writing, the aggravating circumstance(s) it has found beyond a reasonable doubt along with a sentence recommendation of death, life imprisonment without the benefit of probation or parole, life imprisonment without the possibility of parole for a minimum of twenty-five years, a sentence of life, or a sentence of twenty years, but not more than fifty years.¹⁴¹ If the jury cannot unanimously determine that an aggravating circumstance has been proven beyond a reasonable doubt, a death sentence, a sentence of life without parole, or a sentence of life without parole for twenty-five years may not be imposed.¹⁴²

In cases where the jury is unable to reach a decision on sentencing, the court may declare a mistrial, and a new jury must be empanelled and a new penalty phase commenced.¹⁴³ The trial court may not impose the sentence if the jury does not reach a unanimous finding.¹⁴⁴

Whenever the death penalty is imposed for a capital offense, the trial court must prepare and submit a report in the form of a questionnaire to the Kentucky Supreme Court.¹⁴⁵ The questionnaire is created by the Supreme Court and is maintained by the Administrative Office of the Courts.¹⁴⁶

¹⁴⁰ KY. REV. STAT. ANN. § 532.025(2)(b) (West 2011).

¹⁴¹ KY. REV. STAT. ANN. §§ 532.025(2)–(3), 532.030(4) (West 2011).

¹⁴² KY. REV. STAT. ANN. §§ 532.025(3) (West 2011).

¹⁴³ Skaggs v. Commonwealth, 694 S.W.2d 672, 681 (Ky. 1985).

¹⁴⁴ *Id.* (“In absence of findings by a jury where the jury is deadlocked, the trial judge has no authority to fix any sentence.”).

¹⁴⁵ KY. REV. STAT. ANN. § 532.075 (West 2011).

¹⁴⁶ See KY. ADMIN. OFFICE OF THE COURTS, Form no. 085.

C. Motion for a New Trial, Direct Appeal, Rehearing, and Review by the U.S. Supreme Court

1. Motion for a New Trial¹⁴⁷

Following a conviction for a capital offense and a sentence of death, the defendant may challenge his/her conviction and death sentence by filing a motion for a new trial.¹⁴⁸ A motion for a new trial must be made within five days of the verdict, unless the motion is based on “newly discovered evidence,” in which case the motion must be made within one year after the entry of the judgment.¹⁴⁹ The court may grant the defendant’s motion for new trial, for “any cause which prevented the defendant from having a fair trial, or if required in the interest of justice.”¹⁵⁰ The court may also, on its own initiative, order a new trial for “any reason for which it might have granted a new trial on motion of a defendant.”¹⁵¹

2. Direct Appeal and Automatic Review

The defendant (or “appellant”) also may challenge his/her conviction and death sentence by filing a direct appeal with the Kentucky Supreme Court.¹⁵² In order to pursue an appeal, the appellant must file a notice of appeal with the trial court, within thirty days of the entry of his/her judgment or within thirty days of the trial court’s entry of an order denying a new trial.¹⁵³

The appellant’s brief must be filed within sixty days from the date the trial record is filed with the appellate clerk, if the appellant is represented by the Public Advocate.¹⁵⁴ The Commonwealth, as the appellee, must file its brief within sixty days of the filing of the appellant’s brief, if the appellant is represented by the Public Advocate.¹⁵⁵ The appellant may file a reply brief within fifteen days from when the appellee’s brief is filed or due to be filed.¹⁵⁶ In death penalty cases, the appellant and appellee, upon motion and for good cause, may increase the page limit of initial briefs from fifty to 150 pages, and may increase the page limit of reply briefs from ten to twenty-five pages.¹⁵⁷

¹⁴⁷ Pursuant to the Kentucky Rules of Civil Procedure, a death-sentenced defendant may also move for a judgment notwithstanding verdict pursuant to KY. R. CIV. P. 50.02, 50.03, 50.04; a motion for new trial pursuant to KY. R. CIV. P. 59.01; or a motion to vacate, alter, or amend judgment pursuant to KY. R. CIV. P. 59.05. *See* KY. R. CRIM. P. 13.04 (“The Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.”).

¹⁴⁸ KY. R. CRIM. P. 10.02(2) (“Not later than ten (10) days after return of the verdict, the court on its own initiative may order a new trial . . .”).

¹⁴⁹ KY. R. CRIM. P. 10.06(1).

¹⁵⁰ KY. R. CRIM. P. 10.02(1).

¹⁵¹ KY. R. CRIM. P. 10.02(2).

¹⁵² KY. R. CRIM. P. 12.02.

¹⁵³ KY. R. CRIM. P. 12.04(1)–(3).

¹⁵⁴ KY. R. CIV. P. 76.12(2)(b)(1). If the appellant is represented by an attorney other than the Public Advocate, the appellant’s brief must be filed within sixty days from the date notification was given by the clerk of court that the record was filed. KY. R. CRIM. P. 76.12(2)(a)–(b).

¹⁵⁵ KY. R. CRIM. P. 76.12(2)(a)–(b). If the appellant is not represented by the Public Advocate, the appellee’s brief must be filed within sixty days of the filing of the appellant’s brief or within sixty days of the date the record was received by the clerk of the court, whichever is later. KY. R. CRIM. P. 76.12(2)(b)(ii).

¹⁵⁶ KY. R. CRIM. P. 76.12(2)(a)–(b).

¹⁵⁷ KY. R. CRIM. P. 76.12(4)(b). Absent a motion for an increased page limit, initial briefs must be no more than fifty pages and reply briefs may not exceed ten pages. *Id.*

Regardless of whether a direct appeal is taken, in *all* cases in which the death penalty is imposed, the Kentucky Supreme Court is required to determine whether

- (1) The sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
- (2) The evidence supports the jury's or judge's finding of statutory aggravating circumstance(s); and
- (3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.¹⁵⁸

The Kentucky Supreme Court will review for proportionality only those cases in which the death penalty was actually imposed.¹⁵⁹ The Court will include in its analysis a reference to all similar cases it considered when determining whether the sentence was disproportionate or excessive.¹⁶⁰ The Court is not required to consider cases that could have been death penalty eligible but were not prosecuted as capital cases or cases in which the offender received a sentence other than death.¹⁶¹ Following its review, the Court can correct any errors enumerated in the appeal and can either affirm the sentence of death or set aside the sentence and remand to the sentencing court for resentencing.¹⁶²

3. Rehearings and Reconsideration

Once an opinion on the direct appeal is issued, the Kentucky Supreme Court, on motion of the adversely affected party, may grant a rehearing prior to the opinion becoming final.¹⁶³ A petition for a rehearing must be filed within twenty days after the date the opinion was issued and the petition will be assigned to a different justice than the one who authored the opinion.¹⁶⁴ An answer to the petition must be made within twenty days after the petition was filed.¹⁶⁵

¹⁵⁸ KY. REV. STAT. ANN. § 532.075(3) (West 2011). The Kentucky Supreme Court automatically reviews every death sentence regardless of whether the defendant appeals the conviction or death sentence. KY. REV. STAT. ANN. § 532.075 (West 2011).

¹⁵⁹ *Hunt v. Commonwealth*, 304 S.W. 3d 15, 52 (Ky. 2009) (citing *Fields v. Commonwealth*, 274 S.W. 3d 375 (Ky. 2008)) (“Kentucky’s proportionality review is constitutional and comports with statutory requirements and the federal Constitution.”).

¹⁶⁰ KY. REV. STAT. ANN. § 532.075(3)–(5) (West 2011).

¹⁶¹ KY. REV. STAT. ANN. § 532.075(5) (West 2011).

¹⁶² KY. REV. STAT. ANN. § 532.075(2)–(5) (West 2011). On remand, the trial court will be provided with and must consider (1) the arguments of counsel, (2) the records of similar cases referenced by the Supreme Court, and (3) the extracts of all cases in which the death penalty was imposed since January 1, 1970. KY. REV. STAT. ANN. § 532.075(5)(b), (6)(a) (West 2011). *But see* *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010) (holding that a defendant may not face the death penalty after remand if the original trier of fact did not sentence the defendant to death).

¹⁶³ KY. R. CIV. P. 76.32(1)(a), 76.30(2)(a) (“An opinion of the Supreme Court becomes final on the 21st day after the date of its rendition”). If the final disposition of the appeal was made by an order (as opposed to an opinion), the adversely affected party must instead request reconsideration. KY. R. CIV. P. 76.32(1)(a), 76.38(2). If a petition for reconsideration is required, the adversely affected party must file the petition for reconsideration within ten days of the entry and filing of the order. KY. R. CIV. P. 76.38(2).

¹⁶⁴ KY. R. CIV. P. 76.32(2), (6)(a).

¹⁶⁵ KY. R. CIV. P. 76.32(2).

Petitions for rehearing are limited to the issues presented on appeal “[e]xcept in extraordinary cases when justice demands it.”¹⁶⁶ The Court will grant a petition for rehearing if

- (1) The court has overlooked a material fact in the record;
- (2) The court has overlooked a controlling decision or statute; or
- (3) The court has misconceived the issues presented on the appeal and the applicable law.¹⁶⁷

If the petition for rehearing is denied, the opinion immediately becomes final.¹⁶⁸

4. Discretionary Review by the U.S. Supreme Court

If the Kentucky Supreme Court affirms the conviction and death sentence on appeal, the appellant has ninety days after the decision is entered to file a petition for a writ of certiorari with the U.S. Supreme Court, seeking discretionary review of the Kentucky Supreme Court’s decision.¹⁶⁹ If the U.S. Supreme Court reviews the case, it may affirm the conviction and sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.¹⁷⁰ If the Court affirms the conviction and sentence or denies the petition for writ of certiorari, and the appellant wishes to continue to challenge his/her conviction and sentence, s/he may initiate post-conviction relief proceedings under Kentucky law.¹⁷¹

D. State Post-Conviction Relief

While Kentucky provides several mechanisms for post-conviction relief,¹⁷² most post-conviction petitions are governed by Kentucky Rule of Criminal Procedure (RCr) 11.42. In order to apply

¹⁶⁶ KY. R. CIV. P. 76.32(1)(b).

¹⁶⁷ *Id.*

¹⁶⁸ KY. R. CIV. P. 76.30(2)(b)–(c).

¹⁶⁹ 28 U.S.C. §§ 1257, 2101(c) (2011).

¹⁷⁰ 28 U.S.C. § 2106 (2011).

¹⁷¹ KY. R. CRIM. P. 11.42.

¹⁷² *See, e.g.*, KY. R. CRIM. P. 11.42 (motion to vacate, set aside, or correct sentence). The Kentucky Constitution also provides a right to habeas corpus. KY. CONST. § 16 (right to habeas corpus); KY. REV. STAT. ANN. §§ 419.020–419.130 (West 2011) (implementing the constitutional guarantee of habeas corpus). A petition for habeas corpus, however, is a summary procedure reserved for jurisdictional errors or judgments void ab initio. *Commonwealth v. Marcum*, 873 S.W.2d 207, 211–12 (Ky. 1994). The habeas corpus petition requires prompt attention and relief, and should not be used for procedural or substantive collateral attacks. *Id.* Furthermore, Kentucky Rule of Civil Procedure 60.02 permits a grant of relief from a judgment or order if

- (1) The claim is based on mistake, inadvertence, surprise or excusable neglect;
- (2) The claim is founded on newly discovered evidence which by due diligence could not have been discovered in time to file a motion for new trial;
- (3) The claim is based on perjury or falsified evidence;
- (4) The claim is based on a fraud affecting the proceedings, other than perjury or falsified evidence;
- (5) The judgment is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) The conviction and sentence should be vacated for any other reason of an extraordinary nature justifying relief.

KY. R. CIV. P. 60.02.

for state post-conviction relief, a death row inmate must file a motion for post-conviction review in the circuit court where s/he was convicted and sentenced.¹⁷³ The motion must be filed within three years after the conviction becomes final.¹⁷⁴ However, a motion filed after this specified period may still be considered when

- (1) The facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (2) The fundamental constitutional right asserted was not established within the specified period and has been held to apply retroactively.¹⁷⁵

The RCr 11.42 motion must be signed and verified by the defendant and must also state all grounds and factual support for granting post-conviction relief.¹⁷⁶ The Commonwealth must answer a collateral challenge within twenty days after the mailing of the notice of filing.¹⁷⁷

Claims that could have been raised or that were disposed of on direct appeal will not be considered during post-conviction review¹⁷⁸ unless “substantial injustice might otherwise result and [the] former [direct appeal] decision is clearly and palpably erroneous.”¹⁷⁹

After receiving the Commonwealth’s answer, the court will grant an evidentiary hearing on the RCr 11.42 motion if there is a “material issue of fact that cannot be determined on the face of the record.”¹⁸⁰ If a hearing is granted, and the defendant makes a specific request for counsel in writing, the court will make a determination of the defendant’s indigency.¹⁸¹ If the defendant is indigent, then counsel must be appointed for the remainder of the proceeding, including appeal.¹⁸²

After the hearing, the court will issue “findings determinative of the material issues of fact” and enter a final judgment.¹⁸³ If the court determines that there has been a violation of the petitioner’s rights warranting relief,¹⁸⁴ the court must vacate the judgment and discharge the petitioner, resentence the petitioner, grant the petitioner a new trial, or correct the sentence.¹⁸⁵

¹⁷³ KY. R. CRIM. P. 11.42(1).

¹⁷⁴ KY. R. CRIM. P. 11.42(10).

¹⁷⁵ *Id.* If the motion is filed under one of the exceptions, it must be filed within three years of the event allowing the exception. *Id.* The filing of the petition automatically stays the execution. KY. R. CRIM. P. 11.42(8), 12.04(4). The petition must be filed with the clerk of the court where the petitioner was sentenced. KY. R. CRIM. P. 11.42(1), (9).

¹⁷⁶ KY. R. CRIM. P. 11.42(2) (“Failure to comply with this section shall warrant a summary dismissal of the motion.”).

¹⁷⁷ KY. R. CRIM. P. 11.42(4).

¹⁷⁸ Leonard v. Commonwealth, 279 S.W.3d 151, 156 (Ky. 2009).

¹⁷⁹ Gossett v. Commonwealth, 441 S.W.2d 117, 118 (Ky. 1969).

¹⁸⁰ KY. R. CRIM. P. 11.42(5).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ KY. R. CRIM. P. 11.42(6).

¹⁸⁴ Bowling v. Commonwealth, 981 S.W.2d 545, 552 (Ky. 1998).

¹⁸⁵ KY. R. CRIM. P. 11.42(6).

Both the petitioner and the Commonwealth may appeal the final ruling on the post-conviction challenge directly to the Kentucky Supreme Court.¹⁸⁶ The Kentucky Supreme Court will not disturb the trial court's findings of fact unless such findings were clearly erroneous.¹⁸⁷ Conclusions of law will be reviewed de novo.¹⁸⁸

E. Federal Habeas Corpus

A Kentucky death row inmate may also challenge the constitutionality of his/her conviction and death sentence by filing a petition for a writ of habeas corpus with the appropriate federal district court.¹⁸⁹ Kentucky has two federal judicial districts: Eastern and Western.¹⁹⁰ The petitioner may be entitled to appointed counsel to prepare his/her petition if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."¹⁹¹ If a petitioner files a federal habeas corpus petition, the execution is again automatically stayed.¹⁹²

Prior to filing a petition for a writ of habeas corpus, the petitioner must have raised all relevant federal claims in state court, as the failure to exhaust all state remedies available on direct appeal and state post-conviction review is grounds to dismiss the petition.¹⁹³

The petition must be filed in the federal district court in the district in which the petitioner is in custody or in the district where the petitioner was convicted and sentenced.¹⁹⁴ The deadline for filing the petition is one year¹⁹⁵ from the date on which (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the U.S. Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim or claims could have been discovered through due

¹⁸⁶ KY. R. CRIM. P. 11.42(7). *See also* KY. R. CRIM. P. 12.02 ("an appeal from a judgment imposing a sentence of death . . . shall be taken directly to the Supreme Court").

¹⁸⁷ *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007) (stating that "unless the trial court's findings of fact are clearly erroneous, those findings must stand").

¹⁸⁸ *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. Ct. App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) ("we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law")).

¹⁸⁹ *See infra* note 196–97 and accompanying text.

¹⁹⁰ 28 U.S.C. § 97 (2011).

¹⁹¹ 18 USC § 3599 (2011). *See also* *McFarland v. Scott*, 512 U.S. 849, 854 (1994) (internal citations omitted).

¹⁹² 28 U.S.C. § 2262(a)–(b) (2011).

¹⁹³ 28 U.S.C. § 2254(b)(1)–(2) (2011). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. *Rhines v. Weber*, 544 U.S. 269, 269 (2005).

¹⁹⁴ 28 U.S.C. §§ 2254, 2241(d) (2011); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

¹⁹⁵ 28 U.S.C. § 2244(d)(1) (2011). In states that have "opted-in" to the Special Habeas Corpus Procedures in Capital Cases found in 28 U.S.C. §§ 2261–2266, the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2011). However, capital jurisdictions must meet certain criteria in order to opt-in to the expedited filing deadline permitted by the Special Habeas Corpus Procedures in Capital Cases. *See* 28 U.S.C. § 2261 (2011). As of the date of this report, the Commonwealth of Kentucky has not opted-in to the Special Habeas Corpus Procedures in Capital Cases. Additionally, "opt-in" criteria are currently under revision by the U.S. Attorney General. *See* 28 U.S.C. §§ 2261–2265 (2011).

diligence.¹⁹⁶ The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.¹⁹⁷

In a petition for a writ of habeas corpus, the petitioner must identify and raise all possible grounds of relief and identify the facts supporting each ground.¹⁹⁸ If the petitioner challenges a state court’s determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that state court factual determinations are correct.¹⁹⁹ If the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court’s decision of the claim was “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States,” or that it was based on an “unreasonable determination of the facts in light of the evidence presented in State court proceeding.”²⁰⁰

Once the petition is filed, a district court reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief.²⁰¹ If the court finds that the petitioner is not entitled to relief, the court may summarily dismiss the petition.²⁰² In contrast, if the court finds that the petitioner may be entitled to federal habeas corpus relief, the court will order the respondent to file an answer replying to the allegations contained in the petition.²⁰³ In addition to the answer, the respondent must file all portions of the state court transcripts it deems relevant to the petition.²⁰⁴ The court, on its own motion or on the motion of the petitioner, may order that additional portions of the state court transcripts be made part of the record.²⁰⁵

Additionally, either party may submit a request for discovery.²⁰⁶ The court may grant the request if the requesting party establishes “good cause.”²⁰⁷ The court also may direct, or the parties may request, expansion of the record by providing additional evidence relevant to the merits of the petition.²⁰⁸ Such evidence may include letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.²⁰⁹

Upon review of the state court proceedings and the evidence presented, the district court must determine whether an evidentiary hearing is required.²¹⁰ The court may not hold an evidentiary hearing on a claim on which a petitioner failed to develop the underlying facts in the state court proceedings unless the claim relies on

¹⁹⁶ 28 U.S.C. § 2244(d)(1) (2011).

¹⁹⁷ 28 U.S.C. § 2244(d)(2) (2011).

¹⁹⁸ RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

¹⁹⁹ 28 U.S.C. § 2254(e)(1) (2011).

²⁰⁰ 28 U.S.C. § 2254(d)(1)–(2) (2011).

²⁰¹ RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁰² *Id.*

²⁰³ RULES 4–5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁰⁴ RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁰⁵ *Id.*

²⁰⁶ RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁰⁷ *Id.*

²⁰⁸ RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁰⁹ RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²¹⁰ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

- (1) A new rule of constitutional law, made retroactive to cases on collateral review by the [U.S.] Supreme Court, that was previously unavailable; *or*
- (2) That the factual predicate could not have been previously discovered through the exercise of due diligence; *and*
- (3) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error no reasonable factfinder would have found the applicant guilty of the underlying offense.²¹¹

If the court decides that an evidentiary hearing is unnecessary, the court will make a decision on the petition without additional evidence.²¹² If an evidentiary hearing is required, the court should conduct the hearing as promptly as possible.²¹³ During the evidentiary hearing, the court will resolve any factual discrepancies that are material to the petitioner’s claims.²¹⁴ Based on the evidence presented, the court may grant the petition, order a new trial, order a new penalty phase, order a new direct appeal, or deny relief.

In order to appeal the district court’s decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.²¹⁵ If the petitioner seeks to appeal, s/he must also request a “certificate of appealability” from either a district or circuit court.²¹⁶ A judge may issue a certificate of appealability only for those claims on which the petitioner has made a substantial showing of the denial of a constitutional right.²¹⁷ If the certificate of appealability is granted, the appeal will proceed to the U.S. Court of Appeals for the Sixth Circuit.²¹⁸

In rendering its decision, the Sixth Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments.²¹⁹ Based on the evidence, the Sixth Circuit may order a new appeal, an evidentiary hearing by the federal district court, or a new guilt or sentencing phase in the state trial court.

The party adversely affected by the Sixth Circuit’s decision may file a petition for a writ of certiorari to the U.S. Supreme Court.²²⁰ The Court may either grant or deny review of the petition.²²¹ If the Court grants review of the petition it may deny the petitioner relief or order a new trial, a new sentencing hearing, or other proceedings in the lower federal courts or the state court.

²¹¹ 28 U.S.C. § 2254(e)(2) (2011) (emphasis added); *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (“Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.”).

²¹² RULE 8(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²¹³ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²¹⁴ RULE 8(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²¹⁵ FED. R. APP. P. 4(b)(1)(B).

²¹⁶ 28 U.S.C. § 2253(c)(1) (2011); FED. R. APP. P. 22(b)(3).

²¹⁷ 28 U.S.C. § 2253(c)(2) (2011).

²¹⁸ 28 U.S.C. § 2253(c)(1)–(2) (2011). Denial of issuance of a certificate of appealability may be reviewed by the U.S. Supreme Court. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (holding that a certificate of appealability should have been ordered by the court of appeals in petitioner’s case).

²¹⁹ *See* FED. R. APP. P. 10, 28, 31, 34.

²²⁰ 28 U.S.C. § 1254(1) (2011).

²²¹ Ky. Sup. Ct. Rule (SCR) 10 (2010).

If the petitioner wishes to file a second or successive habeas corpus petition with the federal district court, s/he must submit a motion to the Sixth Circuit Court of Appeals requesting an order authorizing the petitioner to file and the district court to consider the petition.²²² A three-judge panel of the Sixth Circuit must consider the motion²²³ and specifically assess whether the petition makes a prima facie showing that the claim presented in the second or successive petition was not previously raised and that the new claim

- (1) Relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (2) The factual predicate of the claim could not have been discovered previously through the exercise of due diligence; and
- (3) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.²²⁴

Claims of actual innocence must meet the requirements of the latter provision.²²⁵ Any second or successive petition that presents a claim raised in a prior petition will be dismissed.²²⁶

If the Sixth Circuit grants the motion, then the second or successive motion will proceed through the same process as the initial petition. If the Circuit Court denies the motion for authorization to file a second or successive petition, the petitioner may not seek further appellate review of the decision.²²⁷

F. Clemency

A death row inmate may seek final review of his/her conviction and sentence by filing a petition for clemency.²²⁸ The power to grant clemency rests exclusively with the Governor.²²⁹ Specifically, the Governor has the authority to grant reprieves, commutations, pardons and exonerations for all criminal convictions except impeachment.²³⁰ In reaching a decision on clemency, the Governor may request the advice of the Kentucky Parole Board, which, upon the Governor's request, must investigate and issue a report on clemency.²³¹ Any recommendation by the Parole Board is nonbinding on the Governor.²³² After making a clemency determination,

²²² 28 U.S.C. § 2244(b)(3)(A) (2011).

²²³ 28 U.S.C. § 2244(b)(3)(B) (2011).

²²⁴ 28 U.S.C. § 2244(b)(2)(A)–(B) (2011).

²²⁵ 28 U.S.C. § 2244(b)(2)(B) (2011); *Ross v. Berghuis*, 417 F.3d 552, 556–57 n.4 (6th Cir. 2005); *see also Habeas Relief for State Prisoners*, 91 GEO. L.J. 817, 843–45 n.2617 (2003).

²²⁶ 28 U.S.C. § 2244(b)(1) (2011).

²²⁷ 28 U.S.C. § 2244(b)(3)(E) (2011).

²²⁸ *McQueen v. Patton*, 948 S.W.2d 418, 419 (1997) (interpreting KY. CONST. § 77 to require the inmate to file an application of clemency with the Governor).

²²⁹ KY. CONST. § 77.

²³⁰ *Id.*

²³¹ KY. REV. STAT. ANN. § 439.450 (West 2011).

²³² *Id.*; *see also* KY. CONST. § 77.

the Governor must provide the death row inmate with a statement explaining the reasons for the decision.²³³

Two Kentucky death row inmates have been granted clemency since the death penalty was reinstated in 1976.²³⁴ In 2003, Kevin Stanford was granted a sentence commutation to life in prison by Governor Paul Patton because Stanford was only seventeen at the time of the offense.²³⁵ Governor Ernie Fletcher commuted the death sentence of Jeffrey Leonard to life without parole in 2007, explaining the reason for clemency as the exceptionally inadequate representation Leonard had at trial.²³⁶

G. Execution

At the conclusion of an unsuccessful challenge to the prisoner's conviction and sentence, the Kentucky Supreme Court will issue a mandate setting the execution date as the fifth Friday following the date of the mandate.²³⁷ If the execution is stayed for any reason and judgment has not been carried out on the day appointed by the Court, the Governor may issue a warrant fixing the date of execution to be obeyed by the warden of the Kentucky State Penitentiary.²³⁸ In practice, after the inmate has exhausted all available appeals, or the time for filing such appeals has elapsed, the Attorney General will request that the Governor issue a warrant for execution.²³⁹ However, the Kentucky Governor's "policy concerning the signing of death warrants is strictly an executive function" and s/he may issue a death warrant before the statute of limitations placed on filing such an appeal elapses.²⁴⁰

²³³ *McQueen*, 948 S.W.2d at 419 (interpreting KY. CONST. § 77 to require the Governor to file a statement explaining the reasons for his/her decision).

²³⁴ See Dennis W. Archer, *Statement Re: The Decision to Commute the Death Penalty of Kevin Stanford*, AM. BAR ASS'N, Dec. 8, 2003, <http://www.abanow.org/2003/12/statement-re-the-decision-to-commute-the-death-penalty-of-kevin-stanford> (last visited June 10, 2011); *Fletcher Pardons 83 People*, WKYT.COM, Dec. 11, 2007, <http://www.wkyt.com/home/headlines/12340711.html> (last visited June 10, 2011).

²³⁵ Dennis W. Archer, *Statement Re: The Decision to Commute the Death Penalty of Kevin Stanford*, AM. BAR ASS'N, Dec. 8, 2003, <http://www.abanow.org/2003/12/statement-re-the-decision-to-commute-the-death-penalty-of-kevin-stanford> (last visited June 10, 2011).

²³⁶ *Fletcher Pardons 83 People*, WKYT, <http://www.wkyt.com/home/headlines/12340711.html> (last visited June 10, 2011).

²³⁷ KY. REV. STAT. ANN. § 431.218 (West 2011). See also Ky. Exec. Order No. 0722 (Aug. 25, 2010).

²³⁸ KY. REV. STAT. ANN. §§ 431.218, 431.240 (West 2011); KY. CONST. § 81.

²³⁹ R.G. Dunlop, *Beshear Asked to Halt Executions for Study of Kentucky's Death Penalty System*, COURIER-J. (Louisville, Ky.), Nov. 24, 2009.

²⁴⁰ See, e.g., *Bowling v. Commonwealth*, 926S.W.2d 667, 668–69 (Ky. 1996). In *Bowling*, the Kentucky Supreme Court described the disparate treatment of death warrants by Kentucky Governors as follows:

Former governors followed a policy wherein ninety (90) days would be allowed for defense counsel to commence the post-conviction relief process when the United States Supreme Court had denied a petition for writ of certiorari in the direct appeal. The present Governor has stated that the "90 day" policy is not the policy of his administration. The new policy is to give defense counsel up to three (3) days from the date of receipt of a death warrant request to respond in writing. The Governor will then review the file consistent with his policy to set execution dates immediately in death penalty cases. There should be no misunderstanding as to the effect of the three-year provision in RCr 11.42(10). This provision serves only as an outer time limit on the bringing of such actions and in no way affects the prerogatives of the Governor with respect to enforcement of criminal judgments.

Id. at 669.

The warden of the institution where the death row inmate is held must ensure the death sentence is carried out properly.²⁴¹ For defendants sentenced to death on or after March 31, 1998, lethal injection is the only legal method of execution.²⁴² If, however, the death row inmate was sentenced prior to March 31, 1998, s/he may opt to be executed by electrocution.²⁴³

As of March 24, 2011, no executions could take place in Kentucky due to a Franklin Circuit Court's issuance of an injunction against implementation of a death sentence on death row inmate Gregory Wilson, citing "substantial legal questions regarding the validity" of the Commonwealth's administrative procedures governing execution.²⁴⁴

²⁴¹ KY. REV. STAT ANN. § 431.240 (2011).

²⁴² KY. REV. STAT ANN. § 431.220(1) (2011).

²⁴³ KY. REV. STAT ANN. § 431.220(1)(b) (2011).

²⁴⁴ *See* Commonwealth ex rel. Conway v. Shepherd, 336 S.W.3d 98 (Ky. 2011) (finding that the Circuit Court's grant of a temporary injunction prohibiting the Commonwealth from executing a death warrant did not constitute an abuse of discretion); Bowling v. Ky. Dep't of Corr., No. 06-CI-574, slip op. at 2 (Franklin Cir. Ct., Sept. 10, 2010).

CHAPTER TWO

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Deoxyribonucleic acid (DNA) testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association (ABA) adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.¹ Since then, almost all fifty states have adopted laws concerning post-conviction DNA testing.² However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among these jurisdictions.

In response to the varied standards employed by the states, as well as reports of errors and misconduct in public and private DNA testing facilities, the ABA adopted the black letter *ABA Criminal Justice Standards on DNA Evidence* in 2006.³ The standards provide a detailed procedure for procurement, testing, utilization, and preservation of and entitlement to biological evidence. When a defendant has been convicted of a murder, rape, or other serious offense, these standards require that any available biological material be retained in a manner that will preserve the DNA evidence for as long as the defendant remains incarcerated. At the post-conviction stage, the standards permit a person convicted of a serious crime to request testing or retesting of biological evidence, as long as the person meets certain pleading criteria. Once the testing is complete, the standards entitle the petitioner to a hearing to determine the available remedies based upon the test results. If the person is indigent and files for DNA testing, counsel should be appointed.

Inmates seeking to prove their innocence through DNA testing often are unable to do so because states have failed to adequately preserve material evidence. Written procedures for collecting, preserving, and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.⁴ The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and

¹ See ABA, RECOMMENDATION 115, 2000 Ann. Mtg. (adopted July 10–11, 2000), available at http://www.abanet.org/moratorium/policy/2000s/2000_AM_115.pdf.

² See *Post-Conviction DNA Motions*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12731> (last visited Aug. 3, 2011); see also *Post-Conviction DNA Testing*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/304.php> (last visited Aug. 3, 2011).

³ See ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE 12 (3d ed. 2007) (Standard 16-6.1(a)–(b)), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf.

⁴ See 1 ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *Id.* (Standard 1-5.1) (police should be “made fully accountable” to their supervisors and to the public for their actions).

local officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency's disciplinary process.⁵

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person.

⁵ *See id.* (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

In 2002, the Kentucky General Assembly enacted legislation to require, in limited circumstances, the preservation of evidence that could be subject to deoxyribonucleic acid (DNA)⁶ testing and to provide mechanisms for individuals (death row inmates) to challenge their convictions and sentences by filing a post-conviction petition for DNA testing.⁷

A. *Collection and Preservation of DNA Evidence*

1. Collection of DNA Evidence

Commonwealth and local law enforcement agencies in Kentucky are responsible for identifying, collecting, and transporting all forensic evidence, including biological evidence, in a criminal investigation to the Kentucky State Police Forensic Laboratory (KSP Laboratory) for DNA testing.⁸ KSP Laboratory performs forensic analysis testing for each of the Commonwealth's "state, federal, county, and municipal law enforcement agencies and [for] the Public Defender's Office in connection with official investigations in criminal cases."⁹ KSP Laboratory staff also provide technical assistance over the telephone to the Commonwealth's law enforcement agencies on evidence collection and preservation issues.¹⁰

2. Kentucky Legal Authority on Preservation and Destruction of Evidence

a. Pre-trial Preservation of Evidence

All evidence "gathered by law enforcement, prosecutorial, or defense authorities[,] that may be subject to [DNA] testing and analysis[,] in order to confirm the guilt or innocence of a criminal defendant,"¹¹ may be disposed of or destroyed, *prior to trial*, under the following conditions:

⁶ "DNA is the 'genetic material present in the nucleus of cells in all living organisms,' and it stores each individual's inherited traits." *Taylor v. Commonwealth*, 175 S.W.3d 68, 76 (Ky. 2005) (citing NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, Pub. No. 177626, *Post-conviction DNA Testing: Recommendations for Handling Requests* 21 (1999)).

⁷ KY. REV. STAT. ANN. §§ 422.285 (effective July 15, 2002) (post-conviction DNA testing in capital cases), 422.287 (effective July 15, 2002) (DNA testing when "a person is being tried for a capital offense"), 524.140 (West 2011) (effective July 15, 2002) (destruction of evidence that may be subject to DNA testing). These statutes, along with KRS 17.176, are commonly referred to as the Kentucky Innocence Protection Statute. H.B. 4, 2002 Gen. Assemb., Reg. Sess. (Ky. 2002) (effective July 15, 2002). According to the Kentucky Supreme Court, "KRS 422.285 was part of a wave of similar statutes in other states passed in response to a number of death-row inmates who were released from custody as a result of being exonerated by DNA testing nationwide." *Taylor*, 175 S.W.3d at 76.

⁸ KSP LAB., PHYSICAL EVIDENCE COLLECTION GUIDE 5 (rev. effective Apr. 16, 2010), available at http://www.kentuckystatepolice.org/for_lab/download/physical_evidence_collection_guide.pdf [hereinafter KSP EVIDENCE GUIDE]; Sabrina Walsh, *CSI: Kentucky*, KY. LAW ENFORCEMENT 26 (Summer 2007) (explaining that "[d]etectives interview suspects, secure a crime scene, and remove evidence for analysis at one of Kentucky's six labs").

⁹ KSP EVIDENCE GUIDE, *supra* note 8, at 5.

¹⁰ *Id.* at 2.

¹¹ KY. REV. STAT. ANN. § 524.140(2) (West 2011) (noting that the evidence must be able to confirm the guilt or innocence of a criminal defendant). The statute applies to defendants charged with a capital offense, class A, B, or C felony, or class D felony under KRS Chapter 510. KY. REV. STAT. ANN. § 524.140(1)(a) (West 2011).

- (a) The prosecution has determined that the defendant will not be tried for the criminal offense;
- (b) The prosecution has made a motion before the court in which the case would have been tried to destroy the evidence; and
- (c) The court has, following an adversarial proceeding in which the prosecution and the defendant were heard, authorized the destruction of the evidence by court order.¹²

b. Post-trial Preservation of Evidence

At the conclusion of a criminal trial,¹³ evidence may be disposed of or destroyed if:

- (a) The evidence, together with DNA evidence testing and analysis results, has been presented at the trial, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial;
- (b) The evidence was not introduced at the trial, or if introduced at the trial[,] was not the subject of DNA testing and analysis, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial, and the trial court has ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant;
- (c) The trial resulted in the defendant being found not guilty or the charges were dismissed after jeopardy attached, whether or not the evidence was introduced at the trial or was subject to DNA testing and analysis or not, and the trial court ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant; or
- (d) The trial resulted in the dismissal of charges against the defendant, and the defendant may be subject to retrial, in which event the evidence shall be retained until after the retrial, which shall be considered a new trial for purposes of this section.¹⁴

Either before or after a capital trial, “[t]he burden of proof for a motion to destroy evidence that may be subject to DNA testing and analysis shall be upon the party making the motion, and the court may permit the destruction of the evidence under this section upon good cause shown favoring its destruction.”¹⁵ The destruction of evidence in violation of the circumstances described above is a Class D felony.¹⁶

¹² KY. REV. STAT. ANN. § 524.140(2) (West 2011).

¹³ The Commonwealth defines “following trial” as either when the “first appeal authorized by the Constitution of Kentucky in a criminal case has been decided” or when the “time for the first appeal authorized by the Constitution of Kentucky in a criminal case has lapsed without an appeal having been filed.” KY. REV. STAT. ANN. § 524.140(1)(b) (West 2011).

¹⁴ KY. REV. STAT. ANN. § 524.140(3) (West 2011).

¹⁵ KY. REV. STAT. ANN. § 524.140(4) (West 2011).

¹⁶ KY. REV. STAT. ANN. §§ 524.140(6) (“Destruction of evidence in violation of this section shall be a violation of KRS 524.100.”), 524.100(2) (West 2011) (“Tampering with physical evidence is a Class D felony.”). In addition, KRS 422.285(6) permits a post-conviction court to order “appropriate sanctions, including criminal contempt” if

c. Preservation of Evidence During Testing (Consumption of Evidence)

The Kentucky General Assembly, acknowledging that “DNA evidence laboratory testing and analysis procedure consumes and destroys a portion of the evidence or may destroy all of the evidence if the sample is small,” adopted statutory safeguards to ensure KSP Laboratory preserves as much material subject to DNA testing as possible.¹⁷ Prior to testing, the laboratory must notify all parties if it “knows or reasonably believes that so much of the biological material or evidence may be consumed or destroyed in the testing and analysis that an insufficient sample will remain for independent testing.”¹⁸

d. Preservation of Evidence for Post-Conviction Testing

If a death row inmate files a petition for post-conviction DNA testing, the Commonwealth’s “appropriate governmental entity” must preserve “any biological materials secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case.”¹⁹ An “appropriate governmental entity” has “the discretion to determine how the evidence is retained . . . provided that the evidence is retained in a condition suitable for DNA testing and analysis.”²⁰ KSP Laboratory policy requires the return of evidence to the submitting agency or to the court after testing is completed.²¹

3. Training and Accreditation Requirements on Collection and Preservation of Evidence

All police departments, training academies, and sheriff offices in Kentucky accredited by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) or the Kentucky Association of Chiefs of Police Accreditation Program (KACP) are required to adopt written procedures for the collection, identification, preservation, and transmittal of evidence to KSP Laboratory.²² Three of KSP Laboratory’s six laboratories are accredited by the American

evidence is “intentionally destroyed after the court orders its preservation.” KY. REV. STAT. ANN. § 422.285(6) (West 2011).

¹⁷ KY. REV. STAT. ANN. § 524.140(5) (West 2011).

¹⁸ KY. REV. STAT. ANN. § 524.140(5)(c) (West 2011).

¹⁹ KY. REV. STAT. ANN. § 524.140(7) (West 2011) (noting that the requirement to maintain biological material for the period of time that the person remains incarcerated is “subject to KRS 422.285(6)”). KRS 422.285(6) stipulates that, upon a filing for post-conviction DNA testing, the Commonwealth must “preserve during the pendency of the proceeding all evidence in the state’s possession or control that could be subjected to DNA testing and analysis.” KY. REV. STAT. ANN. § 422.285(6) (West 2011). Furthermore, “[i]f the defendant is convicted of any offense for which DNA test and analysis results are required to be maintained by law, the DNA test and analysis results obtained pursuant to this section shall be utilized for that purpose, whether or not the test and analysis results were introduced in the case.” KY. REV. STAT. ANN. § 422.287(5) (West 2011).

²⁰ KY. REV. STAT. ANN. § 524.140(7) (West 2011). The Commonwealth “is the custodian of evidence.” *Bowling v. Commonwealth*, No. 2008-SC-000901-MR, 2010 WL 3722283, at *5 (Ky. Sept. 23, 2010).

²¹ KSP FORENSIC LAB., QUALITY ASSURANCE MANUAL 83 (rev. effective Oct. 25, 2010) (on file with author).

²² KY. ASS’N OF CHIEFS OF POLICE ACCREDITATION PROGRAM, 2009 STANDARDS 53 (Apr. 20, 2009), *available at* http://www.kypolicechiefs.org/joomla/attachments/095_STANDARDS_2009_April_20_.doc (Chapter 27, Collection and Preservation of Evidence, 27.1 Evidentiary items) [hereinafter KACP STANDARDS]; COMM’N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42.2.1, 83.2.1 (5th ed. 2009)

Society of Crime Lab Directors Laboratory Accreditation Board (ASCLD/LAB), which requires accredited laboratories to adopt specific policies on the handling, testing, and preservation of evidence, including DNA evidence, and requires specific training of all technicians performing testing.²³ For example, KSP Laboratory’s *Physical Evidence Collection Guide* (KSP Evidence Guide), available on the KSP website and applicable to all Kentucky law enforcement agencies, includes specific procedures and protocols for the collection, packaging, transportation, short-term preservation, and delivery of evidence, including DNA evidence, to KSP Laboratory.²⁴

ASCLD/LAB also requires laboratory personnel to maintain a “chain of custody record with all necessary data which provides for complete tracking of all evidence” and a secure area for overnight and/or long-term storage of evidence.²⁵ All evidence must be marked for identification, stored under proper seal, and be protected from loss, contamination, and/or deleterious change.²⁶ For more information on the accreditation of law enforcement agencies and forensic laboratories as well as on the training provided to law enforcement and forensic personnel, see Chapter Three on Law Enforcement and Chapter Four on Crime Laboratories and Medical Examiners.

All Kentucky law enforcement officers also are required to complete a training course which includes hours of instruction on crime scene evidence collection and preservation.²⁷

B. Testing of DNA Evidence

In Kentucky, capital defendants and death row inmates may request DNA testing and analysis on evidence that was not previously tested or not subjected to the testing now requested.²⁸ All DNA testing performed by KSP Laboratory is conducted at the Central Forensic Laboratory in

[hereinafter CALEA STANDARDS]. CALEA also requires agencies to have written procedures on avoiding contamination of physical evidence. CALEA STANDARDS, *supra* at 83-1 (Standard 83.2.1).

²³ AM. SOC’Y OF CRIME LAB. DIRECTORS, LABORATORY ACCREDITATION BOARD 2008 MANUAL 14, 18–19 (2008) (on file with author) [hereinafter ASCLD/LAB-LEGACY 2008 MANUAL]; ASCLD/LAB *Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/accreditedlabs.html#ky> (last visited Aug. 3, 2011).

²⁴ KSP EVIDENCE GUIDE, *supra* note 8, at 8–18.

²⁵ ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 23, at 20–22.

²⁶ *Id.* at 20–23. In addition, the Commonwealth has promulgated rules to ensure the preservation and integrity of DNA testing of samples for inclusion in Kentucky’s DNA Database. See KY. REV. STAT. ANN. § 17.175(6) (West 2011) (requiring the Cabinet to “promulgate administrative regulations necessary to carry out the provisions of the DNA database identification system,” including procedures for collection of DNA samples from designated persons for inclusion in the database and procedures concerning database system usage and integrity); 502 KY. ADMIN. REGS. 32:010 (2010) (“establish[ing] collection procedures for DNA samples for inclusion in the DNA database, quality assurance and testing proficiency standards for DNA samples included in the DNA database, and procedures governing DNA database system usage, security, and integrity”).

²⁷ See KY. REV. STAT. ANN. § 15.404 (West 2011); KY. DEP’T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE 95 (2011), available at <http://docjt.ky.gov/TrainingSchedule/index.html>.

²⁸ KY. REV. STAT. ANN. §§ 422.285(2)(c), (3)(c) (post-conviction DNA testing for death row inmates), 422.287(1)–(2) (West 2011) (DNA testing when “a person is being tried for a capital offense”).

Frankfort, Kentucky.²⁹ KSP Laboratory does not perform all types of DNA testing, including Y-Str, mitochondrial, and paternity testing.³⁰

1. Standards for Obtaining DNA Testing

A capital defendant or a death row inmate who requests DNA testing must show that the requested testing will yield evidence of probative value by including in his/her motion to the court “sufficient information about the evidence, the necessity for its testing and analysis, and its applicability to the proceeding.”³¹

a. Pretrial and Trial DNA Testing

Pursuant to the Kentucky Revised Statutes (KRS) 422.287, “[w]hen a person is being tried for a capital offense and there is evidence in the case which may be subjected to [DNA] testing and analysis,” both the Commonwealth and defense may request the court to order DNA testing on “any item of evidence not previously subjected to DNA testing and analysis.”³² The court will order DNA testing and analysis to be performed at KSP Laboratory if the requesting party is able to show that (a) the item of evidence has not previously been tested and analyzed, or that new testing and analysis would produce a more accurate result, and (b) DNA testing and analysis would yield evidence of probative value.³³ Results of testing under KRS 422.287 are available to both the Commonwealth and defense, and either party may move for the results to be admitted at trial.³⁴

In practice, the Commonwealth’s law enforcement agencies and/or prosecutors submit evidence to KSP Laboratory for DNA testing and analysis.³⁵ Although KSP Laboratory is statutorily mandated to provide testing to the Kentucky Department of Public Advocacy (DPA) free of

²⁹ *Forensic Laboratories*, KY. STATE POLICE, <http://www.kentuckystatepolice.org/labs.htm> (last visited Aug. 3, 2011); *Central Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/central.htm (last visited Aug. 3, 2011). For more on KSP Forensic Laboratory, see Chapter Four on Crime Laboratories and Medical Examiners.

³⁰ Telephone Interview by Paula Shapiro with Laura Sudkamp, Director, KSP Lab., Jan. 13, 2010 (on file with author) (stating that KSP Laboratory does not perform any type of testing for cases where laboratory personnel may be related to either party). Instead, these types of testing cases are contracted out to independent laboratories outside of the Commonwealth. *Id.* See also *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *5 (Ky. June 16, 2011) (“[Petitioner] also raised another type of DNA testing not previously identified in his motions, Y-STR, which is STR testing of the Y-chromosome, which is present only in males He also raised again the possibility of mitochondrial DNA testing He noted that the state laboratory conducts neither type of test He also noted that the state lab does perform standard STR testing, but that such testing is likely to destroy the entire sample, which would make additional testing impossible.”).

³¹ KY. REV. STAT. ANN. § 17.176(1) (West 2011).

³² KY. REV. STAT. ANN. § 422.287(1) (West 2011); see also KY. REV. STAT. ANN. § 422.285 (West 2011).

³³ KY. REV. STAT. ANN. § 422.287(2)–(3) (West 2011) (allowing KSP Laboratory to select another laboratory to perform the testing and analysis of the DNA evidence).

³⁴ KY. REV. STAT. ANN. § 422.287(4) (West 2011).

³⁵ KSP EVIDENCE GUIDE, *supra* note 8, at 5; Interview with Laura Sudkamp, *supra* note 30. The KRS and KSP Laboratory place limits on the number of items that may be submitted for testing by any submitting entity. See *infra* notes 45–47 and accompanying text.

charge, DPA typically sends evidence to be independently tested at laboratories outside of the Commonwealth.³⁶

b. Post-Conviction Petitions for DNA Testing

At any time, a death row inmate may petition the court for post-conviction DNA testing of any evidence in possession or control of the court or Commonwealth “that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence,” provided that certain preliminary issues are resolved, e.g., condition of the evidence.³⁷

After notice and an opportunity to respond are provided to the Commonwealth’s prosecutor, a court *must* order DNA testing and analysis if the court finds that:

- (a) [a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;
- (b) [t]he evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and
- (c) [t]he evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.³⁸

In the alternative, after notice to the prosecutor and an opportunity to respond, it is within *the court’s discretion* to order DNA testing and analysis if the court finds that:

- (a) [a] reasonable probability exists that either:
 - i. [t]he petitioner’s verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or
 - ii. DNA testing and analysis will produce exculpatory evidence;
- (b) [t]he evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and
- (c) [t]he evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may

³⁶ KY. REV. STAT. ANN. §§ 422.285(3), 422.287(3) (West 2011); Telephone Interview by Sarah Turberville and Paula Shapiro with Randy Wheeler, Project Coordinator, Ky. Innocence Project, Ky. Dep’t of Pub. Advocacy, Jan. 11, 2011 (on file with author).

³⁷ KY. REV. STAT. ANN. § 422.285(1) (West 2011). The statute lists the factors for the court to consider regarding approval of the DNA testing. KY. REV. STAT. ANN. § 422.285(2)–(3) (West 2011). *See also* Taylor v. Commonwealth, 175 S.W.3d 68, 76 (Ky. 2005) (“There are also notice provisions contained in the statute that require a petitioner to inform the Commonwealth of the testing and grant it access to the laboratory reports.”).

³⁸ KY. REV. STAT. ANN. § 422.285(2) (West 2011) (providing the prosecution with the right to be heard on this issue).

resolve an issue not previously resolved by the previous testing and analysis.³⁹

A “reasonable probability,” described at KRS 422.285(2)(a) and 422.285(3)(a), requires the inmate to describe “the role the evidence would have had if available in the original prosecution,” and that “the evidence sought would either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory.”⁴⁰ Furthermore, the inmate petitioning for DNA testing must “at a bare minimum, [] specifically identify what is to be tested, and where on the item the DNA is expected to be found.”⁴¹

If a petition for post-conviction DNA testing is filed under KRS 422.285, the court must “order the [Commonwealth] to preserve during the pendency of the proceeding all evidence in the [Commonwealth]’s possession or control that could be subjected to DNA testing and analysis.”⁴² The Commonwealth must “prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court. If the evidence is intentionally destroyed after the court orders its preservation, the court may impose sanctions, including criminal contempt.”⁴³ KRS 422.285(7) also provides the court with discretionary powers to make any other orders it deems appropriate, including the preservation of some of the sample for replicating the testing and analysis and/or to order elimination samples from third parties.⁴⁴

2. Costs and Limitations of DNA Testing

Upon a court order for DNA testing and analysis during pre-trial, trial, or post-conviction proceedings, both the prosecution and defense are limited to submission of “not more than five [] items of evidence for testing and analysis” by KSP Laboratory or another laboratory selected by KSP Laboratory, free of charge to the submitting agency.⁴⁵ Either the prosecution or defense may request the trial court to order additional testing in excess of these five items, with the cost to be paid by the requesting party.⁴⁶ A trial court’s order authorizing testing and analysis must accompany any “additional item of evidence submitted for testing” to KSP Laboratory.⁴⁷

KSP Laboratory’s Forensic Biology Case Acceptance Policy limits the forensic testing it provides by the type of case associated with each sample as well as the type of testing to be

³⁹ KY. REV. STAT. ANN. § 422.285(3) (West 2011).

⁴⁰ *Bowling v. Commonwealth*, No. 2008-SC-000901-MR, 2010 WL 3722283, at *4 (Ky. Sept. 23, 2010). *Bowling* required the death row inmate to state “what he expects the evidence to be, and how that evidence would, within a reasonable probability, result in exoneration, or a more favorable verdict or sentence, or be exculpatory.” *Id.* at *5.

⁴¹ *Id.* at *5 (“[I]t is patently unreasonable to expect every area of an item to be tested.”).

⁴² KY. REV. STAT. ANN. § 422.285(6) (West 2011); *see also* KY. REV. STAT. ANN. § 17.176(1) (West 2011).

⁴³ KY. REV. STAT. ANN. § 422.285(6) (West 2011).

⁴⁴ KY. REV. STAT. ANN. § 422.285(7) (West 2011).

⁴⁵ KY. REV. STAT. ANN. § 17.176(2)–(3) (West 2011) (also applying the requirements of KRS 422.285).

⁴⁶ KY. REV. STAT. ANN. §§ 17.176(2)–(3), 422.285(4) (West 2011). Additionally, according to KRS 17.176, any other party in a criminal case is permitted to submit DNA evidence to KSP Laboratory or a laboratory chosen by KSP Laboratory after receiving the court’s permission upon “a specific showing of necessity for testing and analysis,” with costs paid by the requesting party. KY. REV. STAT. ANN. § 17.176(4) (West 2011).

⁴⁷ KY. REV. STAT. ANN. § 17.176(2)–(3) (West 2011).

performed (i.e., serology, bloodstain pattern, and DNA testing).⁴⁸ For example, KSP Laboratory permits testing for up to ten items for an initial submission for murder/death investigation cases, although “[a]dditional items may be submitted on a case by case basis if specific information about those items (i.e., multiple victims and/or suspects) is provided by the investigating officer at the time of submission.”⁴⁹ The policy acknowledges that although there may be many items collected during an investigation, “only the most probative items should be submitted to the laboratory for analysis.”⁵⁰ Appropriate reference standards also may be submitted for testing and “are not included in the total item counts” provided.⁵¹ When DPA seeks funding through KRS 31.185 to obtain testing at an independent laboratory, such testing may be limited by the amount of funding approved by the court. However, independent testing is not subject to the ten-sample limitation imposed at KSP Laboratory.

KSP Laboratory maintains “a uniform schedule of fees to be charged for testing and analysis conducted pursuant to KRS 422.285 or KRS 422.287.”⁵² KSP Laboratory policy states that “[c]osts for DNA analyses that are not offered by [KSP Laboratory] will generally be the responsibility of the agency submitting the evidence.”⁵³

3. Disposition of a Post-Conviction DNA Testing Petition

In the event that the results of a death row inmate’s DNA testing and analysis are favorable to the inmate, “the court shall order a hearing and make any further orders that are required” under the KRS or the Kentucky Rules of Criminal Procedure.⁵⁴ Upon unfavorable DNA test results to the death row petitioner, the court will dismiss the petition and may make orders, if it deems appropriate, including (a) “[n]otifying the Department of Corrections and the Parole Board,” (b) requesting the petitioner’s DNA sample to be added to the KSP Laboratory’s centralized database, and (c) “providing notification to the victim or family of the victim.”⁵⁵

Since the enactment of the Kentucky Innocence Protection Statutes in 2002, a number of death row inmates have requested DNA testing under KRS 422.285, with varying degrees of success.⁵⁶ For more on these cases, see the Analysis Section.

⁴⁸ KSP LAB., FORENSIC BIOLOGY ANALYTICAL MANUAL 1–8 (effective Apr. 2, 2010) (listing the Forensic Biology Case Acceptance Policy).

⁴⁹ *Id.* at 1 (noting that as for subsequent submissions, “[c]ommunication between the analyst and the investigating officer/prosecutor should provide information as to the reason additional items may need to be submitted.”).

⁵⁰ KSP LAB., FORENSIC BIOLOGY ANALYTICAL MANUAL 3 (effective Apr. 2, 2010); KY. REV. STAT. ANN. § 17.176(2)–(3) (West 2011) (effective July 15, 2002).

⁵¹ KSP LAB., FORENSIC BIOLOGY ANALYTICAL MANUAL 3 (effective Apr. 2, 2010).

⁵² KY. REV. STAT. ANN. § 17.176(5) (West 2011).

⁵³ KSP LAB., FORENSIC BIOLOGY ANALYTICAL MANUAL 6 (effective Apr. 2, 2010).

⁵⁴ KY. REV. STAT. ANN. § 422.285(9) (West 2011) (authorizing post-conviction relief even when a new trial motion would be time-barred).

⁵⁵ KY. REV. STAT. ANN. § 422.285(8) (West 2011).

⁵⁶ *See, e.g.,* Bowling v. Commonwealth, No. 2008-SC-00901-MR, 2010 WL 3722283 (Ky. Sept. 23, 2010); Moore v. Commonwealth, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *5 (Ky. June 16, 2011); Epperson v. Commonwealth, 97-CR-000016 (Warren Cir. Ct.) (Epperson’s DNA testing has been authorized, although it has not begun, and remains pending before the Warren Circuit Court). *See also* Brief for Appellant, Bowling v. Commonwealth, No. 2008-SC-000901-MR, at *i-ii (Mar. 26, 2010) (“Although KRS 422.285 applies to all death-sentenced inmates and although the statute has now been in existence

4. Limitations on Multiple Petitions

The Kentucky Supreme Court has stated that the Kentucky General Assembly “made clear its intent not to have successive, redundant DNA testing requests and placed a high burden on a movant to establish that an entirely new issue is involved.”⁵⁷ By adopting statutory language in KRS 422.285 that requires the evidence not have been previously tested or, if it was tested, “the type of testing now being requested is qualitatively different and ‘may resolve an issue not previously resolved by the previous testing and analysis.’”⁵⁸ According to the Court, “DNA testing, sometimes many years after trial, is limited to the ‘one bite of the apple’ rule.”⁵⁹

5. Representation for Death Row Inmates Requesting DNA Testing

Death row inmates are not entitled to counsel to assist in requesting the court to order post-conviction DNA testing. Instead, if the court orders testing and analysis, only then is an indigent death row inmate entitled to appointed counsel under KRS Chapter 31.⁶⁰ In practice, however, all death row inmates are assigned counsel through the Kentucky Department of Public Advocacy or the Louisville Metro Public Defender’s Office and are represented during post-conviction proceedings.⁶¹

for approximately seven years, this Court has yet to interpret the meaning or application of the statute as a whole, or the terminology within it.”).

⁵⁷ *Bowling*, 2010 WL 3722283, at *5; KY. REV. STAT. ANN. § 422.285(2)(c), (3)(c) (West 2011).

⁵⁸ *Bowling*, 2010 WL 3722283, at *5; KY. REV. STAT. ANN. § 422.285(2)(c), (3)(c) (West 2011).

⁵⁹ *Bowling*, 2010 WL 3722283, at *5

⁶⁰ KY. REV. STAT. ANN. § 422.285(4) (West 2011).

⁶¹ For more information on the representation of capital defendants and death row inmates, see Chapter Six.

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence⁶² for as long as the defendant remains incarcerated.

The Commonwealth of Kentucky does not require the preservation of all biological evidence for as long as a defendant remains incarcerated. Instead, the Commonwealth's only post-trial preservation requirement is triggered when a death-sentenced inmate applies for post-conviction DNA testing and lasts only through the duration of the post-conviction DNA testing proceedings.⁶³ Prior to 2002, there was no uniform rule among Kentucky's evidence-holding agencies on the proper amount of time to preserve physical evidence after an individual's conviction and sentence became final. Thirty of the thirty-five current death row inmates were originally sentenced to death prior to preservation rules coming in to effect in 2002.⁶⁴

Moreover, the Commonwealth's statute on retention of evidence, found at KRS 524.140, emphasizes destruction rather than preservation of DNA and other types of evidence.⁶⁵ Specifically, the statute permits the *pretrial* destruction of evidence if (a) the prosecution determines that the defendant will not be tried, (b) the prosecution makes a motion to destroy the evidence to the court which would have heard the case had it been tried, and (c) the court authorizes destruction of the evidence after holding an adversarial proceeding in which the prosecution and the defense is heard.⁶⁶ Similarly, if a defendant is "found not guilty or the charges were dismissed after jeopardy attached, whether or not the evidence was introduced at trial or was subject to DNA testing and analysis," the court also may order the destruction of the evidence after holding an adversarial hearing.⁶⁷ By permitting the destruction of evidence under these circumstances, the Commonwealth may destroy evidence in potentially unsolved cases where the perpetrator remains at large.

⁶² "Biological evidence" includes "the contents of a sexual assault examination kit; and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense." See INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING 2 (2010), available at http://www.innocenceproject.org/docs/2010/Access_to_Post-conviction_DNA_Testing_%20Model_Bill_2010.pdf. This includes material that "is catalogued separately (e.g., on a slide, [on a] swab or in a test tube) or is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.)." *Id.*

⁶³ H.B. 4, 2002 Gen. Assemb., Reg. Sess. (Ky. 2002) (effective July 15, 2002) (codified at KY. REV. STAT. ANN. § 422.285(6) (West 2011)) (applying only to death row inmates requesting post-conviction DNA testing). *But see* KY. REV. STAT. ANN. § 524.140(7) (West 2011) (commonly referred to as the Kentucky Innocence Protection statute, this statute applies to certain felony offenders and death row inmates and requires the Commonwealth, *subject to KRS 422.285(6)*, to "retain any biological materials secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case" (emphasis added)).

⁶⁴ See *Profiles of Kentucky Death Row Inmates*, KY. DEP'T OF CORR., <http://www.corrections.ky.gov/inmateinfo/deathrow.htm> (last visited Nov. 17, 2011).

⁶⁵ The actual title of KRS 524.140 is "Disposal of evidence that may be subject to DNA testing; motion to destroy; liability for destruction; penalty; retention of biological material." KY. REV. STAT. ANN. § 524.140 (West 2011).

⁶⁶ KY. REV. STAT. ANN. § 524.140(2) (West 2011).

⁶⁷ KY. REV. STAT. ANN. § 524.140(3)(c) (West 2011).

The KRS also permits the destruction of evidence following trial of a capital defendant.⁶⁸ In cases in which a defendant is found guilty, pled guilty, or entered an Alford plea at trial, and DNA analysis results were presented at trial, the evidence is permitted to be destroyed without a motion to the court or a hearing.⁶⁹ In other cases in which a defendant is found guilty, pled guilty, or entered an Alford plea at trial, and the DNA evidence was *not* introduced at trial, or if evidence was introduced but had not been subject to DNA testing, a Commonwealth court may order the destruction of such evidence after holding “an adversarial hearing conducted upon motion of either the prosecution or the defendant.”⁷⁰ Destruction of evidence in these circumstances renders it impossible to uncover, through testing of previously untested or untestable evidence, instances of wrongful conviction that are revealed only after a capital defendant has been sentenced to death and is awaiting execution.⁷¹

One particular account of a Kentucky non-capital case illustrates the potential consequences of the KRS 524.140’s emphasis on destruction of evidence in criminal cases. A Kentucky citizen, Michael Elliot

was convicted of murder in 1997 and sentenced to life without the possibility of parole. In 2002, while investigating Elliot’s wrongful conviction claim, the Kentucky Innocence Project discovered a bloodstain that they believed came from the assailant. The Project hoped that this piece of . . . evidence, preserved among other physical evidence in the state police department evidence room, could be subjected to DNA analysis and produce results that would exonerate Elliot. The Project immediately moved to have the stain preserved. The prosecutor’s office [] opposed the motion to preserve the stain, [and] filed a motion with the court to have the evidence destroyed before any DNA testing could be conducted. [T]he trial court granted the government’s motion, authorizing the immediate destruction of this untested and potentially exculpatory evidence.”⁷²

⁶⁸ KY. REV. STAT. ANN. § 524.140(3) (West 2011). In fact, the legislation permits the destruction of evidence in all capital cases, Class A, B, and C felonies, and KRS Chapter 510 Class D felonies. KY. REV. STAT. ANN. § 524.140(1) (West 2011). Preservation is required only if a death row defendant makes a motion for post-conviction testing. KY. REV. STAT. ANN. § 422.285(7) (West 2011).

⁶⁹ KY. REV. STAT. ANN. § 524.140(3)(a) (West 2011) (“No item of evidence . . . shall be disposed of following the trial unless [t]he evidence, together with DNA evidence testing and analysis results, has been presented at trial, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial.”). The statute is not clear on whether evidence to be retained or destroyed after having been admitted into evidence must be inculpatory or exculpatory.

⁷⁰ KY. REV. STAT. ANN. § 524.140(3)(b) (West 2011).

⁷¹ See, e.g., *Innocence Project Case Files*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know> (last visited Aug. 3, 2011) (noting that there have been 273 DNA post-conviction exonerations, seventeen of which were of death row inmates); *infra* notes 75–76 and accompanying text. A death row inmate also may request, pursuant to KRS 422.285, post-conviction testing in order to demonstrate that s/he should have not been subject to the death penalty. KY. REV. STAT. ANN. § 422.285 (West 2011). However, since the Commonwealth’s preservation requirements do not account for this possibility, potentially admissible and exculpatory evidence may be destroyed.

⁷² Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1255 n.80 (2005) (citing Katya Cengel, *Kentucky Law Students are Transforming American Justice*, COURIER-J. (Louisville Ky.), June 29, 2003, at 1H. Former FBI Director William Sessions also noted the egregiousness of the actions taken in the Elliot case. William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASH. POST, Sept. 21, 2003, at B2; Testimony of Barry Scheck before the U.S. Senate Committee on the Judiciary (June 18, 2002) (on file with author).

Even in scenarios, such as in the Elliot case, where the possibility of actual innocence is under investigation and a defendant has requested preservation of evidence for testing, Commonwealth courts may approve a prosecution motion to destroy potentially exculpatory evidence. The statutory requirement of providing notice of preservation or testing requests to the Commonwealth also may provide the prosecution notice to counter-file a request to destroy the same evidence.

Furthermore, the burden of proof for a KRS 524.140 “motion to destroy evidence that may be subject to DNA testing and analysis” is “good cause favoring its destruction,” notwithstanding 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.⁷³ There have been instances where Kentucky prosecutors moved for the destruction of evidence when a county did not have enough storage space to hold evidence and when testable material was found on large pieces of evidence, such as a couch.⁷⁴

Because of the different language used by the KRS to describe evidence subject to preservation or testing, it is unclear what specific “biological” evidence or material must be preserved under the Kentucky law.⁷⁵ For example, forensic laboratories now conduct DNA testing on “touch DNA,” which includes evidence that was once never considered in the biological/DNA context.⁷⁶ Potentially exculpatory evidence could be destroyed prior to the discovery of advanced technology that could allow testing on previously untestable evidence.⁷⁷

Finally, the Commonwealth’s statutes do not identify the specific government entity or entities responsible for preservation, nor do uniform standards for preservation by the various Commonwealth entities exist. Instead, the KRS provides that “the appropriate governmental

⁷³ KY. REV. STAT. ANN. § 524.140(2)–(4) (West 2011) (in order to confirm the guilt or innocence of a criminal defendant).

⁷⁴ Jones, *supra* note 72, at 1263 n.107 (citing John Cheves, *Bills Call For Felons’ DNA Samples Another Requires Keeping Evidence*, Lexington Herald-Leader, Feb. 12, 2001, at A1).

⁷⁵ Specifically, the KRS 524.140(2)–(3) preservation requirement applies to an “item of evidence that may be subject to [DNA] evidence testing and analysis.” KY. REV. STAT. ANN. § 524.140(2)–(3) (West 2011). However, KRS 524.140(7) requires the retention of “any biological material secured in connection with a criminal case,” KRS 422.285(1) applies to “any evidence . . . that may contain biological evidence,” and KRS 422.287(1) applies to “evidence . . . which may be subject to DNA testing and analysis.” KY. REV. STAT. ANN. §§ 524.140(2)–(3) & (7), 422.285(1), 422.287(1) (West 2011). *See also* KY. REV. STAT. ANN. §§ 17.169(1) (defining ‘DNA sample’ in the context of the Commonwealth’s DNA database as “a blood or swab specimen from a person . . . that is required to provide a DNA sample pursuant to KRS 17.170 or 17.510”), 17.175 (West 2011) (discussing both “DNA samples” and “DNA identification records”).

⁷⁶ Touch DNA “analyzes skin cells left behind when assailants touch victims, weapons or something else at a crime scene [It] doesn’t require you to see anything, or any blood or semen at all. It only requires seven or eight cells from the outermost layer of our skin.” *What is touch DNA?*, SCIENTIFIC AM., Aug. 8, 2008, <http://www.scientificamerican.com/article.cfm?id=experts-touch-dna-jonbenet-ramsey> (last visited Aug. 3, 2011) (noting that the use of touch DNA analysis became available near or around 2003).

⁷⁷ *See, e.g., Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *6–7 (Ky. June 16, 2011) (where evidence on which a death row inmate requested more advanced DNA testing than was available at the time of his trial had been lost, foreclosing the opportunity for any additional, advanced testing of the evidence).

entity . . . shall have the discretion to determine how the evidence is retained . . . provided that the evidence is retained in a condition suitable for DNA testing and analysis.”⁷⁸

It appears that law enforcement entities are primarily responsible for the preservation of evidence in criminal cases.⁷⁹ Prior to 2002, evidence in some criminal cases had been stored in bank safety-deposit boxes and now prosecutors are unsure “if any of those items are still in safety deposit boxes or if they are at the courthouse.”⁸⁰ In other cases, evidence may have been kept by a variety of different law enforcement agencies, in courtrooms, or in other locations depending on the stage of the case.⁸¹ Notably, when new courthouses are constructed, officials have misplaced evidence during the transfer of such evidence and files from the old to the new courthouse facilities.⁸² During such transition, while the employees of court clerks’ offices are responsible for tracking and “transport[ing] the evidence to ensure it is properly handled,” there is “no written policy for moving evidence from one facility to another.”⁸³ In fact, evidence from at least one non-capital homicide case has been located in the possession of the victim’s family.⁸⁴ The lack of uniformity and specifications in the Commonwealth’s preservation practices clearly increase the likelihood of evidence being lost, misplaced, or even destroyed.

There have been a number of instances in which Commonwealth law enforcement officials or prosecutors have lost or misplaced evidence. In one death penalty case, the Commonwealth was unable to locate hairs that had been introduced and used at trial to convict an inmate, after the inmate requested DNA testing on the hairs.⁸⁵ In another death penalty case, an inmate was unable to obtain possibly exculpatory DNA testing on pants and shoes from the crime scene which had been lost, despite the Commonwealth’s “substantial search for the missing items,

⁷⁸ KY. REV. STAT. ANN. § 524.140(7) (West 2011). If a death row inmate files a petition requesting DNA testing, “the court shall order the state to preserve during the pendency of the proceeding all evidence in the state’s possession or control that could be subjected to DNA testing and analysis.” KY. REV. STAT. ANN. § 422.285(6) (West 2011) (“The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court.”).

⁷⁹ Interview with Randy Wheeler, *supra* note 36; Interview with Laura Sudkamp, *supra* note 30 (noting that KSP Laboratory is not one of the law enforcement entities responsible for preservation).

⁸⁰ Brett Barrouquere, *Lost, Missing Evidence Plagues Kentucky Court System New Efforts Can’t Make Up for Lax Old Rules*, ASSOCIATED PRESS, Nov. 27, 2009.

⁸¹ Barrouquere, *supra* note 80 (noting that prior to the enactment of preservation laws, the Commonwealth had “loose rules for handling evidence [that] allowed legal exhibits to be stored in bank safe-deposit boxes”); *see, e.g.*, Deborah Yetter, *Man cleared after 13 years in prison*, COURIER-J. (Louisville, Ky.), June 12, 2003, at A1 (noting that the DNA evidence from a rape case was finally found over ten years later in a courthouse evidence room).

⁸² Barrouquere, *supra* note 80 (describing missing evidence after construction of new courthouses). Between 2000 and 2009, there were thirty-six new courthouses constructed. *Id.*

⁸³ *Id.* We were unable to determine whether such employees received any training or instruction on the proper handling of evidence.

⁸⁴ In a non-capital homicide from 1971, potentially exculpatory evidence, including the bloody clothes and wallet of the victim, were in the possession of the victim’s family, who said they were unsure “whether the family would be willing to provide the items to the Kentucky Innocence Project.” *City reverses course, release file requested in 40-year-old Lexington murder case*, LEXINGTON HERALD-LEADER, Aug. 9, 2011, <http://www.kentucky.com/2011/08/09/1839153/lexington-police-reverse-course.html#ixzz1VJozvk90> (last visited Aug. 17, 2011).

⁸⁵ *Wilson v. Parker*, 515 F.3d 682, 706 (6th Cir. 2008) (upholding the denial of a hearing on the issue of the missing hairs, stating that in light of the other evidence of guilt, “[e]ven if the hair-matching evidence is unreliable as Wilson alleges and was excluded, the outcome of the trial would have been unaffected.”).

contacting over a dozen individuals and multiple police and other state agencies.”⁸⁶ In another non-capital case, DNA testing that was not available at the time of conviction exonerated Herman May, who spent thirteen years in jail after being wrongly convicted of rape.⁸⁷ The May investigation by the Kentucky Innocence Project (KIP), which is affiliated with the Kentucky Department of Public Advocacy (DPA), had some “hair-raising moments, including the temporary loss of the DNA evidence after a judge [] granted May’s lawyer’s motion for additional testing of the evidence.”⁸⁸

In fact, according to some defense attorneys, “evidence has gone missing in Kentucky, resulting in problems for six capital cases and possibly hundreds of other prosecutions, including rapes and robberies.”⁸⁹

In at least one instance, the Commonwealth has not adhered to a court’s preservation order.⁹⁰ In *Taylor v. Commonwealth*, a death row inmate requested new and advanced DNA testing and analysis on the remaining evidence preserved in his case.⁹¹ In response, the court entered a preservation order pursuant to KRS 422.285.⁹² Despite the presence of this preservation order, KSP Laboratory, at the request of the Commonwealth, conducted testing on one of two

⁸⁶ See *supra* note 30 and accompanying text.

⁸⁷ Deborah Yetter, *Man cleared after 13 years in prison*, COURIER-J. (Louisville, Ky.), June 12, 2003, at A1. While testing during the initial trial produced inconclusive results, “more sophisticated tests conducted [in 2002] showed that the DNA material taken from the victim through a swab after the rape could not have come from May because it did not match May’s “Y” or male chromosome.” *Id.*

⁸⁸ *Id.* (noting that “May’s advocates persuaded officials to keep looking and the DNA evidence, stored in the courthouse evidence room, was found jumbled in a box along with scores of other items where it had been moved”).

⁸⁹ Barrouquere, *supra* note 80. See also, e.g., *Collins v. Commonwealth*, 951 S.W.2d 569, 571–72 (Ky. 1997) (prosecution lost one of the bullets found at the scene); *Fields v. Commonwealth*, 274 S.W.3d 375, 416 (Ky. 2008) (storm window removed from Horton’s home and later lost by the Grayson Police Department), *overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010); *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002) (Commonwealth failed to collect exculpatory evidence by having the victim’s body cleaned before a gunpowder residue test could be performed); *Denton v. Hanifen*, No. 3:06CV00400-JDM, 2008 WL 655984, at *1 (W.D. Ky. 2008) (a Louisville Metropolitan Police Department detective lost a tape recorded conversation between himself and a complaining witness during a criminal investigation); *Grey v. Commonwealth*, No. 2005-SC-000590-MR, 2007 WL 1532661, at *1 (Ky. May 24, 2007) (a bullet was turned into the property room at the Lexington Police Department under another case number and subsequently destroyed); *Tamme v. Commonwealth*, 759 S.W.2d 51, 54 (Ky. 1988) (lost bullet was an unforeseen accident which occurred in the normal course of the police department’s business); *Hembree v. Commonwealth*, No. 2005-CA-001730-MR, 2006 WL 1791396, at *2 (Ky. Ct. App. June 30, 2006) (court found “that the destruction of the [audio tape containing possible exculpatory] evidence by the police officer was deliberate and intentional”); *Mills v. Commonwealth*, 170 S.W.3d 310, 332 (Ky. 2005) (police failed to collect moonshine as evidence), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Morrow v. Commonwealth*, No. 2003-CA-000894-MR, 2004 WL 2368086, at *3 (Ky. Ct. App. Oct. 22, 2004) (law enforcement lost evidence in a burglary case including the defendant’s “driver’s license, social security card and some other things that were removed from the car”); *Roark v. Commonwealth*, 90 S.W.3d 24, 37 (Ky. 2002) (the police lost the second computer-generated composite sketch and did not retain the photo lineups shown to a witness); *Johnson v. Commonwealth* 892 S.W.2d 558, 563 (Ky. 1994) (Stumbo, J., dissenting) (Kentucky State Police, contrary to normal procedure, released a truck involved in a crime to the victim’s family, and thus lost “one of the most critical, if not the most critical, piece of physical evidence in the case.”).

⁹⁰ See *Adams v. Commonwealth*, No. 2006-CA-000910-MR, 2007 WL 1378461, at *1–2 (Ky. Ct. App. May 11, 2007) (dismissing a petition and refusing to address a claim that KSP Forensic Laboratory destroyed DNA evidence in violation of KRS 524.140 because the issue was not filed within a reasonable time and accordance to *Gross*).

⁹¹ *Taylor v. Commonwealth*, 291 S.W.3d 692, 694 (Ky. 2009)

⁹² *Taylor*, 291 S.W.3d at 694.

remaining slides of DNA, thereby consuming a portion of the already limited amount of preserved evidence available.⁹³ Had the evidence been tested at the laboratory chosen by the death row inmate, it appears more advanced testing could have been provided.⁹⁴ In response to the Commonwealth's preemptive testing on one of the slides, the Kentucky Supreme Court found that "[t]hough the Commonwealth *technically disobeyed* the court's preservation of evidence order by testing one of the slides, the testing it did was not an improper form of testing."⁹⁵ In another death penalty case, "for whatever reason, the court and the parties did not comply with the requirements of KRS 422.285(6), which requires that, when a petition for DNA testing is filed, the court order the state to preserve all evidence in its possession and to prepare an inventory of evidence for the court and the defense."⁹⁶

Conclusion

Because the Commonwealth does not preserve biological evidence for as long as a death row inmate remains incarcerated, the Commonwealth does not comply with this Recommendation.

In order to provide an adequate safeguard against the execution of innocent persons, and to preserve law enforcement and judicial resources that are now expended on determining whether and in what condition biological evidence exists, the Kentucky Death Penalty Assessment Team recommends that Kentucky designate the "appropriate governmental entity"⁹⁷ responsible for the proper preservation of all evidence in a capital case. The designated entity must preserve the evidence for as long as the person remains incarcerated, catalogue each item of physical evidence, and preserve the evidence that contains biological material in an amount and manner sufficient to develop a DNA profile. If retention of a particular piece of property containing DNA evidence is impractical, reasonable care should be taken to retain representative samples of those portions of the evidence that contain DNA evidence. The Commonwealth also should adopt legislation clarifying that preservation of "biological evidence" in death penalty cases include all evidence in which biological material could be present, regardless of existing DNA testing capabilities.

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.

⁹³ *Id.* ("[T]he Commonwealth informed Taylor and the trial court that it had conducted its own DNA testing on one of the two slides remaining from the anal swab, contrary to a previously entered preservation of evidence order by the Circuit Court.").

⁹⁴ *Id.*

⁹⁵ *Id.* at 695 (emphasis added). The Court held that the Commonwealth's mistaken testing of one of the slides did "not rise to the level of misconduct that would require us to reverse for a new trial." *Id.*

⁹⁶ *Garland v. Commonwealth*, Nos. 2009-SC-000035-MR, 2009-SC-000361-MR, 2011 WL 2438371, at *5 (Ky. June 9, 2011).

⁹⁷ KY. REV. STAT. ANN. § 524.140(7) (West 2011).

Since 2002, the Commonwealth of Kentucky permits capital defendants and death row inmates to obtain DNA testing of biological evidence prior to trial and, in some circumstances, through post-conviction proceedings.⁹⁸ Kentucky's DNA testing statutes are limited to capital defendants and death row inmates.⁹⁹

DNA Testing During Pretrial Discovery

Pursuant to KRS 422.287, in a capital trial, where there is evidence that may be subjected to DNA testing and analysis, both the Commonwealth and the capital defendant are permitted to request testing and analysis of any evidence not previously DNA tested.¹⁰⁰ The court will order DNA testing and analysis to be performed by KSP Laboratory if either party is able to show that (a) the item of evidence has not yet been tested and analyzed or that new testing and analysis would produce a more accurate result, and (b) DNA testing and analysis would yield evidence of probative value.¹⁰¹ Results are available to the Commonwealth and the capital defendant, and upon court approval, either party may request that the results be admitted at trial.¹⁰²

DNA Testing During Post-Conviction

Pursuant to KRS 422.285, all death row inmates are permitted to file a post-conviction petition for DNA testing and analysis.¹⁰³ Specifically, a death row inmate may request DNA testing and analysis of any evidence which may contain biological material that is (a) in the possession or control of the court or the Commonwealth, and (b) "related to the investigation or prosecution that resulted in the judgment of conviction."¹⁰⁴

The Commonwealth allows a death row inmate to file a petition for post-conviction DNA testing and analysis "at any time" after his/her conviction.¹⁰⁵ However, the statute requires petitioners

⁹⁸ KY. REV. STAT. ANN. §§ 422.287 (pre-trial testing of DNA evidence), 422.285 (West 2011) (post-conviction DNA testing for death row inmates).

⁹⁹ See, e.g., Craig M. Cooley, *Advancing DNA Technology and Evolving Standards of Decency: Do Capital Prisoners Have an Eighth Amendment Right to Post-Conviction DNA Testing in Light of Osborne*, 4 CHARLESTON L. REV. 569, 609 (2010); Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2946 (2010) ("Kentucky and Nevada limit access to post[-]conviction DNA testing to capital cases."). "Forty-seven states, the District of Columbia, and the federal government have all enacted legislation specifically addressing prisoner access to DNA evidence." Michael P. Luongo, *Post-Conviction Due Process Right to Access DNA Evidence: Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009), 29 TEMP. J. SCI. TECH. & ENVTL. L. 127, 134 (2010).

¹⁰⁰ KY. REV. STAT. ANN. § 422.287(1) (West 2011).

¹⁰¹ KY. REV. STAT. ANN. § 422.287(2)-(3) (West 2011). In the alternative, KSP Laboratory would select another laboratory to perform the testing and analysis of the DNA evidence. KY. REV. STAT. ANN. § 422.287(3) (West 2011). The Kentucky Department of Public Advocacy (DPA) and other Commonwealth capital defense attorneys primarily utilize private laboratories outside of Kentucky for DNA testing during trial and post-conviction proceedings. Interview with Randy Wheeler, *supra* note 36.

¹⁰² KY. REV. STAT. ANN. § 422.287(4) (West 2011). Furthermore, "[i]f the defendant is convicted of any offense for which DNA test and analysis results are required to be maintained by law, the DNA test and analysis results obtained pursuant to this section shall be utilized for that purpose, whether or not the test and analysis results were introduced in the case." KY. REV. STAT. ANN. § 422.287(5) (West 2011).

¹⁰³ KY. REV. STAT. ANN. § 422.285 (West 2011).

¹⁰⁴ KY. REV. STAT. ANN. § 422.285(1) (West 2011).

¹⁰⁵ *Id.*; see also *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *5 (Ky. June 16, 2011) (refusing the Commonwealth's claim that a death row inmate

to comply with stringent pleading requirements in order to obtain DNA testing and analysis.¹⁰⁶ After a petition for post-conviction DNA testing is filed, the prosecution must be given the opportunity to respond to the request, and the court must order the Commonwealth to preserve all biological evidence that could be subjected to DNA testing and analysis.¹⁰⁷ Once a preservation order is issued, if any evidence is intentionally destroyed, the court may, but is not required to, issue sanctions.¹⁰⁸ However, in at least one case, the court did not penalize the prosecution for violating a preservation order.¹⁰⁹ It is imperative that the Commonwealth ensure the proper preservation of biological evidence, as the failure to properly preserve such evidence renders useless any testing statute.

Trial courts in Kentucky are *required* to order DNA testing and analysis of biological evidence if “[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results” are found.¹¹⁰ The Kentucky Supreme Court has held that, when making a determination as to whether there is a reasonable probability that the petitioner would not have been convicted or prosecuted or would have received a lesser sentence, the court must make the “assumption that the evidence [if tested] will be favorable to the [inmate].”¹¹¹ Further, the evidence must not have been previously tested unless the petitioner is requesting a newer or more advanced testing procedure that “may resolve an issue not previously resolved” by the earlier tests.¹¹² The court may order testing to be performed outside KSP Laboratory if the petitioner demonstrates that “the requested alternative testing is better suited to demonstrating the truth given the circumstances of the evidence than the standard DNA testing performed by KSP Laboratory.”¹¹³ It is unclear whether a death row inmate seeking testing of evidence that would prove, if favorable, that s/he could not be charged or convicted of a capital offense, must be granted testing under this provision.¹¹⁴

However, the court may, *but is not required*, to order DNA testing of biological evidence if there is a reasonable probability that the “petitioner’s verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial” or there is a reasonable probability that new DNA testing and analysis will produce other exculpatory evidence.¹¹⁵ This discretion affords a trial court the power to deny a petition for DNA testing

should be procedurally barred from requesting post-conviction DNA testing four years after enactment of the DNA testing statute, stating that “[t]his Court will not apply the doctrine of laches to claims under the post-conviction DNA testing statute).

¹⁰⁶ See, e.g., KY. REV. STAT. ANN. § 422.285(1)–(2) (West 2011).

¹⁰⁷ KY. REV. STAT. ANN. § 422.285(2), (6) (West 2011).

¹⁰⁸ KY. REV. STAT. ANN. § 422.285(6) (West 2011).

¹⁰⁹ See *Taylor v. Commonwealth*, 291 S.W.3d 692, 695 (Ky. 2009) (“Though the Commonwealth technically disobeyed the court’s preservation of evidence order by testing one of the slides, the testing it did was not an improper form of testing, and the Commonwealth’s mistake in testing one of the slides does not rise to the level of misconduct that would require us to reverse for a new trial . . .”).

¹¹⁰ KY. REV. STAT. ANN. § 422.285(2) (West 2011) (emphasis added).

¹¹¹ *Bowling v. Commonwealth*, No. 2008-SC-000901-MR, 2010 WL 3722283, at *4 (Ky. Sept. 23, 2010).

¹¹² KY. REV. STAT. ANN. § 422.285(2)(c), (3)(c) (West 2011).

¹¹³ *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *18 (Ky. June 16, 2011).

¹¹⁴ For example, it is unclear whether a court must grant testing if an inmate, convicted of capital murder due to an accompanying felony, such as rape, committed during the course of the murder, sought testing to prove that s/he did not perpetrate the rape and therefore could not be prosecuted or convicted of a capital offense.

¹¹⁵ KY. REV. STAT. ANN. § 422.285(3) (West 2011) (emphasis added).

without reason, perhaps even when the results of such testing could prove that the inmate should not have been subject to the death penalty.¹¹⁶ For example, in *Garland v. Commonwealth*, the Kentucky Supreme Court overruled a circuit court’s denial of a death row inmate’s petition for post-conviction DNA testing.¹¹⁷ The Court held that while the inmate did not prove that the testing, if favorable, would exonerate him/her under KRS 422.285(2), s/he had met the standard of KRS 422.285(3) by showing a “reasonable probability” that the inmate’s ““verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial””¹¹⁸ The Kentucky Supreme Court directed the circuit court to order testing and analysis if the evidence in the case still existed and could be tested.¹¹⁹ If an inmate is able to show that a reasonable probability exists that s/he would have received a more favorable sentence or that DNA testing would produce exculpatory evidence, Commonwealth courts should be required to order DNA testing and analysis.

Additionally, in any case, the death row inmate must show that the biological evidence (a) exists and (b) can be tested.¹²⁰ In one case, a death row inmate was denied testing of two items, which had been admitted as evidence during the trial, because the items had later gone missing and could not be found even after a “substantial search” by the Commonwealth.¹²¹

Courts are required to hold a hearing in order to determine the necessary relief, if any, only once DNA testing and analysis has proven favorable to the death row inmate.¹²² Additionally, Kentucky death row inmates are not entitled to counsel or a hearing unless the court grants the initial *pro se* post-conviction petition for DNA testing.¹²³ Thus, under the statute, the Commonwealth courts would have to rely only on a *pro se* motion and response from the prosecution before deciding to grant or deny the petition. While in practice DPA provides representation to the Commonwealth’s death row inmates during post-conviction proceedings, including during the drafting and filing of an initial post-conviction petition for testing, the statute fails to *guarantee* the assistance of counsel to a death row inmate seeking testing and the opportunity to present evidence in support of its testing petition.¹²⁴ In at least one death penalty case, a death row inmate did not have counsel when s/he initially filed for testing under KRS 422.285.¹²⁵

¹¹⁶ KY. REV. STAT. ANN. § 422.285(2) (West 2011).

¹¹⁷ *Garland v. Commonwealth*, Nos. 2009-SC-000035-MR, 2009-SC-000361-MR, 2011 WL 2438371, at *4–5 (Ky. June 9, 2011); KY. REV. STAT. ANN. § 422.285(3)(a) (West 2011).

¹¹⁸ *Garland*, 2011 WL 2438371, at *4–5; KY. REV. STAT. ANN. § 422.285(3)(a) (West 2011).

¹¹⁹ *Garland*, 2011 WL 2438371, at *5.

¹²⁰ KY. REV. STAT. ANN. § 422.285(2)(a), (3)(a) (West 2011); *see, e.g., Garland*, 2011 WL 2438371 at *5; *Bowling v. Commonwealth*, No. 2008-SC-000901-MR, 2010 WL 3722283, at *4 (Ky. Sept. 23, 2010); *Taylor v. Commonwealth*, 291 S.W.3d 692 (Ky. 2009).

¹²¹ *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at * 7 (Ky. June 16, 2011)

¹²² KY. REV. STAT. ANN. § 422.285(9) (West 2011).

¹²³ KY. REV. STAT. ANN. § 422.285(4)–(9) (West 2011).

¹²⁴ This includes both DPA and the Louisville Metro Public Defender’s Office. For more information on Kentucky defense services, see Chapter Six.

¹²⁵ *Garland v. Commonwealth*, Nos. 2009-SC-000035-MR, 2009-SC-000361-MR, 2011 WL 2438371, at *5–6 (Ky. June 9, 2011) (“On January 2, 2007, Appellant filed a *pro se* post-conviction motion, requesting DNA testing On November 5, 2008, the circuit court entered an order denying Appellant’s *pro se* motion for DNA testing.”).

Upon a return of favorable results from the post-conviction DNA testing and analysis, as noted above, the court must hold a hearing to determine the proper remedy.¹²⁶ However, neither court rule nor statute provide guidance for how such a hearing should be conducted, how a court should determine whether the evidence is favorable, or how a court should proceed if the results are inconclusive.¹²⁷ In the first successful case under KRS 422.285, the court granted DNA testing finding that the inmate had shown that there was a reasonable probability he would not have been convicted if DNA testing results proved favorable.¹²⁸ Because the initial results of the post-conviction tests were inconclusive, the inmate then petitioned the court to retest the evidence using a more advanced testing technique.¹²⁹ The court rejected his request and held that the statute did not allow it to order new testing, despite the clear language of the statute allowing testing on previously tested materials if the requested testing had not been done or if the requested testing “may resolve an issue not previously resolved by the previous testing.”¹³⁰ In a seemingly contradictory decision to its previous grant of DNA testing, the court further held that even if the new testing proved favorable to the inmate, the other evidence presented at trial would have been sufficient to convict the defendant.¹³¹ This inconsistency demonstrates the need for Kentucky to establish clear procedures for the courts to follow both before testing is ordered and after the testing is completed.

Finally, while the KRS requires that the court order preservation of the evidence to be tested, the statute does not require the court to issue a stay of execution upon the filing a post-conviction motion for DNA testing.¹³²

Conclusion

The Kentucky Death Penalty Assessment Team commends the Commonwealth for adopting legislation permitting capital defendants and death row inmates to obtain post-conviction DNA testing on available biological evidence, in recognition that “[a] statute allowing a death [] row inmate to obtain DNA testing furthers the interests of justice by better ensuring that the Commonwealth does not follow through with putting an innocent man to death.”¹³³ However, given the discretion afforded to courts to deny a petition for testing when a reasonable

¹²⁶ KY. REV. STAT. ANN. § 422.285(9) (West 2011). Additionally, the court, in its discretion, may order further testing of elimination samples of third parties for comparison with the exonerating sample. KY. REV. STAT. ANN. § 422.285(7)(b) (West 2011).

¹²⁷ See, e.g., *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737, at *12, 18 (Ky. June 16, 2011) (“Evidence that is favorable but merely impeaches, and thus falls short of absolutely excluding the defendant, must be weighed against the other evidence in the case” and noting how other jurisdictions treat testing results that, while favorable, do not exclude the petitioner).

¹²⁸ Jason Riley, *State Lab’s DNA Testing Halted in 1979 Murder*, COURIER-J. (Louisville, Ky.), May 13, 2008, at B5.

¹²⁹ Opinion and Order, *Moore v. Commonwealth*, No. 79-CR-976 (Jefferson Cir. Ct. Nov. 7, 2008) (denying the inmate’s CR 60.02 motion to vacate decision and/or death sentence); Brett Barrouquere, *Condemned Ky Inmate’s DNA-Based Appeal Rejected*, ASSOCIATED PRESS, Nov. 7, 2008.

¹³⁰ Opinion and Order, *Moore v. Commonwealth*, No. 79-CR-976 (Jefferson Cir. Ct. Nov. 7, 2008); KY. REV. STAT. ANN. § 422.285(2)(c), (3)(c) (West 2011).

¹³¹ Brett Barrouquere, *Condemned Ky Inmate’s DNA-Based Appeal Rejected*, ASSOCIATED PRESS, Nov. 7, 2008.

¹³² *Moore*, 2011 WL 2433737, at *21 (“Moreover, it is not even clear that a KRS 422.285 petition will necessarily cause any delay, since the filing of a petition does not work to stay an execution.”).

¹³³ *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005).

probability exists that the inmate would not have been sentenced to death if the results of DNA testing and analysis had been available at trial, the Commonwealth is in partial compliance with this Recommendation.

However, the problem of lost evidence significantly diminishes the utility of the Commonwealth's DNA testing statute. 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. Furthermore, Kentucky law should provide for a stay of execution during the pendency of the petition for post-conviction DNA testing.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

Preservation of biological evidence is necessary during the collection of evidence at a crime scene, during forensic testing, and during and after the disposition of a criminal proceeding.¹³⁴

Preservation of Evidence at a Crime Scene

Kentucky does not require the Commonwealth's law enforcement agencies to establish and enforce written procedures and policies governing the preservation of biological evidence during evidence collection at a crime scene.¹³⁵

However, to become accredited either by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) or the Kentucky Association of Chiefs of Police

¹³⁴ "The effective exercise of law enforcement responsibility in the investigation of crime and in the prosecution of offenders requires that information be obtained through the application of scientific knowledge and methods. There is no practical alternative. Research has shown clearly that physical evidence must be identified, collected, and preserved properly, and transmitted to the laboratory promptly if laboratory support resources are to be used effectively." CALEA STANDARDS, *supra* note 22, at 83-1.

¹³⁵ The ABA Standards of Criminal Justice on DNA require:

- (a) DNA evidence should be collected and preserved in a manner designed to document its identity, ensure its integrity, and, whenever possible, ensure its availability for testing and retesting. Specifically:
 - (i) the evidence should be properly handled, packaged, labeled, and stored; and
 - (ii) the location where and the place or thing from which the evidence was collected or the person from whom or the entity from which it was collected, the date and time it was collected, the identity of the person who collected it, and the manner in which it was collected and preserved should be documented.
- (b) Whenever DNA evidence is collected from a person, it should be collected by a method that is medically safe and no more intrusive than reasonably necessary. When it is collected from a person by court order, the order should so specify.

ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE 53 (Standard 16-2.5) (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf. The Commonwealth does not require basic or in-service training, mandatory for all Kentucky law enforcement officials, to include information about the possibility that the loss or compromise of evidence or illegal, unethical, or unprofessional behavior may lead to the arrest, prosecution, conviction, or even execution of an innocent person. We were unable to determine whether any Kentucky law enforcement are so trained. *See* KY. REV. STAT. ANN. §§ 15.330, 15.386, 15.404, 15.440 (West 2011); 503 KY. ADMIN. REGS. 1:110, 1:120, 3:030.

Accreditation Program (KACP), law enforcement agencies are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing and transmittal of evidence to testing facilities.¹³⁶ In addition to such policies, CALEA-accredited agencies must specifically promulgate and adopt written policies on biological evidence. Specifically, “DNA evidence collection capabilities and written directives, which include (a) first responder responsibilities and precautions; (b) procedures for the collection, storage, and transportation of DNA evidence; (c) DNA evidence collection training requirements for persons collecting evidence; and (d) procedures for the submission of DNA evidence to accredited laboratories.”¹³⁷ KSP Laboratory also publishes a *Physical Evidence Collection Guide* (KSP Evidence Guide), which provides guidance to all Kentucky law enforcement agencies on the collection, packaging, transportation, short-term preservation, and transference of evidence, including DNA evidence, to KSP Laboratory.¹³⁸

There has been at least one instance where, during post-conviction relief, a Commonwealth inmate claimed “that the police failed to properly maintain the integrity of the crime scene, thereby destroying potentially exculpatory DNA evidence.”¹³⁹ Specifically, the inmate listed twelve deficiencies in the investigation and collection of evidence, noting that that its failure to preserve potentially useful evidence occurred because “the police only collected evidence that strengthened its case against Appellant, and were uninterested in exculpatory evidence.”¹⁴⁰ Stating that “[a]bsent a showing of bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process,” the Kentucky Supreme Court dismissed the allegations and, without further discussion, held that the police’s alleged deficiencies did not rise to the level of bad faith.¹⁴¹

Preservation During Testing

Physical evidence recovered by Kentucky’s state and local law enforcement agencies may be transported to KSP Laboratory, a system of six crime laboratories located throughout Kentucky,

¹³⁶ CALEA STANDARDS, *supra* note 22, at 83-1 (Standards 83.2.1) (“A written directive establishes guidelines and procedures used for collecting, processing, and preserving physical evidence in the field”, and includes the documented transfer of custody of physical evidence, while in the field.), 83-3 (Standard 83.3.2) (“A written directive establishes procedures for submitting evidence to a forensic laboratory, which include: (a) identification of the person responsible for submitting the evidence; (b) methods for packaging and transmitting evidence to the laboratory; (c) types of documentation to accompany evidence when transmitted; (d) receipts to ensure maintenance of chain of evidence; and (e) stipulation that laboratory results be submitted in writing”); KACP STANDARDS, *supra* note 22 (“The agency has written procedures for the collection, identification, preservation, and transmittal of evidentiary items”). For more information on CALEA and KACP, see Chapter Three on Law Enforcement.

¹³⁷ CALEA STANDARDS, *supra* note 22, at 83-3 (Standard 83.2.7); *see infra* notes 155–156 and accompanying text (listing CALEA-accredited entities).

¹³⁸ KSP EVIDENCE GUIDE, *supra* note 8, at 8–18.

¹³⁹ *Hensley v. Commonwealth*, No. 2003-SC-000470-TG, 2005 WL 2674974, at *3 (Ky. Oct. 20, 2005). In fact, there are other cases where law enforcement either lost or destroyed evidence prior to trial in a criminal case. *See supra* note 88.

¹⁴⁰ *Hensley*, 2005 WL 2674974, at *3.

¹⁴¹ *Id.* at *3. In another case, police lost a taped confession for almost twenty years, which contributed to the fact that no one was ever charged for a 1986 murder. *Stefanie Silvey Investigates: Lost Evidence*, 14WFIE.COM, <http://www.14wfie.com/story/4073086/stefanie-silvey-investigates-lost-evidence?clienttype=printable&redirected=true> (last visited Aug. 3, 2011). For additional cases where police misplaced, lost, or destroyed evidence in a criminal case, *see* Recommendation #1, *supra* note 89.

for testing.¹⁴² Three of the regional laboratories—Jefferson, Northern, and Western laboratories—are equipped to provide forensic biology casework screening, and a fourth laboratory, Central Laboratory, conducts all of the Commonwealth’s forensic DNA/biology testing.¹⁴³

In 2002, the Kentucky General Assembly adopted written procedures and policies governing the preservation of evidence during DNA testing, recognizing that “DNA evidence laboratory testing and analysis procedure consumes and destroys a portion of the evidence or may destroy all of the evidence if the [evidence] sample is small.”¹⁴⁴ However, the Commonwealth does not require KSP Laboratory to preserve biological material during testing. Instead, Kentucky adopted statutory provisions that limit KSP Laboratory’s liability for the consumption or destruction of biological evidence if it meets certain conditions.¹⁴⁵

In addition, three of the six KSP laboratories are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), which, as noted in the Factual Discussion, requires forensic laboratories to have written policies and procedures on the testing, handling, preserving, and storage of evidence, including biological evidence.¹⁴⁶ According to the manager of KSP Laboratory, such policies, in practice, govern the operations of

¹⁴² *KSP Forensic Laboratories*, KY. STATE POLICE, <http://www.kentuckystatepolice.org/labs.htm> (last visited Aug. 3, 2011); KSP EVIDENCE GUIDE, *supra* note 8, at 9–14.

¹⁴³ *Western Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/western.htm (last visited Aug. 3, 2011); *Northern Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/northern.htm (last visited Aug. 3, 2011); *Jefferson Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/jefferson.htm (last visited Aug. 3, 2011); *Central Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/central.htm (last visited Aug. 3, 2010); Interview with Laura Sudkamp, *supra* note 30. Once the three regional laboratories conduct screening for the presence of DNA or blood, the evidence is transported to KSP Central Laboratory for testing and analysis. Interview with Laura Sudkamp, *supra* note 30. If evidence is received at one of the two laboratories unequipped to conduct biological screening, the evidence will be automatically sent to KSP Central Laboratory. *Id.*

¹⁴⁴ KY. REV. STAT. ANN. § 524.140(5) (West 2011); *supra* note 16 and accompanying text.

¹⁴⁵ Specifically, KSP Laboratory will not be liable for the consumption of evidence if it (a) “uses a method of testing and analysis which preserves as much of the biological material or other evidence tested and analyzed as is reasonably possible;” (b) “knows or reasonably believes” the evidence to be tested and analyzed will be consumed, and, prior to conducting the testing or analysis, it notifies the court which ordered the testing and analysis, as well as counsel for all parties that (1) the entire evidence sample may be destroyed; (2) the name of another laboratory that may be able to perform testing and analysis in a less destructive manner, and the costs and advantages, including the amount of the sample that may be saved, of using the other laboratory to conduct the alternative testing; and (3) “follows the directive of the court with regard to the testing and analysis;” or (c) “knows or reasonably believes that so much of the biological material or evidence may be consumed or destroyed in the testing and analysis that an insufficient sample will remain for independent testing and analysis that the laboratory follows the procedure specified in paragraph (b) of this subsection.” KY. REV. STAT. ANN. § 524.140(5) (West 2011). Liability for evidence destruction or tampering includes “[d]estruction of evidence in violation of this section [which] shall be a violation of KRS 524.100.” KY. REV. STAT. ANN. §§ 524.140(6), 524.100(2) (“[t]ampering with physical evidence is a Class D felony”), 422.285(6) (West 2011) (permitting “appropriate sanctions, including criminal contempt”). The ABA Standards for Criminal Justice on DNA Evidence recommends that jurisdictions adopt statutory language requiring, “[w]hen possible, a portion of the DNA tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing,” and other safeguards before the full consumption of evidence during testing. ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE 75 (Standard 16-3.4) (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf.

¹⁴⁶ See *supra* notes 26–27 and accompanying text.

all six of Kentucky's crime laboratories regardless of their accreditation status.¹⁴⁷ We note that KSP Western Laboratory, which conducts forensic biology casework screening, is not accredited by ASCLD/LAB, although, as of December 2010, an application is pending for all six laboratories to become accredited by ASCLD/LAB's International Accreditation Program.¹⁴⁸ For a further discussion of KSP Laboratory and ASCLD/LAB's accreditation requirements, please see Chapter Four on Crime Laboratories and Medical Examiner Offices.

Long-term Preservation of Evidence

Pursuant to KSP Laboratory policy, once forensic testing and analysis is complete, KSP Laboratory returns all evidence either to the agency that submitted the evidence for testing or to the relevant Commonwealth's court.¹⁴⁹ It appears that Kentucky law enforcement agencies, rather than the Commonwealth's courts or prosecutors, are typically the entities that preserve and store evidence in long-term facilities.¹⁵⁰

Similar to requirements for the initial collection and preservation of evidence, CALEA and KACP require accredited law enforcement agencies to ensure the security and control of evidentiary items in the custody of the agency. Specifically, CALEA requires extensive written policies and directives (a) establishing a written chain of custody report and guidelines for packaging and labeling property prior to storage and "extra security measures for handling exceptional, valuable, or sensitive items of property"; (b) ensuring that all evidence is stored within secure areas and facilities with limited access for authorized personnel; (c) establishing documented inspections, inventories and audits to be completed at regular intervals; (d) requiring written records of the status of property and ensuring evidence is accounted for; and (e) ensuring that "[f]inal disposition of . . . evidentiary property is accomplished within six months after legal requirements have been satisfied."¹⁵¹ KACP also requires accredited law enforcement agencies to possess written procedures establishing

- (a) a property system for the secure and proper recording, storage, classification, retrieval, and disposition of all evidentiary, recovered, and found property under the protective custody of the agency;¹⁵²
- (b) [p]ersonnel not charged with the custody of property regularly perform inventories and records audits of both property owned and used by the agency and property placed within the protective custody of the agency;¹⁵³ and
- (c) [t]he property system of the agency incorporates special security and control measures to safeguard all money, firearms, controlled substances, and high value items within the protective custody of the agency.¹⁵⁴

¹⁴⁷ Interview with Laura Sudkamp, *supra* note 30. See also ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 23, at 14, 18–24; ASCLD/LAB Accredited Laboratories, ASCLD/LAB, <http://www.ascl-d-lab.org/accreditedlabs.html#ky> (last visited Aug. 3, 2011).

¹⁴⁸ Interview with Laura Sudkamp, *supra* note 30.

¹⁴⁹ KSP LAB., QUALITY ASSURANCE MANUAL 83 (rev. effective Oct. 25, 2010) (on file with author).

¹⁵⁰ See *supra* notes 21, 79–83 and accompanying text.

¹⁵¹ CALEA STANDARDS, *supra* note 22, at 84-1.

¹⁵² KACP STANDARDS, *supra* note 132, at 27.2 (requiring that department owned property is clearly marked and that an OSHA approved ladder is available as necessary).

¹⁵³ KACP STANDARDS, *supra* note 132, at 27.3 (requiring evidence inventories and inventory audit reports).

¹⁵⁴ KACP STANDARDS, *supra* note 132, at 27.4.

As of November 2011, the Lexington Division of Police and the Taylor Mill Police Department are accredited by CALEA's Law Enforcement Accreditation Program.¹⁵⁵ The Kentucky State Police (KSP) and the Newport Police Department in Newport, Kentucky, were previously accredited by CALEA, but are not accredited as of November 2011.¹⁵⁶ As of November 2011, seventy-nine of over 400 law enforcement agencies in Kentucky are accredited by KACP and three agencies are in an expired status.¹⁵⁷

Although all law enforcement agencies previously or currently accredited by CALEA or by KACP should have established written directives governing the preservation of biological evidence, we were unable to confirm the existence of such policies in each of the accredited or previously accredited agencies. We were also unable to determine whether the Commonwealth's law enforcement agencies that have never been accredited by any entity have any policies or procedures governing the preservation of biological or any other type of evidence either during the initial collection at the crime scene or once the evidence is returned after testing. Furthermore, we were unable to determine the extent to which policies on the preservation of biological evidence are enforced.

However, we note that Kentucky has taken steps to ensure that law enforcement agencies and KSP Laboratory follow the standards pertaining to the handling, collection, preservation, and storage of physical evidence, including biological evidence. The KRS incentivizes KSP Laboratory to preserve as much material as possible when conducting DNA testing by limiting its liability under certain conditions.¹⁵⁸ The Commonwealth also adopted provisions to make destruction or tampering of evidence a Class D felony and providing that, in capital cases, courts may institute sanctions if evidence is "intentionally destroyed."¹⁵⁹

¹⁵⁵ See *Agency Search*, CALEA ONLINE, <http://www.calea.org/content/calea-client-database> (last visited Nov. 21, 2011) (use second search function designating "Kentucky" as search criteria). The Lexington Division of Police, accredited since Nov. 20, 1993, was last reaccredited on Nov. 20, 2010, and the Taylor Mill Police Department was first accredited on Nov. 20, 2010. *Id.*

¹⁵⁶ KSP received its initial CALEA accreditation in March 2003, after three years "assess[ing the] Kentucky State Police and its programs, activities and operations in relation to the 443 CALEA standards, and develop and implement a plan to move the agency in the direction to pursue and eventually achieve this national police accreditation," and was reaccredited in March 2006. KY. STATE POLICE, 2003 ANNUAL REPORT 8, available at www.kentuckystatepolice.org/pdf/ksp_anrep_03.pdf. However, KSP was not reaccredited by CALEA in 2009. See *Agency Search*, CALEA ONLINE, <http://www.calea.org/content/calea-client-database> (last visited Nov. 21, 2011) (use second search function designating "Kentucky" as search criteria). The Newport Police Department in Newport, Kentucky received accreditation in 1998 and again in Nov. 2004, but also is not currently CALEA-accredited. See *Agency Search*, CALEA ONLINE, <http://www.calea.org/content/calea-client-database> (last visited Nov. 21, 2011) (use second search function designating "Newport" as search criteria).

¹⁵⁷ *Accredited Agencies, KY. ASS'N OF CHIEFS OF POLICE*, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=54&Itemid=64 (last visited Nov. 3, 2011). Notably, the Kentucky State Police is not accredited by KACP. *Id.*

¹⁵⁸ KY. REV. STAT. ANN. § 524.140(5) (West 2011)

¹⁵⁹ KY. REV. STAT. ANN. §§ 524.140(6) ("[d]estruction of evidence in violation of this section shall be a violation of KRS 524.100"), 17.170(8) ("[a]ny person who tampers or attempts to tamper with any DNA sample collected under this section or its container without lawful authority shall be guilty of a Class D felony"), 524.100(2) (West 2011) ("[t]ampering with physical evidence is a Class D felony"). In addition, KRS 422.285(6) permits the post-conviction court to order "appropriate sanctions, including criminal contempt" if evidence is "intentionally destroyed after the court orders its preservation." KY. REV. STAT. ANN. § 422.285(6) (West 2011).

There have been a number of instances where evidence sought for retesting during post-conviction proceedings has been lost or unavailable. In the case of the now-exonerated Louisville man who spent nine years in prison for homicide, attorneys for Edwin Chandler filed a 110-page federal lawsuit against Kentucky detectives and officers alleging, among other things, that the police concealed and destroyed evidence of Chandler's innocence.¹⁶⁰ The Kentucky Innocence Project's Coordinator noted that in the investigation of several Kentucky innocence claims, it has been impossible to track down evidence, and law enforcement officials at times refuse to confirm or deny the existence of evidence.¹⁶¹ In addition, there have been at least two occasions where flooding or fire has caused extensive damage to law enforcement evidence control/storage facilities that have hindered the Commonwealth's preservation and storage of evidence.¹⁶²

However, in at least one high-profile case, evidence was preserved. William Gregory, wrongly convicted of rape and attempted rape, was released after officials tested hair evidence with a "more sophisticated test" that was not available at the original trial.¹⁶³ The inconsistent nature of evidence preservation indicates that law enforcement agencies across the Commonwealth are not properly equipped nor required to properly preserve evidence in death penalty cases.

Conclusion

The Kentucky Death Penalty Assessment Team applauds the Commonwealth the KSP Laboratory for its establishment of written policies and procedures governing the collection, handling, testing, and transport of biological evidence. Presumably, accredited law enforcement agencies must have adopted such policies. However, to the extent that all law enforcement agencies possess written directives governing the preservation of evidence, notable high-profile cases indicate that there is inconsistent adherence to such policies. Therefore, the Commonwealth of Kentucky is in partial compliance with this Recommendation.

The Kentucky Assessment Team recommends that the Commonwealth require all law enforcement agencies involved in the investigation of potential capital cases to 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. Furthermore, 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.¹⁶⁴

¹⁶⁰ Jason Riley, *Wrongful Slaying Conviction Spurs Suit*, COURIER-J. (Louisville, Ky.), July 8, 2010, at A1 (noting that a beer bottle that had possibly exculpatory evidence disappeared for several years as investigators sought to prove Chandler's innocence).

¹⁶¹ Interview with Randy Wheeler, *supra* note 36.

¹⁶² *Id.* See also notes 80–88, 139–141 and accompanying text.

¹⁶³ Mark Shaver, *Prosecutors Back DNA Test in Rape Case*, COURIER-J. (Louisville, Ky.), May 5, 2000. For additional cases where the Commonwealth was successfully able to locate missing or misplaced evidence, see Recommendation #1, *supra* note 89.

¹⁶⁴ See, e.g., KY. REV. STAT. ANN. § 15.334 (West 2011) (requiring the Kentucky Law Enforcement Council to "approve mandatory training subjects to be taught to all students attending a law enforcement basic training course,"

D. Recommendation #4

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

KSP Laboratory is charged with providing forensic testing of biological evidence at the request of the Commonwealth's law enforcement agencies, prosecutors, and public defense attorneys, and then returning the tested evidence to law enforcement.¹⁶⁵ The Commonwealth's law enforcement agencies and KSP Laboratory receive funding through appropriations from the Kentucky General Assembly and federal grants.

Funding for Testing

KSP Laboratory is funded primarily through appropriations from the Kentucky General Assembly and federal grants.¹⁶⁶ In fiscal year 2009-2010, KSP Laboratory's operating budget was \$3,555,367.¹⁶⁷ As previously discussed, while KSP Laboratory provides the majority of DNA testing for the Commonwealth in-house, it does not conduct all types of DNA testing, such as Y-Str or mitochondrial DNA testing, paternity testing, and testing on any case involving a person related to the laboratory staff.¹⁶⁸ It also appears that KSP Laboratory does not have the technological nor financial capabilities to conduct more advanced forms of DNA testing. In a 2009 case, the Commonwealth violated a court's order to preserve the evidence for testing by the death row inmate. As a result, the private laboratory selected by the inmate could not perform the more advanced testing requested by the inmate because the KSP Laboratory testing had consumed too much of the available evidence.¹⁶⁹ For more information about the funding of KSP Laboratory, see Chapter Four Analysis Recommendation #2.

Through a federal grant from the National Institute of Justice (NIJ), the Commonwealth obtains additional funds to perform DNA testing and other forensic services.¹⁷⁰ For example, under the Forensic DNA Backlog Reduction Program, which "assist[s] eligible States and units of local government to reduce forensic DNA sample turnaround time, increase[s] the throughput of public DNA laboratories, and reduce[s] DNA forensic casework backlogs," the Commonwealth

to "develop and approve mandatory professional development training courses to be presented to all certified peace officers," and to delineate specific subjects that must be covered in law enforcement training curricula).

¹⁶⁵ See *supra* note 146 and accompanying text. In certain circumstances, court clerks or prosecutors have retained evidence for a period of time. See *supra* notes 82-83 and accompanying text.

¹⁶⁶ Interview with Laura Sudkamp, *supra* note 30.

¹⁶⁷ *Id.*

¹⁶⁸ *Supra* note 30 and accompanying text. KSP Laboratory can, but typically is not requested, to conduct testing on behalf of the defense. See Chapter Four on Crime Laboratories and Medical Examiners.

¹⁶⁹ Taylor v. Commonwealth, 291 S.W.3d 692, 694 (Ky. 2009).

¹⁷⁰ The Convicted Offender and/or Arrestee Backlog Reduction Funding Awards Program was created to rapidly accelerate the analysis of convicted offender samples collected by States in order to provide CODIS-compatible data for all local, State, and national DNA databases. *Convicted Offender and/or Arrestee DNA Backlog Reduction Grant Program*, DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/convicted-offender-funding.htm> (last visited Aug. 3, 2011).

received a total of \$4,166,746 between 2004 and 2010.¹⁷¹ Under the NIJ Convicted Offender and/or Arrestee DNA Backlog Reduction Grant Program, KSP Laboratory received a total of \$784,382.¹⁷² The NIJ provides funds under the Solving Cold Cases with DNA Program to “states and units of local government . . . to identify, review, and investigate ‘violent crime cold cases’ that have the potential to be solved using DNA analysis and to locate and analyze biological evidence associated with these cases.”¹⁷³ The Louisville-Jefferson County Metro Government received \$422,423 in 2008 under this grant.¹⁷⁴

Kentucky also receives funds under the Paul Coverdell Forensic Science Improvements Grants Program to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes.¹⁷⁵ Since 2003, the Commonwealth has received \$1,328,424 under this grant.¹⁷⁶

In addition, the Kentucky Innocence Project received \$1,164,441 for post-conviction DNA and forensics testing under the Bloodsworth Grant in 2008.¹⁷⁷ Federal money awarded under this grant “can be used to help defray the costs associated with post[-]conviction DNA testing of certain crimes in which actual innocence might be demonstrated,” including reviewing post-conviction cases and locating and analyzing relevant biological evidence associated.¹⁷⁸ Although the Kentucky Innocence Project does not seek testing on behalf of the Commonwealth’s death row inmates under this grant, like all federal funding, this grant defrays the overall DNA testing costs burdening the Commonwealth.¹⁷⁹

¹⁷¹ *Forensic DNA Backlog Reduction Program*, DNA INITIATIVE, <http://www.dna.gov/funding/backlog-reduction/> (last visited Aug. 3, 2011); *Backlog Reduction Funding Awards—State-by-State Details*, DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-detailed-funding.htm#Kentucky> (last visited Aug. 3, 2011).

¹⁷² *Convicted Offender and/or Arrestee DNA Backlog Reduction Grant Program*, DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/convicted-offender-funding.htm> (last visited Aug. 3, 2011).

¹⁷³ *Solving Cold Cases with DNA*, DNA INITIATIVE, http://www.dna.gov/funding/cold_case (last visited Aug. 3, 2011).

¹⁷⁴ *Cold Case Funding: Awards by Jurisdiction, 2004–2010*, DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/investigations/cold-case/cold-case-award-details.htm#Kentucky> (last visited Aug. 3, 2011).

¹⁷⁵ *FY2009 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-funding-table.xls> (last visited Aug. 3, 2011); *FY2008 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008-funding-table.xls> (last visited Aug. 3, 2011). The Coverdell funding awarded to the Justice and Public Safety Cabinet is split between the Kentucky State Medical Examiner Office (MEO) and the KSP Laboratory system. *See, e.g., FY2009 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-funding-table.xls> (last visited Aug. 3, 2011) (noting that the grant will be shared between the Kentucky Office of the State Medical Examiner and The Kentucky State Police Forensic Laboratories).

¹⁷⁶ *See Coverdell Forensic Science Improvement Grants Program*, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/welcome.htm> (last visited Aug. 3, 2011).

¹⁷⁷ *Postconviction Testing*, DNA INITIATIVE, <http://www.dna.gov/funding/postconviction> (last visited Aug. 3, 2011).

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Randy Wheeler, *supra* note 36.

Nonetheless, KSP Laboratory still experiences an extensive backlog in forensic testing and analysis.¹⁸⁰ As of December 2010, the backlog for DNA screening at KSP Western Laboratory,¹⁸¹ Jefferson Laboratory and Northern Laboratory, was forty-four cases, forty-six cases, and sixty-five cases respectively.¹⁸² KSP Central Laboratory, which is the only location to provide both screening and DNA testing, had a backlog of 608 cases, for a total backlog of 763 cases statewide.¹⁸³ In addition, KSP Central Laboratory has a backlog of 25,257 samples to be tested for inclusion in the Commonwealth's centralized DNA database,¹⁸⁴ although testing is currently on hold as KSP Laboratory determines which samples must be processed for inclusion in the database.¹⁸⁵

Testing at independent laboratories, however, is not subject to the backlogs that exist at KSP Laboratory. DPA and other Commonwealth capital defense attorneys primarily utilize private laboratories outside of Kentucky for DNA testing during trial and post-conviction proceedings.¹⁸⁶ Commonwealth courts may grant funding under KRS 31.185 to permit testing on behalf of an indigent defendant at an independent laboratory, which may permit defendants to request testing on a greater number of samples than permitted at KSP Laboratory.¹⁸⁷ Defendants and, in limited circumstances, Commonwealth prosecutors, also may seek more advanced testing at independent laboratories that is unavailable at KSP Laboratory.¹⁸⁸

Funding for Preservation

We were unable to determine the amount of funding provided to each of the Commonwealth's over 400 law enforcement agencies. However, given the limitations expressed by law enforcement and Commonwealth attorneys to support requests for the destruction of evidence, it

¹⁸⁰ See Steve Tellier, *Hundreds of Untested Rape Kits at Ky. Crime Lab: Experts Say Backlogs Can Delay Prosecutions, Healing Process*, KLKY.COM, Nov. 20, 2009, <http://www.wlky.com/r/21682041/detail.html> (last visited Aug. 3, 2011) (noting that as of November 20, 2009 "the Kentucky Crime Lab has a backlog of 813 cases of all kinds involving blood or DNA evidence, including 136 cases from Louisville Metro Police. Of those statewide cases, 355 are sexual assault cases, and 151 of those have been sitting idle for three months or more."). To lessen the backlog, KSP Laboratory has placed limitations on the services it provides by outsourcing paternity and genealogical DNA testing, certain types of drug testing, and evidence where a suspect or victim may be related to an analyst in the system. Interview with Laura Sudkamp, *supra* note 30. The cost of outsourced testing is included in KSP Laboratory's operating budget. *Id.*

¹⁸¹ KSP Western Laboratory, which provides biology screening, is unaccredited as of August 8, 2011. *Accredited Labs*, ASCLD/LAB, <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#ky> (last visited Aug. 3, 2011).

¹⁸² Interview with Laura Sudkamp, *supra* note 30.

¹⁸³ *Id.*

¹⁸⁴ In 2002, the Kentucky General Assembly passed legislation permitting additional DNA collection for inclusion in the centralized database for DNA identification records, which increased the number of samples KSP Laboratory was dealing with from 500 annually to almost 5,000 annually. KY. REV. STAT. ANN. § 17.175 (West 2002), amended by 2002 Ky. Acts ch. 154, sec. 9 (effective July 15, 2002); Interview with Laura Sudkamp, *supra* note 30.

¹⁸⁵ Interview with Laura Sudkamp, *supra* note 30. KSP Laboratory received 25,000 DNA samples within four months. *Id.*

¹⁸⁶ Interview with Randy Wheeler, *supra* note 36.

¹⁸⁷ *Id.*

¹⁸⁸ *Moore v. Commonwealth*, Nos. 2008-SC-000860-MR, 2008-SC-000925-MR, 2008-SC-000957-MR, 2011 WL 2433737 (Ky. June 16, 2011) (circuit courts have discretion to order DNA testing to be conducted at independent laboratories).

appears that some agencies do not have adequate resources to preserve evidence for as long as a capital defendant or death row inmate remains incarcerated.¹⁸⁹

Furthermore, although we know that law enforcement agencies are primarily responsible for preserving evidence, Kentucky has no uniform requirements on the preservation of evidence. Such a lack of regulations suggests that the Commonwealth does not dedicate sufficient resources toward ensuring the preservation of biological evidence associated with criminal cases.

Conclusion

KSP Laboratory's backlogs and its reliance on federal grants, the existence of statutes and policies that limit how many pieces of evidence may be submitted for DNA analysis, and the fact that KSP Laboratory does not provide more advanced types of DNA testing available at private, out-of-state laboratories, indicate that the Commonwealth does not provide adequate funding to ensure the proper testing of biological evidence.¹⁹⁰

However, while it appears funding is also inadequate to ensure the proper preservation of biological evidence by the Commonwealth's law enforcement agencies, we do not possess sufficient information to determine whether Kentucky is fully compliant with this Recommendation.

¹⁸⁹ See *supra* notes 72–95 and accompanying text (where prosecutors noted that the Commonwealth had to request the destruction of evidence because it was unable to retain large items of evidence).

¹⁹⁰ See, e.g., KY. REV. STAT. ANN. § 17.176(2)–(3) (West 2011) (limiting the number of items for testing to five); KSP LAB., FORENSIC BIOLOGY ANALYTICAL MANUAL 1–8 (effective Apr. 2, 2010) (Forensic Biology Case Acceptance Policy).

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Of individuals proved innocent through DNA testing, eyewitness misidentification and false confessions have been two of the leading causes of the wrongful convictions. Between 1989 and 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.¹ In about 50 percent of these cases, there was at least one eyewitness misidentification, and 20 percent involved false confessions.²

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To decrease the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, the American Bar Association promulgated best practices for promoting the accuracy of eyewitness identification.³ To avoid misidentification, the lineup should include foils chosen for their similarity to the witness’s description,⁴ and the administering officer should be unaware of the suspect’s identity and should tell the witness that the perpetrator may not be in the lineup. Caution in administering lineups and showups is especially important because flaws may easily taint later lineup and trial identifications.⁵

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness’s statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Custodial Interrogations

Of the 205 murder exonerations nationwide, forty-one of the exonerees gave false confessions, some of which were the product of police coercion.⁶ Other reported reasons for false confessions include deception, fear of physical harm, ignorance of the law, and lengthy

¹ See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005).

² *Id.* at 544.

³ ABA, BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES, 2004 Ann. Mtg. (adopted Aug. 9–10, 2004), available at http://www2.americanbar.org/sdl/Documents/2004_AM_111C.pdf.

⁴ See C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 L. & HUM. BEHAV. 43, 57 (1991). A foil is “a person or thing that gives contrast to another.” *Foil*, COLLINS ENGLISH DICTIONARY (10th ed. 2011), <http://dictionary.reference.com/browse/foil> (last visited Nov. 9, 2011). In the context of lineup and photospread procedures, foils are the non-suspect participants.

⁵ See BRIAN L. CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES 13–17, 42–44 (2002).

⁶ See Gross, *supra* note 1, at 544.

interrogations.⁷ Researchers also have found a correlation between a suspect's age and mental health and the probability of a false confession.⁸

Electronically recording interrogations from their outset—not just from when the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.⁹ Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

Initial training of law enforcement is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if prescribed investigative methods cannot be effectively carried out.¹⁰ Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy, or sound professional practice calls for them. Thoroughness in criminal investigations also should be enhanced by using the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,¹¹ and through the priorities and practices of other police oversight groups.¹² Further, jurisdictions should provide adequate opportunity for citizens and investigative personnel to report serious allegations of negligence or misconduct by law enforcement as well as forensic service providers.

⁷ *Id.* See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

⁸ See Gross, *supra* note 1, at 544–45.

⁹ See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

¹⁰ See generally ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION, Part VII (2d ed. 1980) (Standards 7.1–7.11) (“Adequate Police Resources”), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_urbanpolice.html.

¹¹ Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

¹² These oversight groups include the U.S. Department of Justice, which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. See COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES ONLINE, <http://www.calea.org> (last visited Nov. 14, 2011). Similar, state-based organizations exist in many places, as do government-established independent monitoring agencies. Crime laboratories may be accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or the National Forensic Science Technology Center (NFSTC). AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.asclcd-lab.org> (last visited Nov. 14, 2011); NAT’L FORENSIC SCI. TECH. CTR., <http://www.nfstc.org> (last visited Nov. 14, 2011).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

The Commonwealth of Kentucky has a complex system of law enforcement, with approximately 415 state, county, and local law enforcement agencies oftentimes sharing jurisdiction.¹³ Statewide jurisdiction to investigate criminal activity resides in the Kentucky State Police (KSP)¹⁴ and countywide jurisdiction resides in an elected sheriff, an elected constable, or, in a handful of counties, a county police force.¹⁵ At the local level, criminal investigations may be conducted by municipal police forces or by university police forces (e.g., University of Louisville Police Department).¹⁶

A. Law Enforcement Training

1. Statutory Training Requirements

Under Kentucky law, law enforcement officers must be certified by the Kentucky Law Enforcement Council (KLEC).¹⁷ The Kentucky Governor is responsible for making appointments to the twelve-member council, and KLEC's membership also includes, as ex officio, full-voting members, the Attorney General of Kentucky, the commissioner of the Department of Kentucky State Police, directors of the Southern Police Institute of the University of Louisville, the dean of the College of Justice and Safety of Eastern Kentucky University, the president of the Kentucky Peace Officers Association, the president of the Kentucky Association of Chiefs of Police, the president of Kentucky's Fraternal Order of Police, and the president of the Kentucky Sheriffs' Association.¹⁸

In addition to its role certifying Commonwealth peace officers, KLEC is responsible for “prescrib[ing] standards for the approval and continuation of approval of schools at which law

¹³ Telephone Interview by Sarah Turberville with Larry D. Ball, Executive Director, Ky. Law Enforcement Council, Jan. 24, 2011 (on file with author). *See, e.g.*, KY. REV. STAT. ANN. § 16.060 (West 2011) (vesting each KSP officer “with the powers of a peace officer” and granting each “in all parts of the state the same powers with respect to criminal matters and enforcement of the laws relating thereto as sheriffs, constables and police officers in their respective jurisdictions”).

¹⁴ Interview with Larry D. Ball, *supra* note 13.

¹⁵ KY. CONST. § 99; KY. REV. STAT. ANN. § 70.540 (West 2011).

¹⁶ KY. REV. STAT. ANN. § 95.019 (West 2011). Park rangers, responsible for maintaining order in Kentucky's state parks, also may conduct criminal investigations whenever a crime takes place within their jurisdiction. KY. REV. STAT. ANN. § 148.056 (West 2011).

¹⁷ The certification requirement applies to officers of KSP, city, county, and urban-county police officers, deputy sheriffs, State or public university safety and security officers, and certain county detectives. KY. REV. STAT. ANN. § 15.380(1)(a)–(d), (i) (West 2011). The certification requirements provided for in Kentucky law are numerous. *See, e.g.*, KY. REV. STAT. ANN. § 15.382 (West 2011) (listing seventeen requirements for precertification status). However, uncompensated special deputies for whose actions the appointing sheriff ultimately is responsible and deputy sheriffs who provide security service to the courts are excluded from the certification requirement. KY. REV. STAT. ANN. §§ 15.380(1)(c), 70.045, 70.263 (West 2011). Elected sheriffs, elected constables, and the Commissioner of KSP are exempt from the certification requirements. KY. REV. STAT. ANN. § 15.380(5)(a)–(b), (f) (West 2011); *see also* KY. CONST. §§ 99 (establishing county sheriff and county constable offices), 100–101 (establishing requirements for holding county sheriff and county constable offices).

¹⁸ KY. REV. STAT. ANN. § 15.315(1)–(2) (West 2011).

enforcement . . . training courses . . . shall be conducted,” including school curricula.¹⁹ Kentucky state law further requires KLEC to “approve mandatory training subjects to be taught to all students attending a law enforcement basic training course” and to “develop and approve mandatory professional development training courses to be presented to all certified peace officers.”²⁰ The statute also empowers KLEC to “promulgate administrative regulations” respecting “mandatory basic training and professional development training courses,”²¹ but it has not yet done so.²² Finally, KLEC is required each year to “make an annual report . . . to the Legislative Research Commission that details the subjects and content of mandatory professional development training courses established during the past year and the subjects under consideration for future mandatory training.”²³

Kentucky law requires “[a]ny peace officers employed or appointed after December 1, 1998, who have not successfully completed basic training at a school certified or recognized by [KLEC],” to complete a minimum of 640 hours of basic law enforcement training.²⁴ State law also requires, in order to maintain active certification status, forty hours of “annual in-service training that has been certified or recognized by [KLEC].”²⁵ Finally, law enforcement agencies may impose additional employment requirements beyond state statute and regulation.²⁶

2. Law Enforcement Training Institutions on Eyewitness Identifications and Interrogations

While KLEC is responsible for approving minimum training standards, KSP and the Department of Criminal Justice Training (DOCJT) primarily are responsible for law enforcement training in the Commonwealth.²⁷ In addition, the law enforcement agencies of Kentucky’s two largest municipalities, Lexington and Louisville, operate their own training academies: the Lexington

¹⁹ KY. REV. STAT. ANN. § 15.330(1)(a) (West 2011).

²⁰ KY. REV. STAT. ANN. § 15.334(1)–(2) (West 2011). While the statute delineates specific subjects that must be covered, such as “[a]buse, neglect, and exploitation of the elderly, [or] [t]he dynamics of domestic violence,” training curricula is not limited to these subject areas. *Id.*

²¹ KY. REV. STAT. ANN. § 15.334(4) (West 2011).

²² Interview with Larry D. Ball, *supra* note 13.

²³ KY. REV. STAT. ANN. § 15.334(5) (West 2011).

²⁴ KY. REV. STAT. ANN. § 15.404(1)(a) (West 2011). A separate statute also empowers the Department of Criminal Justice Training to administer or approve the minimum 640 hours of basic law enforcement training for “[a]ll police officers and auxiliary police officers originally appointed or employed by a city, urban-county, or charter county government.” KY. REV. STAT. ANN. § 95.955 (West 2011).

²⁵ KY. REV. STAT. ANN. § 15.404(2)(a) (West 2011).

²⁶ KY. REV. STAT. ANN. § 15.402 (West 2011).

²⁷ KY. REV. STAT. ANN. §§ 16.090 (West 2011) (authorizing the commissioner of KSP “to organize and maintain a training school or schools for officers of the department, and in connection therewith to provide by administrative regulation the course and conduct of such training”), 15A.070(1) (West 2011) (requiring DOCJT to “establish, supervise and coordinate training programs and schools for law enforcement personnel”). *See also* KY. REV. STAT. ANN. § 16.080 (West 2011) (requiring the commissioner of KSP to “promulgate administrative regulations for the [] training . . . of officers of the department”). By statute, the commissioner of KSP is authorized to make available KSP’s training facilities “to any local governing unit within [the] Commonwealth.” KY. REV. STAT. ANN. § 16.090 (West 2011). According to Captain Phil Crumpton, the commander of the Kentucky State Police Academy, KSP’s training facilities routinely are used for training non-KSP officers. Telephone Interview by Ryan Kent with Phil Crumpton, Captain, Ky. State Police, Feb. 28, 2011 (on file with author).

Division of Police Basic Training Academy and the Louisville Metro Police Department Training Academy.²⁸

a. KSP Academy

The KSP operates the Kentucky State Police Academy (Academy) located in Frankfort, Kentucky.²⁹ By state regulation, all KSP officers must complete training at the Academy “prior to [their] appointment as officers.”³⁰ The Academy’s basic training program runs twenty-three weeks.³¹

KSP basic training on lineups and photospreads “suggests [five to seven] foils for a photospread and [five] foils for a lineup,” “indicates that foils should be of the same sex, race, approximate age, and basic physical traits [as the suspect],” and advises that “a video or photograph [of a lineup] should be taken . . . but [] is not required.”³² Training materials also advise “that the witness should never be told the suspect is in a lineup or photospread.”³³ Finally, the Academy encourages recruits to, at a minimum, audio record witness interviews, custodial interrogations, and suspect confessions “whenever possible.”³⁴

b. DOCJT

DOCJT's primary training facility is located in Richmond, Kentucky, although DOCJT conducts multiple training sessions throughout the Commonwealth and also makes available select law enforcement courses online.³⁵ According to the agency’s website, “[t]he DOCJT provides entry-level and professional-development training for approximately 12,000 students each year, including city, county, airport and state university police officers, sheriffs, deputy sheriffs, coroners and law enforcement telecommunicators.”³⁶ Apart from “police communications personnel,” no law enforcement official is required, by statute or by regulation, to complete DOCJT’s training program.³⁷ Nevertheless, DOCJT must, at minimum, approve the basic training programs for “[a]ll police officers and auxiliary police officers originally appointed or employed by a city, urban-county, and charter county government,” including the programs

²⁸ Interview with Captain Phil Crumpton, *supra* note 27.

²⁹ *Kentucky State Police Academy*, KY. STATE POLICE <http://kentuckystatepolice.org/academy.htm> (last visited Nov. 15, 2011).

³⁰ 502 KY. ADMIN. REGS. 45:105(2) (2010). *See also* KY. DEP’T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE, *available at* http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

³¹ Interview with Captain Phil Crumpton, *supra* note 27.

³² Telephone Interview by Sarah Turberville with Angela Parker, Branch Commander, Ky. State Police, Oct. 28, 2010 (on file with author).

³³ *Id.*

³⁴ *Id.*

³⁵ *See* KY. DEP’T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE, *available at* http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

³⁶ KY. DEP’T OF CRIMINAL JUSTICE TRAINING, <http://docjt.jus.state.ky.us/> (last visited Nov. 15, 2011).

³⁷ *History of DOCJT*, KY. DEP’T OF CRIMINAL JUSTICE TRAINING, <http://docjt.jus.state.ky.us/history.html> (last visited Nov. 15, 2011). Instead, a peace officer need only ensure that s/he has “successfully completed basic training at a school certified by [KLEC] [] within one year of [his/her] appointment or employment.” KY. REV. STAT. ANN. § 15.404(1)(a) (West 2011).

administered by the Lexington Division of Police Training Academy and the Louisville Metro Police Department Training Academy.³⁸

DOCJT's Basic Training Academy "consists of a minimum of 768 hours of instruction over an [eighteen]-week period," including instruction on criminal investigations.³⁹ Course materials obtained from DOCJT indicate that recruits receive specific guidance for conducting eyewitness identifications and interrogations. Students are advised "that the minimum number for a line-up or photo[s]pread should [be] six participants or photos,"⁴⁰ and "that the 'double[-]blind' method [wherein the officer who conducts the lineup or photospread is unaware of the identity of the suspect] should be used when practicable."⁴¹ In addition, "DOCJT advise[s] [its] students that agencies should videotape custodial interrogations" and "that if videotaping [] an interrogation is not practical then [an] audio recording should take place."⁴²

B. Law Enforcement Accreditation Programs

1. Kentucky Association of Chiefs of Police

The Kentucky Association of Chiefs of Police (KACP), established in 1971, offers an accreditation program to law enforcement agencies in the Commonwealth that "meet commonly accepted professional standards for efficient and effective operations."⁴³ As of January 2011, seventy-six law enforcement agencies are accredited by KACP.⁴⁴

³⁸ KY. REV. STAT. ANN. § 95.955 (West 2011).

³⁹ 503 KY. ADMIN. REGS. 1:110 (2011). See also KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE 42, available at http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

⁴⁰ KY. DEP'T OF CRIMINAL JUSTICE TRAINING, DEP'T OF CRIMINAL JUSTICE TRAINING CURRICULUM & TEACHING CONTENT 9 (2010) (on file with author) [hereinafter DOCJT TRAINING CURRICULUM].

⁴¹ *Id.* at 6.

⁴² *Id.* at 17.

⁴³ *About Our Program*, KY. ASS'N OF CHIEFS OF POLICE, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=56&Itemid=66 (last visited Nov. 15, 2011).

⁴⁴ *Accredited Agencies*, KY. ASS'N OF CHIEFS OF POLICE, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=54&Itemid=64 (last visited Jan. 24, 2011). The following law enforcement agencies have been awarded certification by KACP: Alexandria Police Department, Anchorage Police Department, Ashland Police Department, Audubon Park Police Department, Beaver Dam Police Department, Benton Police Department, Berea Police Department, Boone County Sheriff's Office, Bowling Green Police Department, Calvert City Police Department, Campbell County Police Department, Campbellsville Police Department, Cincinnati/Northern Kentucky International Airport Police Department, Cold Spring Police Department, Covington Police Department, Danville Police Department, Dry Ridge Police Department, Eastern Kentucky University Police Department, Eddyville Police Department, Edgewood Police Department, Elizabethtown Police Department, Erlanger Police Department, Falmouth Police Department, Florence Police Department, Fort Mitchell Police Department, Fort Thomas Police Department, Fort Wright Police Department, Glasgow Police Department, Harlan Police Department, Hazard Police Department, Henderson Police Department, Huntsbourne Acres Police Department, Independence Police Department, Jefferson County Sheriff's Office, Jeffersontown Police Department, Kenton County Police Department, Kenton County Sheriff's Office, the Enforcement Division of the Kentucky Department of Alcoholic Beverages Control, Lakeside Park/Crestview Hills Police Authority, Leitchfield Police Department, Lexington Division of Police, London Police Department, Louisville Metro Police Department, Menifee County Sheriff's Department, Morehead Police Department, Morehead State University Police Department, Murray Police Department, Murray State University Police Department, Northern Kentucky Drug Strike Force, Northern Kentucky University Police Department, Newport

To obtain accreditation, an applicant agency must complete a self-assessment, which requires the agency to “ensure compliance with all KACP [program] standards.”⁴⁵ A team of independent professionals subsequently is assigned “to verify that all applicable standards have been successfully implemented.”⁴⁶ Applicants for KACP accreditation consent to allow professional law enforcement personnel conducting the inspection access to department records and personnel “for purposes of assessment.”⁴⁷ KACP’s accreditation program does not require adherence to specific standards on the administration of eyewitness identifications or interrogations.⁴⁸

2. Commission on Accreditation for Law Enforcement Agencies

The Commission on the Accreditation for Law Enforcement Agencies (CALEA) is an independent credentialing authority established by the four major law enforcement membership associations in the United States.⁴⁹ Only two law enforcement agencies in Kentucky currently are accredited by CALEA: The Lexington Division of Police and the Taylor Mill Police Department.⁵⁰ DOCJT also currently is accredited through CALEA’s *Training Academy Accreditation Program*.⁵¹

To obtain accreditation, a law enforcement agency must complete a self-assessment as well as undergo an on-site assessment.⁵² During the on-site assessment, “[a] team of CALEA-trained

Police Department, Nicholasville Police Department, Oldham County Police Department, Oldham County Sheriff’s Office, Operation UNITE, Owensboro Police Department, Paducah Police Department, Paris Police Department, Pendleton County Sheriff’s Office, Radcliffe Police Department, Russellville Police Department, Saint Matthews Police Department, Shelby County Sheriff’s Office, Sheperdsville Police Department, Shively Police Department, Somerset Police Department, Taylor Mill Police Department, University of Kentucky Police Department, University of Louisville Police Department, Versailles Police Department, Villa Hills Police Department, Western Kentucky University Police Department, Wilder Police Department, Williamstown Police Department, Wilmore Police Department, and Winchester Police Department. *Id.*

⁴⁵ KY. ASS’N OF CHIEFS OF POLICE, ACCREDITATION PROGRAM ii (2009), available at http://www.kypolicechiefs.org/joomla/attachments/095_STANDARDS_2009_April_20_.doc [hereinafter KACP ACCREDITATION PROGRAM].

⁴⁶ Michael Bischoff, *K.A.C.P. Law Enforcement Accreditation Program*, para. 2, available at http://www.kypolicechiefs.org/joomla/attachments/095_What%20is%20Accreditation%20&%20Benefits.doc.

⁴⁷ KY. ASS’N OF CHIEFS OF POLICE, *Kentucky Association of Chiefs of Police Accreditation Application 1*, available at http://www.kypolicechiefs.org/joomla/attachments/095_application%202009.doc.

⁴⁸ KACP Standard 14.1 does require “[e]ach officer having responsibility for the enforcement of the criminal laws in general [to] graduate from a basic training program certified by [KLEC] prior to the exercise of such authority” KACP ACCREDITATION PROGRAM, *supra* note 45, at 33. While KACP Standard 4.6 does require accredited agencies to “adhere[] to an established system for the development and dissemination of written directives,” the decision by an agency to promulgate eyewitness identifications- and interrogations-specific written directives is discretionary. *Id.* at 17.

⁴⁹ *The Commission*, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/commission> (last visited Nov. 15, 2011) (noting that CALEA was established by the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, the National Sheriff’s Association, and the Police Executive Research Forum).

⁵⁰ *Client Database Search*, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/calea-client-database> (last visited Nov. 15, 2011) (using “Search by Location” function and designating “US” and “KY” as search criteria).

⁵¹ *Id.*

⁵² *Steps in the Accreditation Process*, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/steps-accreditation-process> (last visited Nov. 14, 2011).

assessors visits the agency to determine compliance with [CALEA] standards, views agency operations, conducts a public information session, and reports its findings to the Commission for final determination of accreditation status.”⁵³

The CALEA Standards “state what must be accomplished by [an] agency [seeking accreditation], but generally allow wide latitude in determining how to achieve compliance with each applicable standard.”⁵⁴ Specific to eyewitness identifications, CALEA Standards 42.2.11 and 42.2.12 require the creation of written directives “describ[ing] the procedures for using photographic or physical line-ups in eyewitness identification [and] for using show-ups in eyewitness identification.”⁵⁵ Specific to interrogations, CALEA Standard 1.2.3 requires the creation of a written directive “govern[ing] procedures for assuring compliance with all applicable constitutional requirements, including [those related to] interviews (including field interviews); interrogations; and access to counsel.”⁵⁶ As all three of these standards are mandatory for agencies accredited by CALEA, both the Lexington Division of Police and the Taylor Mill Police Department must have written directives in accordance with these standards.

C. Law Enforcement Written Directives

While Kentucky law does not require law enforcement agencies to adopt specific standard operating procedures on conducting eyewitness identifications and interrogations, some law enforcement agencies within the Commonwealth have opted to promulgate internal regulations governing these practices. For example, the Louisville Metro Police Department has adopted written directives detailing agency requirements for conducting lineups, showups, and photospreads and for conducting interrogations.⁵⁷ Kentucky law enforcement agencies must also adopt similar written directives in order to obtain accreditation through CALEA.⁵⁸

D. Constitutional Standards and Case Law Governing Eyewitness Identifications and Interrogations

1. Eyewitness Identifications

⁵³ *Id.*

⁵⁴ COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM xvii (5th ed. 2006) (emphasis omitted) [hereinafter CALEA STANDARDS].

⁵⁵ *Id.* at 42-8, -9.

⁵⁶ *Id.* at 1-4.

⁵⁷ LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURES 8.15–8.19, 8.25 (2010) (on file with author). Notably, “[t]he department conducts audio and/or video recorded interviews/interrogations of suspects/arrestees involved in serious crimes . . . and other crimes at the discretion of the supervisor.” *Id.* at 8.25.5. The Kentucky State Police acknowledges that its policies and handbooks “do not include written directives on lineups, showups, or photospreads.” Interview with Angela Parker, *supra* note 32. KSP notes, however, that its “investigative personnel are trained on the use of such techniques during basic training and subsequent in-service and refresher training on investigations.” *Id.* Likewise, KSP written directives do not address how interrogations should be conducted nor whether interrogations should be videotaped or audio recorded. *Id.*

⁵⁸ See CALEA STANDARDS, *supra* note 54, at 42-8, -9.

The constitutional protection of due process governs pretrial witness identifications.⁵⁹ As described in *Neil v. Biggers*, suppression of an out-of-court pretrial identification is constitutionally required where (1) the identification procedure employed by law enforcement was unnecessarily suggestive, and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.⁶⁰ A court need only consider whether there was a substantial likelihood of irreparable misidentification if it first determines that the pretrial identification procedures used by law enforcement were unnecessarily suggestive.⁶¹ Elaborating on the first prong of the *Biggers* test, the Kentucky Supreme Court has held that “[a]n identification procedure is suggestive when it tends to focus attention on a single individual.”⁶² Accordingly, the Court deems showup procedures “inherent[ly] suggestive[.]”⁶³ The Kentucky Supreme Court also has held that, where law enforcement officials have lost pretrial lineup materials before a defendant has had an opportunity to scrutinize those materials, the procedure shall be presumed suggestive.⁶⁴

If a court determines that an identification procedure was unnecessarily suggestive, the results of that procedure still may be admitted into evidence so long as the court determines that the identification had “sufficient independent indicia of reliability.”⁶⁵ In making this determination, courts consider the following factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.⁶⁶ The Kentucky Supreme Court also looks beyond these factors to “other evidence [that] tends to corroborate the witness’s identification.”⁶⁷

2. Interrogations

While the Kentucky Supreme Court has acknowledged that “it would be ideal for [a] trial court to have perfect evidence in the form of a recording when determining the voluntariness of a confession”⁶⁸ and that “widespread electronic recording [of custodial interrogations] has its

⁵⁹ *Neil v. Biggers*, 409 U.S. 188, 196–97 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968).

⁶⁰ *Biggers*, 409 U.S. 188 at 196–99; *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999) (quoting *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986)).

⁶¹ *Duncan v. Commonwealth*, 322 S.W.3d 81, 95 (Ky. 2010).

⁶² *Id.* at 96 (quoting *United States v. Montgomery*, 150 F.3d 983 (9th Cir. 1998)).

⁶³ *Farrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005); *see also Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978).

⁶⁴ *Grady v. Commonwealth*, 325 S.W.3d 333, 354 (Ky. 2010).

⁶⁵ *Oakes v. Commonwealth*, 320 S.W.3d 50, 58 (Ky. 2010).

⁶⁶ *Farrow*, 175 S.W.3d at 608–09 (Ky. 2005); *Biggers*, 409 U.S. at 199–200. *See also Savage v. Commonwealth*, 920 S.W.2d 512, 513–14 (Ky. 1995); *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985).

⁶⁷ *St. Clair v. Commonwealth*, 140 S.W.3d 510, 551–52 (Ky. 2004) (citing *Merriweather v. Commonwealth*, 99 S.W.3d 448, 451–52 (Ky. 2003) (co-defendant’s admission that he and defendant entered witness’s residence corroborated witness’s identification and ensured that “[defendant’s] due process rights were not violated”); *Roark v. Commonwealth*, 90 S.W.3d 24, 29 (Ky. 2002) (defendant’s possession of items stolen from witness’s bedroom corroborated witness’s identification).

⁶⁸ *Metcalf v. Commonwealth*, 158 S.W.3d 740, 747 (Ky. 2005).

benefits,”⁶⁹ Kentucky does not require the videotaping or audio recording of interrogations or confessions.⁷⁰

⁶⁹ Brashars v. Commonwealth, 25 S.W.3d 58, 62 (Ky. 2000).

⁷⁰ *Id.* at 61–63 (holding that the Constitution of Kentucky does not mandate electronic recording of custodial interrogations); *cf.* Vanhook v. Commonwealth, No. 2003–SC–0003–TG, 2004 WL 868487, at *2 (Ky. Apr. 22, 2004) (accepting a trial court’s finding regarding the voluntariness of a confession in the absence of videotaped or audio recorded evidence). *See also* United States v. Dobbins, No. 96-4233, 1998 WL 598717, at *4 (6th Cir. Aug. 27, 1998) (holding that “federal law does not require that a state electronically record custodial interrogations and confessions”); *accord* United States v. Smith, 319 F. App’x 381, 385 (6th Cir. 2009).

II. ANALYSIS

A. 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 *American Bar Association's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (which has been reproduced below, in relevant part and with slight modifications).

There are no statewide statutes or rules governing the conducting of lineups and photospreads by law enforcement. Therefore, we cannot be assured that all law enforcement agencies throughout the Commonwealth of Kentucky have adopted guidelines or officially adhere to practices in compliance with the subjects covered in the *ABA Best Practices*. However, law enforcement agencies remain free to voluntarily promulgate such guidelines.

The Assessment Team focused on the guidelines and practices of the Kentucky State Police (KSP), the Lexington Division of Police (LDP), and the Louisville Metro Police Department (LMPD), as these agencies are the three largest law enforcement agencies within the Commonwealth.⁷¹ Of these agencies, however, only LMPD has promulgated specific guidelines for conducting lineups and photospreads pertaining to some of the subjects addressed in *ABA Best Practices*. KSP and LDP have not adopted such guidelines.

In the absence of specific agency guidelines, accreditation standards may offer some insight into accredited law enforcement agencies' practices for conducting lineups and photospreads. Currently, seventy-six Kentucky law enforcement agencies receive accreditation from the Kentucky Association of Chiefs of Police (KACP) and two receive accreditation from the Commission on Accreditation for Law Enforcement Agencies (CALEA).⁷²

Finally, the training of law enforcement also offers some insight into the practices of peace officers with respect to lineups and photospreads. The Kentucky Assessment Team obtained or sought training materials from Kentucky's four basic training academies, which taken together account for the training of almost all law enforcement officers each year.⁷³ Although the

⁷¹ Interview with Larry D. Ball, *supra* note 13. Taken together, these three agencies account for approximately 2850 of the 8500 peace officers throughout the Commonwealth. *Id.*

⁷² *Accredited Agencies, KY. ASS'N OF CHIEFS OF POLICE*, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=54&Itemid=64 (last visited Nov. 14, 2011); *Client Database Search, COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES*, <http://www.calea.org/content/calea-client-database> (last visited Nov. 14, 2011) (using "Search by Location" function and designating "US" and "KY" as search criteria). The Assessment Team was unable to determine whether Kentucky law enforcement agencies accredited by KACP or CALEA fully adhere to those programs' respective accreditation requirements, including those that require the accredited law enforcement agency to promulgate guidelines related to eyewitness identifications and interrogations.

⁷³ The Kentucky Assessment Team received materials or information on the basic training programs at the Kentucky State Police Academy and the Department of Criminal Justice Training Basic Training Academy, but was

statewide requirements for that training do not specifically address identification and interrogation procedures,⁷⁴ both the Kentucky State Police Academy and the Basic Training Academy established by the Justice and Public Safety Cabinet's Department of Criminal Justice Training (DOCJT) pertain to several of the subjects addressed within the *ABA Best Practices*.

1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

Although seventy-six Kentucky law enforcement agencies receive accreditation from KACP and two receive accreditation from CALEA, neither KACP nor CALEA requires that the person who conducts a lineup or photospread, in addition to all others present, be unaware of which of the participants is the suspect. Accordingly, both KSP and LMPD acknowledge that no departmental guideline imposes such a requirement.⁷⁵ A review of several cases in Kentucky also reveals that law enforcement officers may know the suspect's identity when presenting a lineup or photospread to an eyewitness.⁷⁶ Finally, DOCJT's Basic Training Academy "instructs students that the 'double[-]blind' method," wherein the officer who conducts the lineup is unaware of the identity of the suspect, "should be used *when practicable*."⁷⁷

In the absence of written guidelines requiring, when practicable, that the person who conducts a lineup or photospread be unaware of which of the participants is the suspect, and in light of the fact that Kentucky courts have allowed identifications into evidence when law enforcement clearly knew who the suspect was during the procedure in-question, it appears that the Commonwealth of Kentucky is not in compliance with this particular *ABA Best Practice*.

unable to obtain similar materials or information from the Lexington Division of Police Basic Training Academy and the Louisville Metro Police Department Academy.

⁷⁴ LARRY D. BALL, ANN. REP. ON MANDATORY TRAINING FOR PEACE OFFICERS (Dec. 30, 2010) (on file with author); LARRY D. BALL, ANN. REP. ON MANDATORY TRAINING FOR PEACE OFFICERS (Dec. 30, 2009) (on file with author); LARRY D. BALL, ANN. REP. ON MANDATORY TRAINING FOR PEACE OFFICERS (Dec. 24, 2008) (on file with author).

⁷⁵ Interview with Angela Parker, *supra* note 32; Interview by Sarah Turberville with Don Burbrink, Major, Louisville Metro Police Dep't, Sept. 27, 2010 (on file with author).

⁷⁶ *See, e.g.,* Oakes v. Commonwealth, 320 S.W.3d 50 (Ky. 2010) (detective who had viewed surveillance video of suspect assembled a five-foil photospread and presented it to the eyewitness/victim); Johnson v. Commonwealth, No. 2009-CA-001879-MR, 2010 WL 5018513 (Ky. App. Ct. Dec. 10, 2010) (officer present during arrest of suspect assembled a photospread and presented it to the eyewitness); Hearn v. Commonwealth, No. 2005-SC-000708-MR, 2008 WL 3890035, at *15 (Ky. Aug. 21, 2008) (detective who "knew which man was the target in each [of two] [photospread][s]" presented the photospreads to the eyewitness).

⁷⁷ DOCJT TRAINING CURRICULUM, *supra* note 40, at 6.

- b. The guidelines should require that eyewitnesses be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

Kentucky law enforcement agencies are not required, through voluntary compliance with the KACP or CALEA accreditation programs, to promulgate internal regulations that specifically require such instructions be given to eyewitnesses viewing lineups or photospreads. However, LMPD specifically has adopted a written directive, which provides that “[p]rior to viewing the line-up, the officer conducting the line-up shall instruct the victim/witness on the proper viewing of the line-up by advising him/her that . . . [t]he person who committed the crime may or may not be in the group of individuals being presented” and that “[s/he is] not obligated to choose an individual from the line-up.”⁷⁸ In practice, however, prior to an eyewitness viewing a lineup or photospread, LMPD may notify him/her that a suspect has been “developed” in the case and asks that the eyewitness view a lineup or photospread “to see if the suspect who committed the crime is one of them.”⁷⁹

Although students at KSP’s Academy are not advised to affirmatively tell eyewitnesses that a suspect may *not* be in a lineup, students are cautioned to avoid suggesting to those eyewitnesses that a suspect *is* in a lineup or photospread.⁸⁰ By contrast, DOCJT advises basic training and other students to notify eyewitnesses that “the suspect may or may not be in the lineup [or] photoarray.”⁸¹ It is unclear whether cadets at the KSP Academy or DOCJT training academies are advised to instruct the eyewitness that they should not assume that the person administering the lineup or photospread knows which individual is the suspect and the eyewitness need not identify anyone. While we commend these law enforcement training entities for including these recommendations in their peace officer training programs, the decision to so instruct eyewitnesses remains at the discretion of law enforcement officials.

Furthermore, the Kentucky Supreme Court has held that implying or stating that a suspect is in a lineup or photospread is only a factor to consider in determining whether a procedure was unduly suggestive and, even if the procedure is deemed unduly suggestive, the identification still may be admissible so long as there was not “a very substantial likelihood of irreparable misidentification.”⁸²

⁷⁸ LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURE 8.15.5 (2010) (on file with author).

⁷⁹ Interview with Major Don Burbrink, *supra* note 75.

⁸⁰ Interview with Angela Parker, *supra* note 32.

⁸¹ DOCJT TRAINING CURRICULUM, *supra* note 40, at 9.

⁸² *Oakes*, 320 S.W.3d at 56; *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). *See also* *Farrow v. Commonwealth*, 175 S.W.3d 601, 608–09 (Ky. 2005); *Hearn v. Commonwealth*, No. 2005–SC–000708–MR, 2008 WL 3890035, at *16 (Ky. Aug. 21, 2008) (presenting a photospread to an eyewitness and asking the eyewitness to “identify the person [s/he] saw” is not *per se* suggestive). *See also* *Burrell v. Commonwealth*, No. 2006-SC-000547-MR, 2008 WL 3890049, at *8 (Ky. Aug. 21, 2008) (informing an eyewitness, prior to administering a photospread, that an arrest had been made was not suggestive where none of the photographs indicated that the individual pictured had been placed under arrest).

Due to the absence of the guidelines, it appears that the Commonwealth of Kentucky only partially adheres to this particular *ABA Best Practice*.

2. Foil Selection, Number, and Presentation Methods

- a. **The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
- b. **The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

Of the three largest law enforcement agencies within the Commonwealth, only LMPD has promulgated specific guidelines mandating that lineups and photospreads use a select number of individuals and that foils be chosen for their similarity to the eyewitness's description of the perpetrator.⁸³ Specifically, LMPD guidelines require that all lineups include a minimum of five foils with the same general physical characteristics (e.g., race, sex, age, height, weight, hair color, hair length, and physical build) as the suspect.⁸⁴ With respect to photospreads, LMPD officers are advised to “[u]se at least five photos of individuals who are of the same sex and race and are reasonably similar in age, height, weight and general appearance to the suspect.”⁸⁵

In addition, both the KSP and DOCJT training academies recommend that an officer conducting a lineup or photospread include a minimum of five foils.⁸⁶ KSP's Academy advises that “foils should be of the same sex, race, approximate age, and [possess the same] basic physical traits [as the suspect].”⁸⁷ Similarly, DOCJT's Basic Training Academy advises that all participants in a lineup should be “of similar appearance” and that photographs presented in a photospread should present individuals of the same sex, race, approximate age, height, and weight as the suspect.⁸⁸ DOCJT training materials also advise cadets not to “draw attention to any particular lineup participant.”⁸⁹

Although the Kentucky Supreme Court has deemed single-participant showup procedures inherently suggestive, it has not held the use of evidence resulting from these practices unconstitutional.⁹⁰ Thus, in Kentucky, there presumably is no constitutionally imposed

⁸³ LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURES 8.15.5, 8.17.2 (2010) (on file with author).

⁸⁴ LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURE 8.15.5 (2010) (on file with author).

⁸⁵ LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURE 8.17.2 (2010) (on file with author). Standard Operating Procedure 8.17.2 also cautions LMPD officers to “[a]void using non-suspect photos that so clearly resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the non-suspects.” *Id.*

⁸⁶ Interview with Angela Parker, *supra* note 32; DOCJT TRAINING CURRICULUM, *supra* note 40, at 10.

⁸⁷ Interview with Angela Parker, *supra* note 32.

⁸⁸ DOCJT TRAINING CURRICULUM, *supra* note 40, at 10–11. DOCJT's training materials also urge that all photos in a photospread should present similar backgrounds “to avoid prejudicing the witness.” *Id.* at 11.

⁸⁹ *Id.* at 10.

⁹⁰ See *Farrow v. Commonwealth*, 175 S.W.3d 601, 608–09 (Ky. 2005) (“the totality of the circumstances, as illustrated by the five *Neil v. Biggers* factors, indicates that the show-up identification did not violate Appellant's

minimum number of foils that must be present in a lineup or photospread. With respect to the degree of similarity between the suspect and the other participants in a lineup or photospread, the Kentucky courts have admitted into evidence an eyewitness's identification at a lineup or photospread in which some of the foils differed markedly from the suspect in terms of their physical characteristics.⁹¹

In light of the foregoing, it appears that the Commonwealth of Kentucky partially adheres to this *ABA Best Practice*.

3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**

Of the three largest law enforcement agencies within the Commonwealth, both the Lexington Division of Police (LDP) and LMPD have promulgated specific guidelines addressing the recording of eyewitness interviews, which may include statements given during the conducting of a lineup.⁹² Specifically, an LMPD written directive states that “[v]ideo recordings shall be made of all line-ups” and that “[o]ptional audio recordings may also be made,”⁹³ although there is some basis for concluding that this policy is not followed in every instance.⁹⁴ Furthermore, LDP departmental policy does not specifically address recording lineup and photospread procedures, although investigators are required to “[i]nterview any known witnesses for details of their observations, documenting the information in either a written or audio/visual

due process rights”). Although it sanctioned the use of the show-up procedure in *Farrow*, the Kentucky Supreme Court observed that “it would have been preferable for the police to have [used] an array of photographs to overcome the inherent suggestiveness of the show-up procedure.” *Id.*

⁹¹ For example, in *Rhodes v. Commonwealth*, the victim described her assailant as “a dark-skinned white man with a dark goatee and dark hair.” *Rhodes v. Commonwealth*, No. 2007-CA-000701-MR, 2008 WL 2550761, at *2 (Ky. Ct. App. June 27, 2008). While all five foils in the photospread were Caucasian males, only three participants—among them, the suspect—had either a goatee or a combination of a goatee and other facial hair; furthermore, one participant was entirely clean shaven. *Id.* at *3. Also, in *King v. Commonwealth*, an eyewitness described the perpetrator of credit card fraud as wearing eyeglasses, yet only the suspect wore eyeglasses in the photos presented to the eyewitness. *King v. Commonwealth*, 142 S.W.3d 645, 648–50 (Ky. 2004). A majority of the Kentucky Supreme Court in *King* held that the photospread procedure was unduly suggestive. *Id.* at 651–52 (Johnstone, J., concurring) (agreeing with the dissent that the trial court should have suppressed the in-court identification but finding the error harmless beyond a reasonable doubt); *Id.* at 652–53 (Stumbo, J., dissenting) (finding the photospread procedure unduly suggestive and ultimately concluding that the trial court erred by admitting into evidence the out-of-court and later in-court identifications).

⁹² Our legal research related to this Recommendation indicates that law enforcement agencies within the Commonwealth predominately use the photospread, rather than the lineup, identification procedure.

⁹³ LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURE 8.15.5 (2010) (on file with author).

⁹⁴ See Interview with Major Don Burbrink, *supra* note 75 (replying that LMPD “require[s] that the line up be photographed and that there be a letter and an interview as to what the [eyewitness] said in regards to identity”).

recording.”⁹⁵ Finally, the Kentucky State Police has not promulgated any comparable internal guideline.

The training materials obtained by the Kentucky Assessment Team from DOCJT indicate that DOCJT’s Basic Training Academy “instructs students that it is preferred that all witness identification procedures be recorded.”⁹⁶ Absent this recording, students are “instruct[ed] . . . to thoroughly document line-ups and photo[spread] identification procedures,” which includes but is not limited to “noting all persons present during the procedure, noting the identity of all persons used in the line-up or photo[spread] as foils, noting whether or not the particular witness made an identification and their level of certainty, and noting the date, time and place of the procedure.”⁹⁷ As for KSP’s Academy, training recommends that eyewitness interviews and statements be, at minimum, audio-recorded “whenever possible.”⁹⁸

In light of the foregoing, it appears that the Commonwealth of Kentucky partially adheres to this *ABA Best Practice*.

- c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

KSP, LDP, and LMPD do not, as a matter of agency policy, request that eyewitnesses indicate their level of confidence in any identification made during a lineup or photospread procedure. Neither KSP nor LDP specifically discuss lineups and photospreads in their guidelines and LMPD guidelines merely require that eyewitnesses “state whether one of the individuals shown [in a lineup] is the perpetrator of the crime.”⁹⁹ LMPD guidelines do require law enforcement officers “to assess [an eyewitness’s] level of confidence” and “ability to make an identification” prior to conducting a photospread or one-on-one identification procedure, but this assessment clearly is distinct from requesting that the eyewitness indicate his/her level of confidence in an identification that s/he has just made.¹⁰⁰

As previously described, DOCJT indicates that its Basic Training Academy “instruct[s] students to thoroughly document line-ups and photo[spread] identification procedures,” which includes “noting whether or not the particular witness made an identification and their level of certainty.”¹⁰¹ Although DOCJT should be commended for drawing its students’ attention to the

⁹⁵ LEXINGTON DIV. OF POLICE, STANDARD OPERATING PROCEDURE 92-25/D (2010) (on file with author).

⁹⁶ DOCJT TRAINING CURRICULUM, *supra* note 40, at 14.

⁹⁷ *Id.* at 15–16.

⁹⁸ Interview with Angela Parker, *supra* note 32.

⁹⁹ LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURE 8.15.5 (2010) (on file with author); *see also* Interview with Major Don Burbrink, *supra* note 75.

¹⁰⁰ *See* LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURES 8.17.2 & 8.16.2 (2010) (on file with author).

¹⁰¹ DOCJT TRAINING CURRICULUM, *supra* note 40, at 16.

importance of *noting* these details, this recommendation does fall short of advising students to actively *request* that an eyewitness indicate his/her level of confidence in any identification.

In the absence of written guidelines requiring that eyewitnesses be requested to indicate their level of confidence in any identification made during a lineup or photospread procedure, it appears that the Commonwealth of Kentucky does not adhere to this particular *ABA Best Practice*.

4. Immediate Post-Lineup or Photospread Procedures

- a. **The guidelines should require that police and prosecutors avoid at any time giving the witness feedback on whether he or she selected the “right man”—the person believed by law enforcement to be the culprit.**

As mentioned, LMPD has promulgated specific guidelines addressing lineup and photospread procedures. With respect to lineups, an LMPD written directive advises that “[o]fficers administering or present at a line-up, shall not say or do anything, or otherwise provide feedback, which would distinguish the suspect from other line-up participants.”¹⁰² Likewise, with respect to photospreads, an LMPD written directive advises that “[o]fficers involved in [the photospread] procedure shall not say or do anything, or otherwise provide feedback, which may influence the judgment or perception of the victim/witness.”¹⁰³ By contrast, neither KSP nor the LDP has promulgated comparable internal guidelines.¹⁰⁴

Furthermore, the training materials obtained by the Kentucky Assessment Team from DOCJT indicates that the Department’s Basic Training Academy, Advanced Individual Training Section, and Legal Training Section each advise their students not to provide any feedback as to whether the eyewitness has selected the “right man.”¹⁰⁵ Students are instructed that their function merely is to document any identification made by the witness and to retain all documentation of the procedure.¹⁰⁶

It appears, therefore, that the Commonwealth of Kentucky partially adheres to this *ABA Best Practice*.

Conclusion

In light of the foregoing analysis, the Commonwealth of Kentucky only partially complies with Recommendation #1.

¹⁰² LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURE 8.15.5 (2010) (on file with author).

¹⁰³ LOUISVILLE METRO POLICE DEP’T, STANDARD OPERATING PROCEDURE 8.17.4 (2010) (on file with author).

¹⁰⁴ Whereas KSP has no written directives addressed to this subject, LDP’s Standard Operating Procedure 92-25/D only states that, “[i]f [a] suspect [to a criminal complaint] is unknown, [investigators should] gather as much information as possible and attempt to establish the identity through witnesses, informants, news releases, etc.” LEXINGTON DIV. OF POLICE, STANDARD OPERATING PROCEDURE 92-25/D (2010) (on file with author).

¹⁰⁵ DOCJT TRAINING CURRICULUM, *supra* note 40, at 16.

¹⁰⁶ *Id.*

The Assessment Team recommends that Kentucky adopt as statewide policy the *ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*.

B. 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.

Kentucky law generally mandates that “[a]ll peace officers with active certification status shall successfully complete forty [] hours of annual in-service training that has been certified or recognized by the Kentucky Law Enforcement Council.”¹⁰⁷ Materials obtained from DOCJT indicate that “continuing education to in-service students” covers “lineups, photo spreads and interviewing techniques.”¹⁰⁸ Likewise, the Bureau of Professional Standards within the Lexington Division of Police (LDP) recently included, as part of its 2008 in-service training program, a course on “Interview and Interrogation Training.”¹⁰⁹

In light of the absence of statewide requirements delineating the topics to be addressed during in-service training of law enforcement, and due to the fact that prosecutors’ offices have limited involvement in implementing lineup and photospread guidelines and interviewing eyewitnesses during those procedures, we were unable to determine whether Kentucky is in compliance with Recommendation #2.

C. 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.

As mentioned in the Factual Discussion, KSP has not promulgated any internal regulations regarding lineup and photospread procedures.¹¹⁰ Although the Kentucky Assessment Team received information from LMPD that it revises its internal regulations regarding eyewitness identification procedures “[a]s the law changes,” we were unable to ascertain whether all Kentucky law enforcement agencies and prosecutors’ offices periodically update existing guidelines to incorporate advances in social scientific research and the continuing lessons of

¹⁰⁷ KY. REV. STAT. ANN. § 15.404(2) (West 2011).

¹⁰⁸ DOCJT TRAINING CURRICULUM, *supra* note 40, at 17.

¹⁰⁹ LEXINGTON DIV. OF POLICE, LEXINGTON DIVISION OF POLICE 2008 ANNUAL REPORT 16 (2009), *available at* <http://www.lexsc.com/documents/police/reports/LPD%202008%20Annual%20Report.pdf>. The Assessment Team was unable to obtain the specific content of this course from LDP’s Bureau of Professional Standards.

¹¹⁰ As a general matter, the Kentucky State Police “audits [and] updates continuously” its internal regulations to ensure compliance with Kentucky statutes and regulations as well as with those organizations from which KSP receives accreditation. Ky. State Police, Gen. Order AM-B-8, at 4 (2010) (on file with author). *See also* Interview with Angela Parker, *supra* note 32. Although this general order specifically mentions “compl[iance] with . . . CALEA standards,” KSP no longer is accredited by CALEA but is, instead, accredited by KACP. Ky. State Police, Gen. Order AM-B-8, at 4 (2010) (on file with author). Thus, it is inferred that KSP’s auditing and updating policy principally is concerned with KACP’s, rather than CALEA’s, standards. While commendable, KSP’s auditing and updating policy does not specifically address itself to “advances in social scientific research.”

practical experience.¹¹¹ Therefore, the Commonwealth of Kentucky only partially complies with Recommendation #3.

The Commonwealth's need to evaluate the effectiveness of existing practices and incorporate advances in social science in to their guidelines is paramount, particularly given the lack of uniformity among Kentucky's law enforcement agencies. The case of Herman May provides an example of how outdated practices affect a criminal investigation and may lead to wrongful conviction.

Suspected of raping a University of Kentucky student in the early morning hours of May 22, 1988, May was identified by the victim during a simultaneous photospread conducted approximately one month after the attack occurred.¹¹² The photospread included May's photograph and those of six foils, and all seven men had red or light-colored hair.¹¹³ According to the trial video, the victim first "identified three of the seven men as possible attackers," then "narrowed [the] identification of her attacker to May[,] saying that she would never forget the 'mean look in his eyes.'"¹¹⁴ Partly on the basis of this identification, May received two concurrent twenty-year sentences for the crimes of rape and sodomy. He served thirteen years of that sentence before new tests of the DNA evidence¹¹⁵ convinced the Franklin County Circuit Court to order May's release, the new evidence being of "such decisive value or force . . . that it would probably change the result if a new trial should be granted."¹¹⁶

May's case demonstrates the limitations of human memory, underscoring the utility of guidelines for conducting lineups and photospreads that incorporate the best available social science and continuing lessons in the field.

D. 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.

¹¹¹ Interview with Major Don Burbrink, *supra* note 75.

¹¹² Beth Albright & Debbie Davis, *Guilty Until Proven Innocent: The Case of Herman Douglas May*, 30 N. KY. L. REV. 585, 588 (2003). Law enforcement focused their attention on May because he possessed a guitar and amplifier that were stolen from the same neighborhood where the rape occurred at around the time that the rape occurred. *Id.* at 587–88.

¹¹³ *Id.* at 588. Although law enforcement had some basis for suspecting May, a composite sketch of the assailant based on the witness's description to law enforcement did not match May. *Id.* Furthermore, witnesses alleged that the victim variously described the assailant to them as having "chocolate brown" hair and "black or brown" hair—hues notably in contrast with May's light red hair—but the victim maintained that she never provided these descriptions. *Id.* at 588, 588 n.18.

¹¹⁴ *Id.* at 588.

¹¹⁵ These new tests included nuclear and mitochondrial DNA testing of the biological samples contained within the female rape kit. *Id.* at 597–99. Testing performed on the samples at around the time of May's original trial was inconclusive due to the small size of the samples and limits to the existing technology. Consequently, the only scientific evidence submitted by the prosecution at that trial was dubious microscopic hair analysis of human hair found at the crime scene. *Id.* at 592, 592 n.88.

¹¹⁶ *Id.* at 599 (internal quotations omitted).

None of Kentucky's three largest law enforcement agencies require that the entirety of custodial interrogations of crime suspects be video- or audio-recorded.¹¹⁷ LMPD guidelines do address the video- or audio-recording of interrogations, but the decision to record any interrogation remains "at the discretion of the supervisor."¹¹⁸ Furthermore, the two primary accrediting entities within the Commonwealth—KACP and CALEA—do not require recording of custodial interrogations. The commentary to CALEA Standard 1.2.3 merely advises that "[c]onsideration [] be given to audio/video recording [] custodial interrogations involving major cases," but KACP makes no mention at all of video- or audio-recordings.¹¹⁹

On the other hand, the basic training programs at the KSP and DOCJT training academies advise their students to, at minimum, audio-record custodial interrogations.¹²⁰ However, DOCJT explicitly directs its students to "[v]ideo tape *only the confession portion* of the interrogation" and notes that "[i]t is alright to stop a statement, but when it resumes, [the law enforcement officer taking the statement should] explain the reason for the break."¹²¹

A review of Kentucky court cases indicates that law enforcement agencies may only video- or audio-record the confession portion of the interrogation, rather than the entirety of the custodial interrogation.¹²² In other instances, law enforcement officers simply do not record the entirety of their interviews with suspects, whether or not those suspects are in custody.¹²³

¹¹⁷ Interview with Angela Parker, *supra* note 32 ("Kentucky State Police written directives do not require [the] videotap[ing] or audiotap[ing] of an interrogation."); Interview with Major Don Burbrink, *supra* note 75 (answering "No" to the question "Are [LMPD] law enforcement officers required to videotape or audiotape the entire interrogation?"). The Lexington Division of Police (LDP) explicitly requires investigators to "'document[] . . . in either a written or audio/visual recording' information learned from interviews with 'any known witnesses,'" however, none of the guidelines obtained by the Assessment Team from LDP indicate that a comparable recording requirement is imposed on investigators "[c]onduct[ing] interrogation[s] of suspect(s)." See LEXINGTON DIV. OF POLICE, STANDARD OPERATING PROCEDURE 92-25/D, at 1 (2010) (on file with author). Therefore, it is inferred that LDP—as with KSP and LMPD—does not have such a policy.

¹¹⁸ LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURE 8.25.5 (2010) (on file with author). According to Thomas P. Sullivan, the former chair of the Illinois Governor's Commission on Capital Punishment, the Louisville Metro Police Department records a majority of its custodial interrogations, "from the *Miranda* warnings to the end, . . . in a defined class of felony investigations." Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1338 (2008). Sullivan also lists Elizabethtown Police Department, Hardin County Sheriff, Jeffersontown Police Department, Louisville Police Department, Oldham County Sheriff, and St. Matthews Police Department as law enforcement agencies within the Commonwealth that record a majority of their custodial interrogations, although Louisville Police Department has not existed since January 6, 2003 when the governments of Louisville and Jefferson County merged to form a single government entity. *Louisville/Jefferson County Merger*, LOUISVILLE METRO GOV'T, <http://www.louisvilleky.gov/yourgovernment/merger.htm> (last visited Nov. 14, 2011).

¹¹⁹ CALEA STANDARDS, *supra* note 54, at 1–4.

¹²⁰ Interview with Angela Parker, *supra* note 32 (adding that a "transcript, excerpts, or summary [of the interrogation] may also be written into or attached to the case file"); DOCJT TRAINING CURRICULUM, *supra* note 40, at 17.

¹²¹ DOCJT TRAINING CURRICULUM, *supra* note 40, at 19.

¹²² See, e.g., McClain v. Commonwealth, No. 2009–CA–000537–MR, 2011 WL 556197, at *1 (Ky. App. Ct. Feb. 18, 2011) (audio-recording of suspect's custodial interrogation commenced only after suspect confessed to burglarizing a liquor store); Turley v. Commonwealth, No. 2009-CA-001342-MR, 2010 WL 3186812, at *1 (Ky. App. Ct. Aug. 13, 2010) (suspect was reminded of his prior *Miranda* warning "before [he] gav[e] a recorded statement in which he admitted [sexually abusing his daughter]," suggesting that the audio-recording of suspect's custodial interrogation commenced only after suspect indicated his intent to confess); Clem v. Commonwealth, No. 2006–SC–000145–MR, 2007 WL 4139639, at *1 (Ky. Nov. 21, 2007) (audio-recording of suspect's custodial

Therefore, the Commonwealth of Kentucky only partially complies with Recommendation #4.

Nationwide, of the first 250 wrongful convictions later discovered due to DNA testing, forty suspects confessed to crimes that they did not commit.¹²⁴ Moreover, the evidence from these cases indicates that a false confession need not be the result of either a pathological need for fame or recognition on the part of the suspect or physically abusive law enforcement interrogation practices. In many instances, innocent persons who are “anxious, fatigued, pressured, or confused” and “subjected to highly suggestive methods of police interrogation” may come to believe that they committed the crime and confess.¹²⁵

Video- or audio-recording the entirety of custodial interrogations of suspects would help avert convictions based on false confessions by making available features of a confession that are not captured in a transcript and that may shed light on the confession’s veracity.¹²⁶ Furthermore, full recording better presents the context in which a confession occurred. Without it, prosecutors and judges may never discover that a confession succeeded many hours of psychological interrogation methods—methods known to have elicited false confessions from vulnerable suspects in the past.¹²⁷

In the Commonwealth, the practice of recording none or only part of custodial interrogations frequently leads to disputes as to what transpired between law enforcement and suspects, and these disputes themselves frequently degenerate into suppression hearing “swearing contests” between interrogating officers and defendants.¹²⁸ Because fine distinctions in language often determine legal outcomes, the benefits of fully recording custodial interrogations become all the

interrogation commenced only after suspect, while not in custody, confessed). *Accord* Carlisle v. Commonwealth, 316 S.W.3d 892, 893–95 (Ky. App. Ct. 2010) (following a ninety-minute, recorded custodial interrogation, suspect asked to speak with the investigating officer outside of the interrogation room, and this subsequent conversation was not recorded; upon returning to the room, suspect confessed); *Cummings v. Commonwealth*, 226 S.W.3d 62, 64–65 (Ky. 2007) (suspended audio-recording of suspect’s custodial interrogation recommenced only after suspect began to make incriminating statements); *Nevitt v. Commonwealth*, No. 2004-CA-001784-MR, 2006 WL 1112970, at *1 (Ky. App. Ct. Apr. 28, 2006) (audio-recording of non-custodial suspect commenced thirty-five minutes into interview and only after suspect confessed to sexually abusing a minor).

¹²³ See *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 32 (Ky. 2011) (no recordation of “brief exchange prior to questioning,” during which time defendant alleged he requested counsel); *Yenawine v. Commonwealth*, No. 2003–SC–0283–MR, 2005 WL 629007, at *3–4 (Ky. Mar. 17, 2005) (no recordation of first exchange between law enforcement officers and defendant); *White v. Commonwealth*, No. 2007-CA-001477-MR, 2008 WL 2780269, at *1 (Ky. App. Ct. July 18, 2008) (no recordation of non-custodial interrogation); *Vanhook v. Commonwealth*, No. 2003–SC–0003–TG, 2004 WL 868487, at *2 (Ky. Apr. 22, 2004) (no recordation of custodial interrogation).

¹²⁴ See Brandon L. Garrett, *Getting It Wrong: Convicting the Innocent*, SLATE, Apr. 13, 2011, <http://www.slate.com/id/2291061/entry/2291064> (last visited Nov. 15, 2011).

¹²⁵ See Saul M. Kassir, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997).

¹²⁶ Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L. J. 719, 750 (1997). These features include the “precise syntax, diction, and grammar used by the [interrogation] participants.” *Id.*

¹²⁷ See Saul M. Kassir, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 5–7 (2010) (describing the problem of false confessions and the lawful interrogation practices that can elicit them).

¹²⁸ See, e.g., *Vanhook*, 2004 WL 868487, at *2 (Ky. Apr. 22, 2004) (dispute as to whether suspect invoked his right to counsel in the absence of video- or audio-recording).

more apparent.¹²⁹ Absent these recordings, suspects, law enforcement, and the Kentucky courts will continue to spend many hours and resources litigating issues that a fully recorded custodial interrogation could more easily resolve.¹³⁰ Full recordings of custodial interrogations also would foreclose the need to litigate in many cases whether a confession had been legally obtained.

Accordingly, the Commonwealth should require video-recording of the entirety of custodial interviews, particularly in homicide investigations, in conformance with this Recommendation. In drafting such a requirement, the Commonwealth should craft an appropriate remedy for law enforcement's failure to record the entirety of the custodial interview.

E. Recommendation #5

Ensure adequate funding for the proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.

We were unable to determine whether the Commonwealth of Kentucky provides adequate funding to ensure the proper development, implementation, and updating of procedures for identifications and interrogations. Budgetary figures released by the Kentucky Office of State Budget Director do indicate, however, that the Operations Division within the Kentucky State Police received only 86% and 79% of its fiscal year 2011 and fiscal year 2012 budget requests, respectively.¹³¹ These shortfalls may have an adverse impact on KSP's ability to develop, implement, and update its policies and procedures relating to identifications and interrogations—significant in that KSP accounts for approximately 12% of all law enforcement officers within the Commonwealth and has statewide jurisdiction to investigate homicide crimes. Likewise, both for fiscal year 2011 and for fiscal year 2012, the Kentucky Department of Criminal Justice Training received 94% of its budget requests.¹³² Finally, the Lexington Division of Police and the Louisville Metro Police Department received approximately 100% of their fiscal year 2009–2010 and fiscal year 2010–2011 budget requests.¹³³

¹²⁹ See, e.g., *Bradley v. Commonwealth*, 327 S.W.3d 512, 518 (Ky. 2010) (noting the fine distinctions between the statements “I need a lawyer,” which successfully invokes the right to counsel, and “I might need a lawyer,” which does not); *Yenawine v. Commonwealth*, No. 2003–SC–0283–MR, 2005 WL 629007, at *3 (Ky. Mar. 17, 2005) (holding that a suspect had not unambiguously and unequivocally invoked his right to counsel when stating “I might need to speak with my lawyer about whether I should talk with you” and gave the officer the attorney’s business card); *Jackson v. Commonwealth*, 187 S.W.3d 300, 306–07 (Ky. 2006) (noting the distinction between invoking the right to have counsel present during a custodial interrogation and indicating a desire to contact an attorney merely for a separate purpose); see also *Kotila v. Commonwealth*, 114 S.W.3d 226, 235 (Ky. 2003) (same); *Dean v. Commonwealth*, 844 S.W.2d 417, 418–20 (Ky. 1992) (same).

¹³⁰ See generally Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 220–23 (2007) (recounting the many benefits for suspects, law enforcement, and the judiciary that arise from full video- or audio-recordings of custodial interrogations).

¹³¹ KY. OFFICE OF STATE BUDGET DIR., 2010-2012 BUDGET OF THE COMMONWEALTH 251 (2011), available at <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>. For fiscal year 2011, KSP's Operations Division requested \$128,737,300 but received \$110,910,600; for fiscal year 2012, KSP's Operations Division requested \$141,638,700 but received \$111,451,900. *Id.*

¹³² *Id.* at 243. For fiscal year 2011, DOCJT requested \$53,545,400 and received \$50,522,500; for fiscal year 2012, DOCJT requested \$54,352,600 and received \$51,035,300. See Interview with Larry D. Ball, *supra* note 13 (providing approximate force strength figures).

¹³³ LEXINGTON-FAYETTE URBAN COUNTY GOV'T, ADOPTED BUDGET, FY 2009–2010, 146 (2009), available at <http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=7700> (for fiscal year 2009-2010, LDP

In addition to these budget figures, it is worth noting that the Commonwealth has established the Kentucky Law Enforcement Foundation Program Fund (Fund) to assist peace officers in the Commonwealth to obtain training by means of a “cash salary supplement.”¹³⁴ In both fiscal year 2011 and fiscal year 2012, the Fund received 94% of its budget requests.¹³⁵

While some Kentucky law enforcement agencies have received all or the vast majority of their annual budget requests, the analyses pertaining to Recommendations #1 through #4 indicate that these funds have not been sufficiently devoted to optimizing agency identification and interrogation policies and procedures. Therefore, we cannot determine whether the Commonwealth of Kentucky meets the requirements of Recommendation #5.

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.

The Kentucky Supreme Court has held that Commonwealth trial courts have the discretion, under Kentucky Rule of Evidence 702, to admit expert witness testimony regarding the reliability of eyewitness identification.¹³⁶ The Commonwealth of Kentucky, therefore, complies with Recommendation #6.

G. 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

requested \$56,499,510 and received \$56,486,960); LEXINGTON-FAYETTE URBAN CNTY. GOV'T, ADOPTED BUDGET, FY 2010–2011, 101 (2010), *available at* <http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=12200> (for fiscal year 2010-2011, LDP requested \$59,753,340 and received \$59,566,470). LOUISVILLE METRO GOV'T, FY 2009–2010 EXECUTIVE BUDGET, 66 (2009), *available at* <http://www.louisvilleky.gov/NR/rdonlyres/1CD108B5-B4C2-4447-9EE9-952ED4EC5A8B/0/ePolice.pdf> (for fiscal year 2009-2010, the mayor recommended \$152,513,700 and LMPD received \$152,023,700); LOUISVILLE METRO GOV'T, FY 2010-2011 EXECUTIVE BUDGET, 66 (2010), *available at* <http://www.louisvilleky.gov/NR/rdonlyres/6FB75F29-316B-46C6-B059-0FC767EA828B/0/ePolice.pdf> (for fiscal year 2010-2011, the mayor recommended \$152,749,200 and LMPD received \$152,749,200).

¹³⁴ KY. REV. STAT. ANN. § 15.470(1) (West 2011). *See generally* KY. REV. STAT. ANN. §§ 15.410–15.515 (West 2011) (establishing the fund). The Kentucky Law Enforcement Foundation Program Fund (Fund) agency resources are derived from property and casualty insurance premium surcharges that accrue pursuant to state law. *See* KY. REV. STAT. ANN. § 136.392 (West 2011).

¹³⁵ KY. OFFICE OF STATE BUDGET DIR., 2010-2012 BUDGET OF THE COMMONWEALTH 247 (2011), *available at* <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>.

For fiscal year 2011, the Fund requested \$52,229,900 but received \$49,218,000 and for fiscal year 2012, it requested \$53,005,700 but received \$49,723,300. *Id.*

¹³⁶ *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002). Kentucky Rule of Evidence 702 reads: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” KY. R. EVID. 702.

instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.

Across the United States, there have been numerous high-profile cases of exonerations where the innocent were convicted based substantially upon inaccurate eyewitness testimony. It is reported that “[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.”¹³⁷ A well-crafted cautionary jury instruction can have, as many jurisdictions have recognized, some positive impact in creating a more informed jury that is better able to reach a rational decision.¹³⁸

¹³⁷ *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 14, 2011).

¹³⁸ See generally Christian A. Meissner & John Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, 7 PSYCHOL. PUB. POL’Y & L. 3, 25 (2001). States that use a cautionary instruction as to the unreliability of eyewitness identification testimony include Alabama, see *Brooks v. State*, 380 So. 2d 1012, 1014 (Ala. App. Ct. 1980) (“[a] requested identification instruction which deals realistically with the shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court’s oral charge”), California, see *People v. Hall*, 616 P.2d 826, 835 (Cal. 1980), *overruled on other grounds by People v. Newman*, 981 P.2d 98, 104 n.6 (Cal. 1999) (refusal to give a requested instruction “deal[ing] with identification in the context of reasonable doubt” was error), Connecticut, see *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Georgia, see *Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005) (“[t]he creation of the pattern jury instruction regarding the assessment of reliability of eyewitness identification testimony reflects the studied conclusion that judicial guidance to the jury on the topic of eyewitness identification is warranted”), Kansas, see *State v. Warren*, 635 P.2d 1236, 1244 (Kan. 1981) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Massachusetts, see *Commonwealth v. Rodriguez*, 391 N.E.2d 889, 302 (Mass. 1979) (“a defendant who fairly raises the issue of mistaken identification might well be entitled to instructions [as to the possibility of mistaken identification]”), Michigan, see *People v. Storch*, 440 N.W.2d 14, 16 n.1 (Mich. App. Ct. 1989) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Minnesota, see *State v. Burch*, 170 N.W.2d 543, 553–54 (Minn. 1969) (“where requested by defendant’s counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence”), Montana, see *State v. Hart*, 625 P.2d 21, 31 (Mont. 1981) (“[a cautionary jury instruction warning the jury of the risks of misidentification] may be proper, if not mandatory, in certain cases”), New Jersey, see *State v. Green*, 430 A.2d 914, 919 (N.J. 1981) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met); *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (holding that “a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case”), North Carolina, see *State v. Kinard*, 283 S.E.2d 540, 543 (N.C. App. Ct. 1981) (“[i]f the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification”), Pennsylvania, see *Commonwealth v. Washington*, 927 A.2d 586, 603–04 (Pa. 2007) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Utah, see *State v. Long*, 721 P.2d 483, 492 (Utah 1986) (“trial courts shall give [a cautionary jury] instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense”). See also *State v. Smith*, No. 48-2009-CF-005719-O (Fla. 9th Jud. Cir. 2011) (order permitting cautionary jury instruction on gauging eyewitness identification accuracy). Many other jurisdictions use similar instructions, and it is important to note, as the Georgia Supreme Court recently did in *Brodes*, that “level of certainty” as a reflection of an eyewitness’s accuracy in his/her identification has been “flatly contradicted by well-respected and essentially unchallenged empirical studies.” *Brodes*, 614 S.E.2d at 770 (quoting *Long*, 721 P.2d at 491 (citing Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980); R.C. Lindsay, Gary L. Wells & Carolyn M. Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80–82 (1981); Jacqueline M. Bibicoff, *Seeing is Believing? The Need for Cautionary Jury Instructions on the Unreliability of Eyewitness Identification Testimony*, 11 SAN FERN. V. L. REV. 95, 104 n.35 (1983))).

The Kentucky Assessment Team recognizes that implementation of this Recommendation requires a change of existing Kentucky law since Kentucky courts have held that an instruction explaining the factors to be considered in gauging lineup accuracy are not required and may instead be considered “encompassed by the reasonable doubt instruction.”¹³⁹ Therefore, the Commonwealth of Kentucky is not in compliance with Recommendation #7.

The Kentucky Assessment Team recommends that the 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. However, when evidence is properly submitted to the jury, the question of how much *weight* to give that evidence should be in the sole discretion of the jury.¹⁴⁰

H. 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.

The Commonwealth statutorily mandates that law enforcement officers receive basic and periodic training in order to retain their law enforcement certification. Specifically, KRS 15.404 requires that all peace officers successfully complete at least 640 hours of basic training at a school certified or recognized by the Kentucky Law Enforcement Council (KLEC) and that all peace officers with active certification complete forty hours of KLEC-approved annual in-service training “appropriate to the officer’s rank and responsibility and the size and location of his[her] department.”¹⁴¹ Furthermore, the Department of Criminal Justice Training, responsible for training approximately 12,000 entry-level and in-service peace officers each year, is currently accredited through CALEA’s *Training Academy Accreditation Program*.¹⁴²

Both KACP and CALEA require the promulgation of agency guidelines governing disciplinary procedures, and the contents of these guidelines must specifically address personnel conduct, the procedures and criteria of the disciplinary system implemented to enforce that conduct, the role of supervisory and command staff relative to disciplinary actions, and appeal procedures.¹⁴³

¹³⁹ *Goodan v. Commonwealth*, No. 2003-SC-0657-MR, 2003-SC-0658-MR, 2005 WL 1185184, at *2 (Ky. May 19, 2005) (quoting *Evans v. Commonwealth*, 702 S.W.2d 424, 424 (Ky. 1986) (“[a]n instruction on eyewitness identification is not required in Kentucky”)); *Brock v. Commonwealth*, 627 S.W.2d 42, 43 (Ky. App. Ct. 1981); *Jones v. Commonwealth*, 556 S.W.2d 918, 921 (Ky. App. Ct. 1977). Expert testimony on eyewitness identifications was not offered in any of these cases. *Goodan*, 2005 WL 1185184; *Brock*, 627 S.W.2d 42; *Jones*, 556 S.W.2d 918.

¹⁴⁰ *See, e.g.*, 1-1 COOPER & CETRULO, KENTUCKY JURY INSTRUCTIONS §1.09 (“It is improper to instruct the jury on the weight to be accorded to any evidence, this being a question left exclusively to their discretion.”).

¹⁴¹ KY. REV. STAT. ANN. § 15.404(1)(a), (2)(a) (West 2011).

¹⁴² KY. OFFICE OF STATE BUDGET DIR., 2010-2012 BUDGET OF THE COMMONWEALTH 247 (2011), available at <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>. *Client Database Search*, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/calea-client-database> (last visited Nov. 14, 2011) (using “Search by Location” function and designating “US” and “KY” as search criteria).

¹⁴³ *See* KACP ACCREDITATION PROGRAM, *supra* note 45, at 29; CALEA STANDARDS, *supra* note 54, at 26-1 to -3.

Presumably, Kentucky law enforcement agencies accredited by KACP and CALEA have adopted conforming guidelines, and materials received by the Kentucky Assessment Team from KSP support this presumption. For example, KSP policy requires that every “[s]worn [o]fficer of [KSP] has a personal responsibility for, *and will be held strictly accountable for*, adherence to the agency standards of conduct.”¹⁴⁴

The case of one former LMPD detective demonstrates that agency’s disciplinary procedures at work.¹⁴⁵ After an assistant Jefferson County attorney questioned a number of arrests made by the detective, an administrative inquiry began that culminated in the detective’s firing in January 2011.¹⁴⁶ That inquiry found that the detective had “violated police department procedures [sixty-eight] times, mostly involving the misuse of photographs intended to help witnesses identify suspects.”¹⁴⁷

The Kentucky Assessment Team applaud Kentucky’s statutorily mandated training requirements and, as can be inferred from the information respecting accreditation, the promulgation by seventy-six Kentucky law enforcement agencies of internal guidelines governing the disciplining of peace officers. However, as approximately 415 state, county, and local agencies are responsible for law enforcement throughout the Commonwealth, the Assessment Team was unable to establish whether all law enforcement agencies have promulgated comparable internal guidelines.¹⁴⁸

Furthermore, anecdotal evidence casts doubt as to the effectiveness of disciplinary procedures in ensuring that investigative personnel are held accountable for their performance. A particularly egregious case concerns that of another LMPD law enforcement officer. Over the course of thirteen years, this officer received suspensions on seven occasions and reprimands on eight occasions, which stemmed from a range of inappropriate conduct, including “multiple instances of dishonesty.”¹⁴⁹ Yet despite this considerable misconduct, detailed in his 794-page internal police file, he remains an officer with LMPD.¹⁵⁰ In a separate case within the Commonwealth, an Owensboro police officer fired for misconduct was hired shortly thereafter as a deputy with the McLean County Sheriff’s Department. Videotape evidence showed the officer verbally taunting and striking an intoxicated man who, at the time, had been placed in handcuffs and was in the process of being booked for public intoxication. In defense of this hiring decision, the McLean County Sheriff offered: “This man needs another chance” and “I feel [this officer] is

¹⁴⁴ Ky. State Police, Gen. Order AM-E-3, at 1 (on file with author).

¹⁴⁵ See Jason Riley & R.G. Dunlop, *White Fires Detective after Probe*, COURIER-J. (Louisville, Ky.), Jan. 7, 2011, at A1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* A separate internal criminal investigation determined that “there was insufficient evidence that [Detective] Marlowe had broken the law,” although the prosecutor who reviewed that investigation “found ‘she performed her job in a way that has raised questions about her competence’ and her compliance with police procedures.” *Id.* Moreover, an independent analysis by the Courier-Journal of that internal criminal investigation found that “it was riddled with factual errors, unsupported conclusions[,] and attempts by investigating officers to shift blame elsewhere.” *Id.*

¹⁴⁸ Interview with Larry D. Ball, *supra* note 13.

¹⁴⁹ See R.G. Dunlop & Jason Riley, *History of Misconduct Shadows Metro Officer*, COURIER-J. (Louisville, Ky.), Aug. 1, 2010, at A1.

¹⁵⁰ *Id.*

more than competent, and he's qualified."¹⁵¹ At a minimum, the rehiring of this officer as a deputy sheriff reflects a disconcerting disconnect among Kentucky law enforcement agencies in terms of the professional conduct expected of the Commonwealth's peace officers.

Kentucky, therefore, only partially complies with Recommendation #8.

I. Recommendation #9

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

KRS 16.140 and KRS 16.192 govern the investigation and disciplining of KSP officers. Both statutes permit "[a]ny person" to file charges in writing against KSP personnel covered by the statute.¹⁵² Whenever probable cause appears, the Commissioner of KSP is empowered to "prefer"¹⁵³ or "present"¹⁵⁴ those charges "against any officer whom he believes to have been guilty of conduct justifying his removal or punishment."¹⁵⁵ The bases for disciplinary action include "inefficiency, misconduct, insubordination, and violation of law or of any administrative regulation promulgated by the [C]ommissioner [of KSP]."¹⁵⁶ Accordingly, KSP has adopted internal guidelines governing the handling of these complaints.¹⁵⁷

Furthermore, both KACP and CALEA accreditation program standards require agencies to establish procedures respecting complaints received against the agency or an employee of the agency. CALEA Standard 52.1.1 requires the adoption of a written directive mandating that "*all* complaints against the agency or its employees *be investigated*," including anonymous complaints.¹⁵⁸ KACP's requirements are not as specific. For example, KACP Standard 12.6 insists only that "[a] written directive establishes procedures for the reporting, investigation and disposition of complaints received against the agency or employee of the agency," which leaves available the possibility that some complaints may not receive a partial or full investigation under the promulgated guideline.¹⁵⁹

Apart from KSP and the other Kentucky law enforcement agencies accredited by KACP and CALEA, the Kentucky Assessment Team could not determine whether the other several hundred

¹⁵¹ See James Mayse, *Ex-OPD Officer Gets Job as McLean Deputy*, MESSENGER-INQUIRER (Owensboro, Ky.), Oct. 13, 2010. The officer's verbal taunts included both insults, "I think you're stupid," and fighting words, "If you ask me to, I'll take the cuffs off, you can come over and slap me if you want to." *Id.*

¹⁵² KY. REV. STAT. ANN. §§ 16.140, 16.192 (West 2011).

¹⁵³ KY. REV. STAT. ANN. § 16.140 (West 2011) (addressing the "[d]iscipline and removal" of state troopers).

¹⁵⁴ KY. REV. STAT. ANN. § 16.192 (West 2011) (addressing the "[r]emoval, suspension, or reduction of grade or pay" of agency employees other than state troopers).

¹⁵⁵ KY. REV. STAT. ANN. §§ 16.140, 16.192 (West 2011).

¹⁵⁶ *Id.*

¹⁵⁷ See Ky. State Police, Gen. Order AM-E-2 (2010) (on file with author).

¹⁵⁸ CALEA STANDARDS, *supra* note 54, at 52-1 (emphasis added).

¹⁵⁹ KACP ACCREDITATION PROGRAM, *supra* note 45, at 30. KACP Standard 12.6 requires that the written directive address, at a minimum, the following: "Categories of complaints; [a]cceptance of complaints; [c]omplaint documentation and report format; [p]erson [or] [p]osition responsible for investigation; [i]nvestigation process and timeline; [e]mployee notification and rights; [p]rocedures for notifying complainant; [a]dministrative leave; [d]isposition; [a]nnual review of complaints; and [m]aintenance of records and confidentiality." *Id.*

law enforcement agencies within Kentucky provide adequate opportunity for citizens and investigative personnel to report misconduct in investigations. Therefore, the Commonwealth of Kentucky only partially complies with Recommendation #9.

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The United States Supreme Court has long recognized the value of scientific evidence as one of the most reliable and effective crime-solving tools known to the criminal justice system.¹ As forensic science disciplines advance into new fields and with increased reliance on forensic evidence in criminal cases—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that forensic service providers, such as crime laboratories, coroners, and medical examiner offices, produce expert, accurate results. However, as the National Academy of Sciences recognized in its 2009 report on forensic science, “a number of factors have combined in the past few decades to place increasing demands on an already overtaxed, inconsistent, and under-resourced forensic science infrastructure.”²

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited forensic analysts have increasingly been called into serious question. While the majority of forensic service providers strive to do their work accurately and impartially, a troubling number of laboratory technicians in laboratories across the United States have been accused and/or convicted of failing to properly analyze samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of innocent individuals in cases where the actual perpetrator has not been identified.

¹ See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964) (“[A] system of criminal law enforcement, which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system that depends on extrinsic evidence independently secured through skilled investigation.”); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (“[F]ingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the ‘third degree.’”).

² COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 1–4* (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter *NAS REPORT 2009*]. The National Academy of Sciences (NAS) was established by Congress in 1863 to advise the federal government on scientific and technical matters. *About the NAS*, NAT’L ACAD. OF SCIENCES, http://www.nasonline.org/site/PageServer?pagename=ABOUT_main_page (last visited June 20, 2011). In 2005, Congress authorized the NAS to form a “Forensic Science Committee,” composed of members of the forensic science community, the legal community, and scientists, charged with identifying the needs of the forensic science community. *NAS REPORT 2009*, *supra* note 2, at 1–2. The committee heard testimony from over seventy expert witnesses through a series of eight public hearings throughout 2008, “reviewed numerous published materials, studies, and reports related to the forensic science disciplines, [and] engaged in independent research on the subject . . .” *Id.* at 2, App. B. The committee’s report, issued in 2009, set forth thirteen specific recommendations to address “the most important issues now facing the forensic science community and medical examiner system . . .” *Id.* at 4.

In addition, the system of medicolegal death investigations throughout the United States is fragmented, sometimes relying on elected officials without any medical training to determine the cause and manner of sudden or unexplained deaths.³ Like other forensic service providers, many medical examiner and coroner offices suffer from inadequate funding, making it difficult to recruit and retain qualified death investigation personnel.

The need for accuracy and reliability in forensic science necessitates that jurisdictions allocate adequate resources to forensic service providers. In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, forensic service providers must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided. Further, jurisdictions should provide adequate opportunity for citizens and investigative personnel to report serious allegations of negligence or misconduct by law enforcement as well as other forensic service providers.

³ NAS REPORT 2009, *supra* note 2, at 50.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

Kentucky provides forensic science services⁴ through the Kentucky State Police (KSP), the Department of Criminal Justice Training (DOCJT), the Kentucky State Medical Examiner's Office (MEO), and the Commonwealth's 120 elected county coroners.⁵ KSP is the Commonwealth's statewide law enforcement agency, which controls and operates the KSP Forensic Laboratory System.⁶ The MEO employs forensic specialists who support the Commonwealth's county coroners and law enforcement officials in conducting medicolegal death investigations.⁷

A. Forensic Science Laboratories⁸

1. Kentucky State Police Forensic Laboratory

Pursuant to the Kentucky Revised Statutes (KRS), KSP Laboratory provides forensic services, free of charge, to federal, state, county, and municipal law enforcement agencies in Kentucky and to the Department of Public Advocacy (DPA) in connection with official investigations in criminal cases.⁹ KSP Laboratory is a forensic laboratory system that consists of a "Central Laboratory" in Frankfort, and five regional branches located throughout the Commonwealth in

⁴ "Forensic science" encompasses a broad range of disciplines, including general toxicology, biology/serology (such as DNA analysis), firearms, blood pattern analysis, and crime scene investigation. NAS REPORT 2009, *supra* note 2, at 6–7. Forensic science also includes "medicolegal death investigation," typically conducted by a coroner, medical examiner, forensic pathologist, and/or physician's assistant, to determine the cause and manner of sudden, unexpected, or violent deaths. *Id.* at 5 n.5.

⁵ *Overview*, KY. JUSTICE & PUB. SAFETY CABINET, <http://www.justice.ky.gov/departments> (last visited June 20, 2011). The Justice and Public Safety Cabinet, in which the MEO is housed, is statutorily mandated, among other things, to "provide medical assistance to coroners investigating deaths; provide or contract for laboratory facilities for performing autopsies and investigations . . . ; [and] provide for the keeping of reports of all investigations and examinations . . ." KY. REV. STAT. ANN. § 72.220 (West 2011).

⁶ KY. STATE POLICE, 2006 ANNUAL REPORT 1 (2006), *available at* http://www.kentuckystatepolice.org/pdf/KSP_ANREP_06.pdf (Kentucky General Assembly established the Kentucky State Police in 1948).

⁷ KY. DEP'T OF CRIMINAL JUSTICE TRAINING, <http://docjt.jus.state.ky.us> (last visited June 20, 2011); KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KY., FISCAL YEARS 2010-2012, 246 (Jan. 19, 2010), *available at* <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf> [hereinafter 2010-2012 BUDGET].

⁸ Forensic laboratories provide a broad range of forensic services, with varying: [T]echniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published materials. Some of the forensic science disciplines are laboratory based (e.g., nuclear and mitochondrial DNA analysis, toxicology and drug analysis); others are based on expert interpretation of observed patterns (e.g., fingerprints, writing samples, toolmarks, bite marks, and specimens such as hair).

NAS REPORT 2009, *supra* note 2, at 7.

⁹ KSP FORENSIC LAB., PHYSICAL EVIDENCE COLLECTION GUIDE 5 (rev. effective Apr. 16, 2010), *available at* http://www.kentuckystatepolice.org/for_lab/download/physical_evidence_collection_guide.pdf [hereinafter KSP EVIDENCE GUIDE]; Telephone and Email Interviews by Paula Shapiro with Laura Sudkamp, Director, KSP Forensic Lab., Jan. 13, 2010, Dec. 17, 2010, and Jan. 4, 2011 (on file with author). In practice, however, DPA routinely elects to obtain independent forensic testing of DNA evidence at private laboratories located outside of Kentucky and typically only submits evidence to KSP Laboratory for forensic testing roughly five to ten times a year. Telephone Interview by Sarah Turberville & Paula Shapiro with Randy Wheeler, Project Coordinator, Ky. Innocence Project, Ky. Dep't of Pub. Advocacy, Jan. 11, 2011 (on file with author).

Cold Springs (Northern Laboratory), Louisville (Jefferson Laboratory), Ashland (Eastern Laboratory), Madisonville (Western Laboratory), and London (Southeastern Laboratory).¹⁰ KSP's Central Laboratory provides a complete range of forensic laboratory services, including Breath Alcohol Maintenance, Blood Alcohol, Toxicology, Solid Dose Drugs, Trace/Gunshot-Residue/Arson, Firearms/Toolmarks/Imprint Evidence, DNA Casework and DNA Database,¹¹ Photograph, Polygraph, and Forensic Video Analysis.¹² KSP's regional laboratories provide limited forensic services.¹³

KSP Laboratory personnel are not active in the field; instead, local police detectives handle evidence collection at crime scenes and then transfer evidence to KSP Laboratory analysts.¹⁴ However, KSP Laboratory provides technical assistance on collection and preservation issues via phone and email to law enforcement agents and coroners at crime scenes.¹⁵ Latent print capabilities are not included in the services provided by KSP Laboratory and instead are provided by the KSP Automated Fingerprint Identification Section (AFIS) in Frankfort.¹⁶

KSP Laboratory publishes the *Physical Evidence Collection Guide (KSP Evidence Guide)*, available to all Commonwealth law enforcement agencies and the public on the KSP website, which includes procedures for law enforcement officials on the collection, preservation, and transportation of evidence to the Commonwealth's six laboratories.¹⁷ In addition to the *KSP Evidence Guide*, KSP Laboratory has developed manuals containing procedures or protocols for quality assurance, handling, testing, and preserving evidence once the evidence is at KSP Laboratory, training materials for all KSP Laboratory staff and technicians, and other related documents.¹⁸

¹⁰ 2010-2012 BUDGET, *supra* note 7, at 252.

¹¹ For a more specific discussion on the testing and preservation of DNA evidence in Kentucky, please refer to Chapter Two, Recommendation #2.

¹² *Central Lab*, KY. STATE POLICE, http://www.kentuckystatepolice.org/for_lab/central.htm (last visited June 20, 2011).

¹³ For a full description of the forensic capabilities of KSP's regional laboratories, please see the Kentucky State Police website. *Forensic Laboratories*, KY. STATE POLICE, <http://www.kentuckystatepolice.org/labs.htm> (last visited June 20, 2011).

¹⁴ Interviews with Laura Sudkamp, *supra* note 9; KSP EVIDENCE GUIDE, *supra* note 9, at 5; Sabrina Walsh, *CSI: Kentucky*, KY. LAW ENFORCEMENT 26, 26 (Summer 2007) (explaining that "[d]etectives interview suspects, secure a crime scene, and remove evidence for analysis at one of Kentucky's six labs").

¹⁵ KSP EVIDENCE GUIDE, *supra* note 9, at 5. KSP Laboratory does not have sufficient resources to hire evidence collection personnel and instead relies on law enforcement agents to collect crime scene evidence. KSP EVIDENCE GUIDE, *supra* note 6, at 2; Interviews with Laura Sudkamp, *supra* note 9.

¹⁶ KSP EVIDENCE GUIDE, *supra* note 9, at 5. AFIS and KSP's Electronic Crime Section are not part of KSP Forensic Laboratories and are not accredited. Interviews with Laura Sudkamp, *supra* note 9.

¹⁷ KSP EVIDENCE GUIDE, *supra* note 9.

¹⁸ *See, e.g.*, KSP FORENSIC LAB., CONTROLLED SUBSTANCES TRAINING MANUAL (rev. effective Nov. 2, 2010) (on file with author); KSP FORENSIC LAB., CONTROLLED SUBSTANCES QUALITY MANUAL (rev. effective June 7, 2010) (on file with author); KSP FORENSIC LAB., CONTROLLED SUBSTANCES ANALYTICAL MANUAL (rev. effective May 5, 2009) (on file with author); KSP FORENSIC LAB., LABORATORY ADMINISTRATIVE PROTOCOLS (rev. effective Apr. 26, 2010) (on file with author); KSP FORENSIC LAB., QUALITY ASSURANCE MANUAL (rev. effective Oct. 25, 2010) (on file with author); Interviews with Laura Sudkamp, *supra* note 9.

KSP Laboratory employs a variety of forensic service practitioners in each of its six locations.¹⁹ As of December 17, 2010, KSP Laboratory employed over 100 staff, including forty-eight chemists, twenty-five biologists, six firearm/toolmark examiners, and eleven breath alcohol technicians, and fifteen supervisors who also conduct laboratory casework.²⁰ KSP Laboratory examiners, who perform testing on evidence and whose opinions and/or results are included in laboratory reports, are available to provide expert testimony in court.²¹

2. Laboratory Accreditation

To gain an understanding of the procedures and standards employed by Kentucky's forensic laboratories, it is instructive to review the requirements of the accreditation program through which select branches of KSP Laboratory have obtained voluntary, national accreditation. While the Commonwealth does not require forensic laboratories to be accredited, since 2005 three of the six laboratories have obtained national accreditation through the *Legacy* Accreditation Program (*Legacy* program) of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).²² The *Legacy* program is "a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and health and safety procedures meet established standards."²³ The program requires crime laboratories to demonstrate and maintain compliance with a number of established standards.²⁴

Since April 2004, ASCLD/LAB has provided accreditation under both the *Legacy* program and its *International* Accreditation Program, the latter of which is based on standards developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), called the ISO/IEC 17025:2005 (*International* program).²⁵ Effective April

¹⁹ Interviews with Laura Sudkamp, *supra* note 9. In the United States, a variety of forensic service practitioners are employed at forensic laboratories, including scientists (some with advanced degrees) in the fields of chemistry, biochemistry, biology, and medicine; laboratory technicians; crime scene investigators; and various law enforcement officers. NAS REPORT 2009, *supra* note 2, at 5.

²⁰ Interviews with Laura Sudkamp, *supra* note 9. All supervisors at the five regional laboratories are chemists. *Id.* Four of the Central Laboratory supervisors are chemists, two are biology supervisors, one is a firearms/toolmarks supervisor, one is the Quality Assurance/Quality Control Supervisor, one is the Administrative Supervisor, and Ms. Sudkamp, the Director. *Id.* There are also three KSP Laboratory Commanders (a KSP Major and two Lieutenants), administrative staff, and photo laboratory staff. *Id.*

²¹ KSP EVIDENCE GUIDE, *supra* note 9, at 5.

²² ASCLD/LAB Accredited Laboratories, AM. SOC'Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#ky> (last visited June 20, 2011). KSP Northern Laboratory, KSP Central Laboratory, and KSP Jefferson Laboratory have been accredited by ASCLD/LAB-*Legacy* since 2005. *Id.*

²³ AM. SOC'Y OF CRIME LAB. DIRECTORS, LABORATORY ACCREDITATION BOARD 2008 MANUAL 1 (2008) (on file with author) [hereinafter ASCLD/LAB-*LEGACY* 2008 MANUAL].

²⁴ *Id.* at 13–60. The only other entity that accredits crime laboratories in the United States is Forensic Quality Services (FQS). NAS REPORT 2009, *supra* note 2, at 2–16. No Kentucky entity is accredited by FQS. FORENSIC QUALITY SERVICES, http://www.forquality.org/Accredited_Labs.html (last visited Jan. 19, 2011).

²⁵ *Programs of Accreditation*, AM. SOC'Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited June 20, 2011); INT'L ORG. FOR STANDARDIZATION & INT'L ELECTROTECHNICAL COMM'N, ISO/IEC 17025: GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES vi (2d ed. 2005) (on file with author) [hereinafter ISO/IEC 17025: GENERAL REQUIREMENTS].

1, 2009, ASCLD/LAB no longer accepts new applications for accreditation under the *Legacy* program, and is “currently [] in the process of converting the accreditation of its U.S. laboratories to meet the requirements of a recognized international standard, [namely,] ISO/IEC 17025:2005.”²⁶ As of February 2011, KSP Laboratory has submitted an application for each of its six laboratories to obtain accreditation under ASCLD/LAB’s *International* program.²⁷

a. ASCLD/LAB-*Legacy* Accreditation

The *Legacy* program requires crime laboratories to demonstrate and maintain compliance with a number of established standards which are contained in the 2008 ASCLD/LAB-*Legacy* Accreditation Board Manual (*Legacy* Manual).²⁸

i. ASCLD/LAB-*Legacy* Accreditation Standards and Criteria

The *Legacy* Manual contains various standards and criteria, each of which is assigned a rating of “Essential,” “Important,” or “Desirable.”²⁹ In order to obtain accreditation, the “laboratory must achieve 100% of the Essential, 75% of the Important, and 50% of the Desirable criteria.”³⁰ Essential criteria contained in the *Legacy* Manual include:

- (1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, maintenance and calibration of equipment and instruments, and operation of individual characteristic databases;³¹
- (2) A training program to develop the technical skills of employees in each applicable discipline and sub-discipline;³²
- (3) A chain of custody record that provides a comprehensive, documented history of each evidence transfer over which the laboratory has control;³³
- (4) The proper identification and storage of evidence to protect its integrity.³⁴

²⁶ *Programs of Accreditation*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited June 20, 2011); ABA, RECOMMENDATION 100E, 2010 Ann. Mtg. (adopted Aug. 9–10, 2010), available at www.abanet.org/leadership/2010/annual/docs/100e.doc (urging the federal government to provide funding and resources sufficient to facilitate the accreditation of crime laboratories under standards such as IEC/ISO 17025). ASCLD/LAB continues to “monitor and fully support” *Legacy*-accredited laboratories as well as to “accept applications to add new accredited disciplines under the *Legacy* Program for those laboratories.” *Programs of Accreditation*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited June 20, 2011).

²⁷ Interviews with Laura Sudkamp, *supra* note 9.

²⁸ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 3, 69–84, app. 1–3.

²⁹ *Id.* at 2. The *Legacy* Manual defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence”; “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence”; and “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory.” *Id.*

³⁰ *Id.* at 2 (emphasis omitted).

³¹ *Id.* at 14.

³² *Id.* at 18.

³³ *Id.* at 20.

- (5) A comprehensive quality manual;³⁵
- (6) The performance of an annual review of the laboratory's quality system;³⁶
- (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;³⁷
- (8) The performance and documentation of administrative reviews of all reports issued;³⁸
- (9) The monitoring of the testimony of each examiner, at least annually;³⁹ and
- (10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.⁴⁰

The *Legacy* Manual also contains Essential criteria on laboratory personnel qualifications, requiring each examiner to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony s/he provides, and an understanding of the necessary instruments, methods, and procedures.⁴¹ Additionally, each examiner must successfully complete a competency test prior to assuming casework and thereafter successfully perform annual proficiency exams.⁴²

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the *Legacy* inspection team will arrange and conduct an on-site inspection of the laboratory.⁴³

ii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of a laboratory tour, interviews with analysts, and a review of technical procedure manuals, training manuals, and case files, including all notes and data, generated by each analyst.⁴⁴ The inspection team also interviews all trainees to evaluate the laboratory's training program.⁴⁵ At the conclusion of the inspection, the team meets with the laboratory director to review the findings and discuss any deficiencies.⁴⁶ While an ASCLD/LAB "audit committee" evaluates the draft inspection report, the laboratory may correct any deficiencies identified by the inspection team during the on-site assessment.⁴⁷ Decisions on

³⁴ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 20–22.

³⁵ *Id.* at 24–25.

³⁶ *Id.* at 28.

³⁷ *Id.*

³⁸ *Id.* at 35.

³⁹ *Id.* at 36.

⁴⁰ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 37.

⁴¹ *Id.* at 42–54.

⁴² *Id.* at 42–54. "Competency testing should include evaluation of knowledge of existing literature, written and/or oral examinations, examination and identification of known and unknown material, and moot court." *Id.* at 54.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 5–7. *See also id.* at 85, app. 4.

⁴⁵ *Id.* at 7.

⁴⁶ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 7.

⁴⁷ *Id.*

accreditation are made within twelve months of “the date of the laboratory’s first notification of the audit committee’s consideration of the draft inspection report.”⁴⁸

The ASCLD/LAB Board of Directors (Board) will vote as to whether to grant full accreditation to the laboratory or accreditation limited to specific disciplines or sub-disciplines.⁴⁹ If the Board grants accreditation to the laboratory, it is effective for five years, “provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs.”⁵⁰ On August 2, 2011, ASCLD/LAB granted the three accredited KSP laboratories a third six-month extension on their five-year *Legacy* accreditation as these laboratories seek to complete the more stringent *International* Accreditation Program application.⁵¹

b. ASCLD/LAB-*International* Accreditation

ASCLD/LAB’s *International* program is a voluntary program “of accreditation in which any crime laboratory . . . may participate to demonstrate that its technical operations and overall management system meet ISO/IEC 17025:2005 requirements and applicable ASCLD/LAB-*International* supplemental requirements.”⁵² The ISO/IEC 17025:2005 standards, “developed through technical committees to deal with particular fields of technical activity,”⁵³ “specif[y] the general requirements for the competence to carry out tests and/or calibrations.”⁵⁴ The ASCLD/LAB-*International* supplemental requirements contain additional “accreditation requirements for forensic science testing laboratories for the examination or analysis of evidence as it relates to legal proceedings.”⁵⁵ The *International* program offers accreditation in forensic science testing (including controlled substances, toxicology, trace evidence, biology, firearms/toolmarks, questioned documents, latent prints, crime scene, and digital and multimedia evidence) and forensic science calibration (toxicology, breath alcohol measuring, and instruments).⁵⁶

i. ASCLD/LAB-*International* Accreditation Standards and Criteria

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 1. “[L]aboratories seeking renewal are expected to remain in compliance with the requirements of the accreditation program at all times.” *Id.* at 3.

⁵¹ See Letter from Ralph M. Keaton, Executive Director, ASCLD/LAB to Laura Sudkamp, KSP Laboratory Director (Aug. 2, 2011), available at http://www.ascl-d-lab.org/cert/extensions/KSP_3rd_ext.pdf; Letter from Ralph M. Keaton, Executive Director, ASCLD/LAB to Laura Sudkamp, KSP Laboratory Director (Jan. 26, 2011), available at http://www.ascl-d-lab.org/cert/extensions/KSP-2nd_Ext.pdf; Letter from Ralph M. Keaton, Executive Director, ASCLD/LAB to Major Ricki Allen, KSP Forensic Lab. (Oct. 3, 2007) (on file with author).

⁵² AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., ASCLD/LAB-INTERNATIONAL PROGRAM OVERVIEW 3 (Sept. 11, 2010) (effective Oct. 1, 2010), available at <http://www.ascl-d-lab.org/documents/AL-PD-3041.pdf> [hereinafter ASCLD/LAB-INTERNATIONAL OVERVIEW].

⁵³ NAS REPORT 2009, *supra* note 2, at 198.

⁵⁴ *Id.* at 21; ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at vi.

⁵⁵ ASCLD/LAB-INTERNATIONAL, 2006 SUPPLEMENTAL REQUIREMENTS FOR THE ACCREDITATION OF FORENSIC SCIENCE TESTING LABORATORIES 2 (Jan. 24, 2006) (on file with author) [hereinafter INTERNATIONAL SUPPLEMENTAL REQUIREMENTS].

⁵⁶ *Id.* at 5–7.

In order to be accredited through the *International* program, the forensic laboratory must meet all of the ISO/IEC 17025:2005 requirements as well as the ASCLD/LAB-*International* supplemental requirements applicable to the work conducted at that particular laboratory.⁵⁷ The ISO/IEC requirements include maintenance of the following:

- (1) A quality manual that details the laboratory's policies, systems, programs, procedures, and instructions to the extent necessary to ensure quality results, as well as a laboratory "quality policy statement";⁵⁸
- (2) Document control procedures;⁵⁹
- (3) A review system for requests, tenders and contracts;⁶⁰
- (4) Policies and procedures for handling complaints;⁶¹
- (5) Procedures to ensure "quality policy, quality objectives, audit results, analysis of data, corrective and preventative actions and management review";⁶²
- (6) Procedures for the "identification, collection, indexing, access, filing, storage, maintenance and disposal of quality and technical records. . . . includ[ing] reports from internal audits and management reviews as well as records of corrective and preventative actions";⁶³
- (7) Periodic internal audits to ensure compliance with the requirements of the management system and the ISO/IEC 17025:2005 standards, as well as management reviews of both the laboratory management system, testing and calibration activities to ensure effectiveness;⁶⁴
- (8) Maintenance of records of relevant competence, education, professional qualifications, training, skills and experience of all staff performing sampling, testing and/or calibration;⁶⁵
- (9) Monitoring, controlling, and recording all environmental conditions that may have an impact on the results of the testing;⁶⁶
- (10) Instructions on the proper use and operation of all relevant equipment, as well as on the handling and preparation of items for testing and/or calibration; in addition, all instructions, standards, manuals and reference materials should be kept up to date and made available to staff;⁶⁷

⁵⁷ *Id.* at 5. Additionally, "where applicable, laboratories performing DNA analysis will be assessed in accordance with the requirements of the most current version of the *Quality Assurance Standards for Forensic DNA Testing Laboratories* and the *Quality Assurance Standards for Convicted Offender DNA Databasing Laboratories*." ASCLD/LAB-INTERNATIONAL OVERVIEW, *supra* note 52, at 4.

⁵⁸ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at 3. The "quality policy statement" includes the laboratory's commitment to good professional practice and quality services, purpose of the management system, requirement that all personnel familiarize him/herself with the quality documentation, and the laboratory's commitment to comply with the ISO/IEC standards. *Id.* at 3-4.

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 7.

⁶² *Id.*

⁶³ *Id.* at 9.

⁶⁴ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at 9-10.

⁶⁵ *Id.* at 12.

⁶⁶ *Id.*

⁶⁷ *Id.*

- (11) Objective evidence and calibration uncertainty measurement procedures;⁶⁸
- (12) Data control policies, including measurement traceability programs and procedures;⁶⁹
- (13) Procedures related to the handling of test and calibration items, including “transportation, receipt, handling, protection, storage, retention and/or disposal of test and/or calibration items,” identification of testing and/or calibrated items, as well as procedures for preventing deterioration, loss or damage;⁷⁰
- (14) Policies for assuring the quality of test and calibration results, including the recording of such results;⁷¹ and
- (15) Standards for reporting tested items.⁷²

Once the laboratory has assessed its compliance with the *International* program criteria and submitted a complete application, an ASCLD/LAB-*International* Assessment Team will conduct an on-site inspection of the laboratory.⁷³

ii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

In addition to the on-site inspection requirements included for *Legacy* accreditation, the *International* accreditation inspection consists of observing demonstrations of specific testing and/or calibration activities by laboratory personnel.⁷⁴ *International* program assessors review the entire record of at least one case from each discipline in which the laboratory seeks accreditation, taking into consideration “evidence integrity, quality of reagents used, maintenance and calibration of the specific instruments used, etc.”⁷⁵ The assessors also interview support personnel to evaluate the laboratory’s support capabilities.⁷⁶

At the conclusion of the assessment, the inspection team will hold a closing meeting and provide the laboratory director with a *Preliminary Assessment Report* and a *Corrective Action Request*.⁷⁷ These reports list all non-conformities with the ISO/IEC 17025:2005 and ASCLD/LAB-*International Supplemental Requirements* and include the necessary corrective action to be taken.⁷⁸ Unlike *Legacy* accreditation, *International* accreditation requires laboratories to conform to *each* of the program’s requirements, and laboratories must correct non-conformities

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 15–17.

⁷⁰ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at 19.

⁷¹ *Id.* at 20.

⁷² *Id.* at 20–23.

⁷³ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 52, at 9.

⁷⁴ *Id.* at 11–12 (noting that the assessment team will also meet with the administrator, such as a sheriff or chief of police, who is in command over the laboratory).

⁷⁵ *Id.* at 12.

⁷⁶ *Id.* at 10–12.

⁷⁷ *Id.* at 13–14.

⁷⁸ *Id.* at 13–15. A three-member ASCLD/LAB Quality Review Panel will conduct a quality review of the Assessment Team’s findings, generally within ten business days of the on-site assessment, and then issue a *Full Assessment Report*, triggering the specified time period the laboratory has to complete any necessary corrective action. *Id.* at 14–15.

either immediately prior to receiving accreditation or, under certain circumstances, within a year of receiving accreditation.⁷⁹

Once the applicant laboratory has completed the necessary corrective action, a *Final Assessment Report* will be prepared and presented to the Board for review and determination of accreditation.⁸⁰ If the Board grants the laboratory accreditation, the *International* program accreditation certificate will specify the field(s), discipline(s), and sub-discipline(s) in which accreditation was received.⁸¹ Accreditation is granted for a period of five years, “provided that the laboratory continues to meet all applicable accreditation standards, submits to scheduled on-site surveillance visits; completes and submits an *Annual Accreditation Audit Report*; and participates in prescribed proficiency testing programs.”⁸² If the laboratory wishes to maintain accreditation, it must submit a new application every fifth year, thereby undergoing another on-site assessment.⁸³

3. The Commonwealth’s Crime Scene Units

Crime scene units and law enforcement investigators from the Commonwealth’s law enforcement agencies, rather than KSP Laboratory personnel, conduct on-scene forensic collection and investigation and engage in various types of forensic testing that can be conducted in non-laboratory settings.⁸⁴ Across the United States, these non-traditional crime laboratories “primarily conduct crime scene investigations, latent print and [ten]-print examinations, photography, and bloodstain pattern analyses. A smaller number are involved in other forensic functions, such as the analysis of digital evidence, footwear, tire track impressions, firearms, forensic art, questioned documents, polygraph tests, and dental evidence.”⁸⁵ In Kentucky, this testing is also conducted, in some cases, in the Commonwealth’s largest sheriff’s departments, police departments, and other law enforcement agencies.⁸⁶ For example, in addition to collecting forensic evidence for analysis by KSP Laboratory, the Commonwealth’s law enforcement agencies, such as the Kentucky State Police, Louisville Metro Police Department

⁷⁹ ASCLD/LAB-INTERNATIONAL OVERVIEW, *supra* note 52, at 13–14. For more on the requirements of ASCLD/LAB-INTERNATIONAL accreditation, see Chapter Four, Analysis Recommendation #1, *infra* notes 164–182 and accompanying text.

⁸⁰ ASCLD/LAB-INTERNATIONAL OVERVIEW, *supra* note 52, at 15–16.

⁸¹ *Id.* at 20.

⁸² *Id.* at 19.

⁸³ *Id.*

⁸⁴ See *supra* notes 14–16 and accompanying text; NAS REPORT 2009, *supra* note 2, at 56–57. According to the 2009 NAS Report, “many forensic examiners do not work in a traditional crime laboratory. Often they work within law enforcement offices called ‘identification units’ or ‘fingerprint units.’” *Id.* at 63–64. For example, a 2004 study conducted by ASCLD for the National Institute of Justice reported that “[two-thirds] of fingerprint identifications take place outside the traditional crime laboratories. Insufficient data are available on the size and expertise of this population of forensic examiners who are not employed in publicly funded forensic science laboratories.” *Id.* at 64.

⁸⁵ NAS REPORT 2009, *supra* note 2, at 64.

⁸⁶ Telephone Interview by Paula Shapiro with Tim Carnahan, Detective, Boone County, Ky. Sheriff’s Dep’t, Dec. 14, 2009 (on file with author); Telephone Interview by Paula Shapiro with Allen Dobson, Sergeant, Lexington Div. of Police (Ky.), (Dec. 30, 2009) (on file with author); *Units/Sections*, LOUISVILLE METRO POLICE DEP’T, <http://www.louisvilleky.gov/MetroPolice/Units+and+Sections> (last visited Nov. 29, 2010). There are over 415 law enforcement agencies in Kentucky. Telephone Interview by Sarah Turberville with Larry D. Ball, Executive Director, Ky. Law Enforcement Council, (Jan. 24, 2011) (on file with author). See also Chapter Three on Law Enforcement Identifications and Interrogations.

and the Lexington Division of Police, may conduct AFIS fingerprint analysis, video and computer forensics, transcription, polygraph testing, serial number restoration, and limited ballistics testing.⁸⁷

B. Kentucky's Medicolegal Death Investigator System

Kentucky's system of medicolegal death investigation utilizes both elected county coroners as well as medical examiners working at the statewide level.⁸⁸ According to the Department of Justice's Bureau of Justice Statistics' *Special Report on Medical Examiners and Coroners' Offices*, Kentucky is one of eight states with a "decentralized death investigation system [that] also [has] a State medical examiner office performing medicolegal duties."⁸⁹ In Kentucky, coroners are called to crime scenes to determine whether the deceased should be sent to the Kentucky State Medical Examiner's Office (MEO) for autopsy.⁹⁰ The MEO has four offices throughout the Commonwealth, employing medical examiners as well as forensic autopsy specialists, histologists, and administrative staff.⁹¹ As of January 21, 2011, the Commonwealth had 120 coroners and 313 deputy coroners.⁹²

1. Coroners and Deputy Coroners

a. Election and Qualification Requirements for Coroners and Deputy Coroners

⁸⁷ Interview with Sergeant Allen Dobson, *supra* note 86; LEXINGTON DIV. OF POLICE, <http://www.lexingtonky.gov/index.aspx?page=97> (last visited June 20, 2011); *Units/Sections*, LOUISVILLE METRO POLICE DEP'T, <http://www.louisvilleky.gov/MetroPolice/Units+and+Sections> (last visited June 20, 2011). Sgt. Dobson stated that the Division has the capability to perform ballistics testing; however, it does not presently employ staff capable of conducting such tests. Interview with Sergeant Allen Dobson, *supra* note 86.

⁸⁸ KY. CONST. § 99; KY. REV. STAT. ANN. § 72.210 (West 2011). *See also* NAS REPORT 2009, *supra* note 2, at 5 n.5.

⁸⁹ U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT ON MEDICAL EXAMINERS AND CORONERS' OFFICES, 2004 1 (June 2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/meco04.pdf>. The other seven states are Alabama, Arkansas, Georgia, Iowa, Montana, North Dakota, and Tennessee. *Id.* at 1.

⁹⁰ Victoria Corderi, *Dead Men Talking: Inside a Medical examiner's office*, *Interview with Dr. Tracey Corey, Chief Medical Examiner*, MSNBC.COM, Aug. 21, 2007, http://www.msnbc.com/id/20364031/ns/dateline_nbc/print/1/displaymode/1098 (last visited June 20, 2011). Autopsies are examinations and scientific testing of a deceased body and organs in order to determine cause of death and performed by a physician licensed in pathology. Telephone Interview by Paula Shapiro with David Jones, retired Executive Director, Ky. State Med. Examiner's Office, Nov. 23, 2010 (on file with author); *Forensic Library: Autopsy Protocol*, KY. CORONERS ASS'N, <http://www.coroners.ky.gov/NR/rdonlyres/D96EE84C-BB83-41D1-96C5-311894E54F54/0/2009PandPSectionF.pdf> (last visited June 20, 2011).

⁹¹ *Kentucky Medical Examiner's Office*, JUSTICE & PUB. SAFETY CABINET, <http://justice.ky.gov/departments/me> (last visited June 20, 2011) (noting that the Commonwealth's medical examiners are forensic pathologists, forensic odontologists, and specialists in neuropathology, and forensic toxicology).

⁹² KY. CORONERS ASS'N, 2011 CORONERS MASTER DIRECTORY (2010), *available at* <http://www.coroners.ky.gov/NR/rdonlyres/71D41E94-FF96-4BAA-9A68-EDB9B1012A0B/0/012411CORONERS WEBSITEDIRECTORY.rtf> [hereinafter KY. CORONER DIR. 2011]. In 2009, there were 120 coroners and 272 deputy coroners. KY. OFFICE OF THE STATE MED. EXAM'R, 2009 CALENDAR YEAR ANNUAL REPORT, *available at* <http://justice.ky.gov/NR/rdonlyres/3C5FFEB5-DB22-4AF6-8158-8706BF14713D/0/2009MEAnnualReport.doc> [hereinafter 2009 MEO ANNUAL REPORT].

Kentucky's Constitution mandates that each county within the Commonwealth elect a coroner whose official duty is to investigate deaths under circumstances specified by KRS 72.025.⁹³ Coroners hold office for four-year terms.⁹⁴ At the time of election, the coroner must be at least twenty-four years of age, be a citizen of Kentucky, and have resided in Kentucky for at least two years including one year preceding the election.⁹⁵ Coroners are permitted to appoint deputy coroners, with fiscal court approval, as well as additional deputy coroners not to exceed one for every 25,000 county inhabitants.⁹⁶ Deputy coroners must hold a high school diploma or its equivalent, and successfully complete the training described below.⁹⁷

b. Powers and Duties of Coroners and Deputy Coroners

In Kentucky, coroners and deputy coroners have the full power and authority of peace officers as they investigate the cause and manner of all deaths defined as "coroner's cases," including when the death of a human being appears to be caused by homicide or violence.⁹⁸ When investigating a coroner's case, coroners may perform a post-mortem examination and/or "request the assistance of the district medical examiner and the [MEO], order an autopsy, and hold an inquest."⁹⁹ A post-mortem examination, according to the KRS, is a physical examination of a deceased "by a medical examiner or by a coroner or deputy coroner who has been certified by the [DOCJT] and may include an autopsy performed by a pathologist or other appropriate scientific tests administered to determine cause of death."¹⁰⁰ Coroners and deputy coroners typically request "an autopsy [to be] performed when deaths involve homicide, an inmate [] dies in police custody or incarceration, an individual[s] whose death is suspicious, or deaths [are] suspected to be due to injury of any type."¹⁰¹ In practice, Kentucky coroners and deputy

⁹³ KY. CONST. § 99; KY. REV. STAT. ANN. § 72.025 (West 2011) (listing circumstances where a post-mortem is required to be performed by a coroner); *City of Lexington v. Hager*, 377 S.W.2d 27, 30 (Ky. 1960) (noting that "the coroner by constitutional designation is a county officer. The services he performs have historically and traditionally been performed by such an officer."); *Frequently Asked Questions*, KY. CORONERS ASS'N, <http://coroners.ky.gov/faq.htm> (last visited June 20, 2011).

⁹⁴ KY. CONST. § 99.

⁹⁵ KY. CONST. § 100.

⁹⁶ KY. REV. STAT. ANN. §§ 64.185(6), 72.010 (West 2011). As of January 21, 2011, every county, except for Robertson and Wolfe Counties, had at least one deputy coroner. KY. CORONER DIR. 2011, *supra* note 92. Jefferson and Fayette counties have the most deputy coroners with twelve and seven respectively. *Id.*

⁹⁷ KY. REV. STAT. ANN. § 72.415(2) (West 2011).

⁹⁸ KY. REV. STAT. ANN. § 72.415 (West 2011). For a full list of the circumstances identified as "coroners' cases," see KRS 72.025. KY. REV. STAT. ANN. § 72.025 (West 2011). Coroners have the power of arrest, bear arms, administer oaths, enter upon public or private premises for the purpose of making investigations, seize evidence, interrogate persons, impound vehicles involved in vehicular deaths, employ special investigators and photographers, and expend funds for the purpose of carrying out the KRS provisions on coroners. KY. REV. STAT. ANN. § 72.415(1) (West 2011).

⁹⁹ KY. REV. STAT. ANN. § 72.410(2) (West 2011). Coroners and deputy coroners "act as [] liaison[s] between the police and the medical examiner's office in the investigation of various types of deaths" within the Commonwealth. *Investigations*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/Coroner/investigations.htm> (last visited June 20, 2011). An "inquest" is "an examination . . . into the causes and circumstances of any death which is a coroner's case by a jury of six (6) residents of the county impaneled and selected by the coroner to assist him[/her] in ascertaining the cause and manner of death." KY. REV. STAT. ANN. § 72.405(3) (West 2011); *see also* Interview with David Jones, *infra* note 90 (noting that inquests were more common over twenty years ago).

¹⁰⁰ KY. REV. STAT. ANN. § 72.405(4) (West 2011); *see also* Interview with David Jones, *supra* note 99.

¹⁰¹ *Forensic Library: Autopsy Protocol*, KY. CORONERS ASS'N, <http://www.coroners.ky.gov/NR/rdonlyres/D96EE84C-BB83-41D1-96C5->

coroners conduct post-mortem examinations and only the MEO's medical examiners conduct autopsies.¹⁰²

Coroners also have the power to obtain and possess any "objects, medical specimens, or articles which, in his/her opinion, may be helpful in establishing the cause of death" and the coroner has the power to determine how those objects are tested by the Commonwealth's medical examiners.¹⁰³ In practice, the Commonwealth's medical examiners decide which tests are medically necessary to determine cause and manner of death in the cases referred to their offices.¹⁰⁴ In the event of a criminal prosecution, the coroner maintains this evidence, and any reports made regarding the evidence, until the prosecuting attorney requests it, unless otherwise directed by the Commonwealth courts.¹⁰⁵ However, in cases in which the medical examiner is involved, the evidence will be forwarded to the MEO, where it will be retained during the course of the criminal investigation.¹⁰⁶ KRS 72.470 grants immunity to a coroner or deputy coroner, "acting in good faith within the scope of his[/her] official duties, . . . from any civil liability that may otherwise be incurred or imposed."¹⁰⁷

c. Accreditation, Certification and Training of County Coroners

Kentucky's elected coroners are not required to obtain certification or undergo training. However, Commonwealth law provides that a coroner who successfully completes the initial basic training course and at least eighteen hours of approved training annually is entitled to a salary of \$200 to \$400 more per month than a coroner who does not complete the training.¹⁰⁸

Deputy coroners, on the other hand, are required, as a condition of their office, to receive and maintain certification by completing the DOCJT's basic training and a minimum of eighteen hours of continuing education each year.¹⁰⁹ Deputy coroners who are physicians licensed to

311894E54F54/0/2009PandPSectionF.pdf (last visited June 20, 2011). If a coroner declines to order an autopsy to be conducted by the MEO, prosecutors and law enforcement officials can petition the district or circuit court to order the MEO to conduct an autopsy. KY. REV. STAT. ANN. § 72.445 (West 2011) (noting that "[i]n granting or denying such request, the court shall determine whether or not reasonable grounds exist for believing that the decedent may have died as a result of a criminal act").

¹⁰² Interview with David Jones, *supra* note 99; *Investigations*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/Coroner/investigations.htm> (last visited June 20, 2011).

¹⁰³ KY. REV. STAT. ANN. § 72.020(2) (West 2011). In practice, law enforcement conducting homicide investigations typically maintain control and possession of such objects. Statement of Hon. Gordie Shaw, Commonwealth's Attorney, Fourteenth Judicial Circuit of Ky., February 2, 2011 (on file with author).

¹⁰⁴ Email to Paula Shapiro from Dr. Tracey Corey, Chief Medical Examiner, Ky. State Med. Examiner's Office, Jan. 5, 2011 (on file with author). If a coroner requests a test to be performed that a medical examiner believes is not necessary, the coroner may have that test performed at his/her expense, rather than on the expense of the MEO. *Id.*

¹⁰⁵ KY. REV. STAT. ANN. § 72.020(2) (West 2011).

¹⁰⁶ Email from Dr. Tracey Corey, *supra* note 104.

¹⁰⁷ KY. REV. STAT. ANN. § 72.470 (West 2011).

¹⁰⁸ KY. REV. STAT. ANN. § 64.185(1) (West 2011).

¹⁰⁹ KY. REV. STAT. ANN. § 72.415(2) (West 2011) (requiring training course for deputy coroners); *Introduction*, KY. CORONERS ASS'N, <http://www.coroners.ky.gov/Forensic+Library.htm> (last visited June 20, 2011). The KRS also permits additional compensation for certified deputy coroners. KY. REV. STAT. ANN. § 64.185(2) (West 2011).

practice medicine in Kentucky may be exempt from the certification requirement.¹¹⁰ The DOCJT's coroner training, which is available free of charge to all of the Commonwealth's coroners and deputy coroners, includes trainings on firearms, vehicular death investigation, fatal child investigation, arson investigation, and drug investigation deaths.¹¹¹ Uncertified coroners and deputy coroners cannot conduct death investigations or perform post-mortem examinations; thus they lose the power and authority of a coroner and may not be entitled to a salary.¹¹² In practice, coroners and deputy coroners obtain certification through the Commonwealth's DOCJT training program.¹¹³

Finally, the National Association of Medical Examiners (NAME) and the American Board of Medicolegal Death Investigators (ABMDI) are national organizations that accredit coroners and medical examiners.¹¹⁴ While we are aware of eight coroners or deputy coroners in Kentucky certified by ABMDI,¹¹⁵ we are not aware of any county coroner office in Kentucky whose office has received voluntary accreditation under NAME or any other national accreditation program.¹¹⁶ AMBDI and NAME accreditation are discussed below.¹¹⁷

i. ABMDI

¹¹⁰ KY. REV. STAT. ANN. §§ 72.405(5), 72.415(2), 72.265 (West 2011) (instead of DOCJT training, courses from other organizations may be substituted if approved by the Justice and Public Safety Cabinet).

¹¹¹ KY. REV. STAT. ANN. § 72.415(2) (West 2011); *Investigations*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/Coroner/investigations.htm> (last visited June 20, 2011).

¹¹² KY. REV. STAT. ANN. § 72.405(4)–(5) (West 2011) (defining a post-mortem examination as one conducted by a *certified* coroner or deputy coroner) (emphasis added); 84 Ky. Op. Att'y Gen. 355 (1984) (stating that generally, a uncertified coroner or deputy coroner may not perform post-mortem examinations, but there are exceptions to the certification requirements for licensed physicians); Interview with David Jones, *supra* note 99. Mr. Jones explained that although coroners, as constitutionally mandated positions, may not be fired, if they fail to obtain certification, they would almost certainly not be re-elected. *Id.* In addition, a “deputy coroner who failed to complete his or her training might not be entitled” to immunity from civil liability under KRS 72.470. KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2009 CORONER TRAINING SCHEDULE 7 (2009), *available at* <http://docjt.jus.state.ky.us/forms/Coroners/2009/Coroner2009.pdf>.

¹¹³ Telephone Interview by Paula Shapiro with Dr. Tracey Corey, Chief Medical Examiner, and Mandy Combest, Executive's Staff Advisor, Ky. State Med. Examiner's Office, Nov. 24, 2010 (on file with author); Interview with David Jones, *supra* note 99; KY. REV. STAT. ANN. § 72.405(5) (West 2011).

¹¹⁴ NAME accredits coroner's offices; medical examiner systems, which includes satellite offices where autopsies are performed; and individual medical examiner offices. NAT'L ASS'N OF MED. EXAMINERS, INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 2, July 2009, *available at* http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME MANUAL]. ABMDI “certifies individuals who have the proven knowledge and skills necessary to perform medicolegal death investigations.” AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited June 20, 2011).

¹¹⁵ *Registry Diplomates*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-database> (last visited June 20, 2011) (typing in and searching under Kentucky, which lists five coroners).

¹¹⁶ *NAME Accredited Offices*, NAT'L ASS'N OF MED. EXAMINERS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited June 20, 2011) (The Office of the Chief Medical Examiner in Jefferson County has received a full accreditation). For more information on NAME, please see the next section on Medical Examiners, *infra* notes 151–161 and accompanying text.

¹¹⁷ See *infra* notes 118–127, 151–161 and accompanying text.

ABMDI is a voluntary, independent professional certification board for medicolegal death investigators.¹¹⁸ ABMDI's certification program certifies coroners and personnel within medical examiner offices "who have proven knowledge and skills necessary to perform medicolegal death investigations" as set forth in the National Institutes of Justice 1999 publication *Death Investigation: A Guide for the Scene Investigator (NIJ Guide)*.¹¹⁹

ABMDI certifies forensic specialists as "Registry Diplomates" or "Board Certified Fellows."¹²⁰ In order to become a Registry Diplomate, an individual must be at least eighteen years old, have a high school diploma or equivalent, be employed at the time of both application and examination in a Medical Examiner or Coroner office with the responsibility to "conduct death scene investigations," and have a minimum of 640 hours of death investigation experience.¹²¹ The applicant also must successfully complete the 240 multiple choice questions on the ABMDI Registry Examination, testing "factual knowledge, technical information, [and] understanding the principles and problem-solving abilities related to the profession," based on the *NIJ Guide*.¹²² The examination is divided into eight sections covering the following test subject areas: "(1) Interacting with Federal, State and Local Agencies; (2) Communicating; (3) Interacting with Families; (4) Investigating Deaths; (5) Identifying and Preserving Evidence; (6) Maintaining Ethical and Legal Responsibilities; (7) Demonstrating Scientific Knowledge; and (8) Coping with Job-Related Stress."¹²³ Certification as an ABMDI Registered Diplomate lasts five years, during which time the certified individual must complete a minimum of forty-five hours of approved continuing education.¹²⁴

Registry Diplomates who have been in good standing for a minimum of six months are eligible to become "Board Certified Fellows," provided the individual has an associate's degree from a post-secondary educational institution, and has a minimum of 4,000 hours of experience in medicolegal death investigation in the past six years.¹²⁵ Applicants must successfully complete a Board Certification Examination, which is comprised of both a "Performance Section," in which the applicant must analyze medicolegal death investigation scenes, and a "Multiple Choice Section," which consists of 240 questions on "(1) Investigating Specific Death Scenes, (2) Investigating Multiple Fatalities, (3) Investigating Atypical Death Scenes, (4) Investigating

¹¹⁸ AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited June 20, 2011). In 2005, ABMDI received accreditation from the Forensic Specialties Accreditation Board. FORENSIC SPECIALTIES ACCREDITATION BD., <http://www.thefsab.org/> (last visited June 20, 2011). The Forensic Specialties Accreditation Board is "a mechanism whereby the forensic community can assess, recognize and monitor organizations or professional boards that certify individual forensic scientists or other forensic specialists." *Id.*

¹¹⁹ AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited June 20, 2011).

¹²⁰ *Id.*

¹²¹ *Registry Certification (Basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited June 20, 2011).

¹²² *Id.*; U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, DEATH INVESTIGATION: A GUIDE FOR THE SCENE INVESTIGATOR (Nov. 1999), available at <http://www.ncjrs.gov/pdffiles/167568.pdf>.

¹²³ *Registry Certification (Basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited June 20, 2011).

¹²⁴ *Recertification*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=recertification> (last visited June 20, 2011).

¹²⁵ *Board Certification (Advanced)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-certification-advanced> (last visited June 20, 2011).

Institutional Deaths, (5) Demonstrating Leadership Skills, (6) Demonstrating Legal Knowledge, (7) Communication Skills, and (8) Demonstrating Advanced Forensic Science Knowledge.”¹²⁶ Upon completion, the individual will receive certification as an ABMDI Certified Fellow for a period of five years.¹²⁷

2. Kentucky State Medical Examiner’s Office (MEO)

Kentucky established the MEO in order to assist the Commonwealth’s coroners in all aspects of death investigation, including determining the cause and manner of death, identification of the deceased, and collection and interpretation of trace evidence.¹²⁸ The MEO employs medical examiners who perform medicolegal death investigations, including autopsies, post-mortem examinations, and scientific testing, at the request of county coroners.¹²⁹ The MEO maintains four offices and autopsy facilities: the Office of the Chief Medical Examiner in Louisville,¹³⁰ the Office of the Associate Chief Medical Examiner in Frankfort,¹³¹ the Western Kentucky Regional Medical Examiner's Office in Madisonville,¹³² and the Northern Kentucky Regional Medical Examiner's Office in Fort Thomas.¹³³

a. Appointment and Qualification Requirements for Medical Examiners

The Commonwealth’s MEO is led by a Chief Medical Examiner appointed by the Secretary of the Kentucky Justice and Public Safety Cabinet (Cabinet).¹³⁴ The Chief Medical Examiner is “responsible for all matters relating to forensic pathology and forensic toxicology and other duties assigned by the Secretary.”¹³⁵ Under Kentucky law, an individual must be a forensic pathologist certified by the American Board of Pathology in order to be eligible for the position of Chief Medical Examiner.¹³⁶ The Chief Medical Examiner reports to the Cabinet Secretary and is authorized to employ such staff as necessary to perform the forensic duties, functions, and responsibilities of the office.¹³⁷

¹²⁶ *Id.*

¹²⁷ *Recertification*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=recertification> (last visited June 20, 2011).

¹²⁸ KY. REV. STAT. ANN. § 72.210 (West 2011) (noting that “it is not the intention of the General Assembly to abolish or interfere with the coroner in his role as a constitutionally elected peace officer. It is the intent of the General Assembly for the [MEO] to aid, assist, and complement the coroner in the performance of his duties by providing medical assistance to him in determining causes of death.”); Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113. Trace evidence “refers to the size and quantities of evidence that can be collected. Paint chips, a few bits of glass, and soil stuck to shoes are examples.” KSP EVIDENCE GUIDE, *supra* note 9, at 49.

¹²⁹ 2009 MEO ANNUAL REPORT, *supra* note 92, at 5.

¹³⁰ *Id.* at 44.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ KY. REV. STAT. ANN. §§ 15A.020(1)(e), 72.240 (West 2011).

¹³⁵ KY. REV. STAT. ANN. §§ 15A.020(3)(e), 72.240 (West 2011).

¹³⁶ KY. REV. STAT. ANN. § 72.240(1) (West 2011). For a description of the American Board of Pathology requirements for certification and re-certification, see *Requirements for Primary and Subspecialty Certifications*, AM. BD. OF PATHOLOGY, <http://www.abpath.org/2011BookletofInformation.pdf> (last visited June 20, 2011).

¹³⁷ KY. REV. STAT. ANN. § 15A.020(3)(e) (West 2011).

By statute, the Cabinet can appoint additional physicians licensed to practice medicine in Kentucky or can designate county or district health officers as county or district medical examiners.¹³⁸ In practice, the Chief Medical Examiner makes employment decisions on medical examiners, technicians, and other staff members at the MEO.¹³⁹ All medical examiner offices in Kentucky are staffed by forensic pathologists who are certified by the American Board of Pathology and/or board-eligible and who have completed at least five years of post-graduate training in forensic pathology.¹⁴⁰ As of December 1, 2010, the Kentucky MEO employs twelve full-time forensic pathologists, including the Chief Medical Examiner and the Associate Chief Medical Examiner, and one part-time forensic pathologist, all of whom perform approximately 2,500 autopsies annually.¹⁴¹

b. Powers and Duties of Medical Examiners

There are six basic functions of the Kentucky State Medical Examiner Office:

- (1) Determine the cause and manner of death of individual decedents in a timely fashion;
- (2) Identify the dead with a high degree of certainty and written documentation;
- (3) Prepare and maintain accurate, thorough, and timely reports regarding examinations and opinions;
- (4) Safeguard and account for evidence and personal property;
- (5) Maintain confidentiality of case information; and
- (6) Base expert opinions on logical conclusions after considering all historical and physical evidence available, in light of current scientific and medical knowledge.¹⁴²

A medical examiner becomes involved in a death investigation at the discretion of the county coroner whose county in which the decedent is found.¹⁴³ However, it is ultimately the medical examiner's responsibility to determine the type and extent of the examination medically necessary to establish the cause and manner of death.¹⁴⁴ According to the MEO, Kentucky's medical examiners perform a full autopsy in every homicide occurring within the Commonwealth.¹⁴⁵ Since September 2008, Kentucky's MEO has contracted with AIT Laboratories, Inc., in Indianapolis, Indiana, for toxicology screenings, including the detection, identification and quantification of alcohol and other drugs in biological specimens.¹⁴⁶

¹³⁸ KY. REV. STAT. ANN. § 72.240(2) (West 2011).

¹³⁹ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁴⁰ 2009 MEO ANNUAL REPORT, *supra* note 92, at 6. However, the Madisonville forensic pathologist previously had been board-eligible, but that eligibility has expired. Email from Dr. Tracey Corey, *supra* note 104.

¹⁴¹ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁴² 2009 MEO ANNUAL REPORT, *supra* note 92, at 5.

¹⁴³ *Id.* at 6–7. Law enforcement investigators also may obtain a court order authorizing the involvement of the MEO in the rare event that the coroner declines to provide such authorization. *Id.*

¹⁴⁴ Email from Dr. Tracey Corey, *supra* note 104; 2009 MEO ANNUAL REPORT, *supra* note 92, at 7.

¹⁴⁵ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁴⁶ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113; *ABFT Accredited Forensic Toxicology Laboratories*, AM. BD. OF FORENSIC TOXICOLOGY, http://abft.org/index.php?option=com_content&view=article&id=55&Itemid=64 (last visited Nov. 18, 2010) (listing

In addition to performing autopsies and post-mortem examinations, Kentucky's medical examiners and forensic pathologists routinely consult with law enforcement officials, prosecutors, and defense attorneys regarding aspects of criminal investigations, including blood spatter analysis, crime scene investigation and toxicology interpretation, meeting with decedents' families, and providing expert testimony in courts throughout Kentucky.¹⁴⁷ The MEO also provides clinical forensic medicine services.¹⁴⁸ The staff also provides assistance to DOCJT's programs for coroners and law enforcement officers, particularly on the identification, collection, and preservation of bodily evidence.¹⁴⁹

c. Accreditation of Medical Examiner Offices and Certification

One branch within Kentucky's MEO, the Office of the Chief Medical Examiner in Louisville, has obtained voluntary accreditation through the National Association of Medical Examiners (NAME).¹⁵⁰

NAME is the primary accrediting entity for medical examiner offices.¹⁵¹ NAME accreditation "attests that an office has a functional governing code, adequate staff, equipment, training, and a suitable physical facility and produces a forensically documented accurate, credible death investigation product."¹⁵² The NAME accreditation process for medical examiner offices is similar to the ASCLD/LAB accreditation process associated with forensic laboratories. The applicant must perform a self-inspection using the NAME Accreditation Checklist,¹⁵³ file an application, and undergo an external inspection to evaluate whether the facility meets the NAME Standards for Accreditation.¹⁵⁴

The external inspection is conducted by a NAME inspector, who will "systematically examine in detail each question on the [Accreditation] Checklist with the chief medical examiner . . . or his

accreditation for AIT Laboratories, Inc.). Prior to September of 2008, all necessary toxicology screenings were conducted in house by the MEO's Toxicology Office. Interview with David Jones, *supra* note 99.

¹⁴⁷ 2009 MEO ANNUAL REPORT, *supra* note 92, at 6. See also Jacinta F. Manning, *Speaking for the Dead: An In-Depth Look at the Kentucky Medical Examiner's Officer*, KY. LAW ENFORCEMENT NEWS, Sept. 2005, at 36.

¹⁴⁸ 2009 MEO ANNUAL REPORT, *supra* note 92, at 6.

¹⁴⁹ *Id.* at 8.

¹⁵⁰ NAME Accredited Offices, NAT'L ASS'N OF MED. EXAMINERS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited June 20, 2011). The other accrediting body for medical examiners and medical examiner offices is the American Board of Forensic Toxicology (ABFT), which accredits laboratories and individual forensic toxicologists, has "establish[ed] and enhance[d] voluntary standards for the practice of forensic toxicology and for the examination and recognition of scientists and laboratories providing forensic toxicology services." AM. BD. OF FORENSIC TOXICOLOGY, www.abft.org (last visited June 20, 2011). As indicated above, the toxicology laboratory that performs all toxicology testing for the MEO is accredited by the American Board of Forensic Toxicology. See *supra* note 146.

¹⁵¹ NAS REPORT 2009, *supra* note 2, at 258 ("Currently, the standard for quality in death investigation for medical examiner offices is accreditation by NAME").

¹⁵² *Id.*

¹⁵³ NAT'L ASS'N OF MED. EXAMINERS, NAME INSPECTION AND ACCREDITATION CHECKLIST, 2-6 (2d ed. 2009), available at http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME ACCREDITATION CHECKLIST].

¹⁵⁴ NAME MANUAL, *supra* note 114, at 61-65.

or her representative.”¹⁵⁵ The checklist contains a series of questions designated as “essential” or “non-essential” criteria.¹⁵⁶ Essential requirements include whether

- (1) The office has a written and implemented policy or standard operating procedure, signed within the last two years, covering facility maintenance, security, and personnel issues;
- (2) The Chief Medical Examiner or the Coroner’s autopsy surgeon is a forensic pathologist certified by the American Board of Pathology and has at least two years of forensic pathology work experience beyond forensic pathology residency/fellowship training; and
- (3) There are written and implemented qualifications established for medical investigators.¹⁵⁷

The inspection report must be submitted to NAME within thirty days of the inspection.¹⁵⁸ The report concludes with a recommendation for full accreditation, provisional accreditation, or non-accreditation.¹⁵⁹ In order to obtain full accreditation, the applicant may not have more than fifteen “non-essential” criteria deficiencies and may not have any “essential” criteria deficiencies.¹⁶⁰ Full accreditation is conferred for a maximum period of five years from the date the accreditation is given.¹⁶¹

¹⁵⁵ *Id.* at 65.

¹⁵⁶ *Id.* at 57. (Note that we have adopted language inconsistent with NAME, where NAME’s “Phase I” are “non-essential” criteria and “Phase II” are “essential” criteria).

¹⁵⁷ NAME ACCREDITATION CHECKLIST, *supra* note 153, at 2–4, 24, 26.

¹⁵⁸ NAME MANUAL, *supra* note 114, at 67.

¹⁵⁹ *Id.* at 68.

¹⁶⁰ *Id.* at 69.

¹⁶¹ *Id.*

II. ANALYSIS

A. 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.

Accreditation means that a “laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements.”¹⁶² As explained in the 2009 National Academy of Sciences report on forensic science (*NAS Report*), “[l]aboratory accreditation and individual certification of forensic science professionals should be mandatory” and all forensic laboratories should “establish routine quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners.”¹⁶³

Crime Laboratories

The Commonwealth of Kentucky does not require the accreditation of forensic laboratories. However, since 2005 three of the six locations of the Kentucky State Police Forensic Laboratory (KSP Laboratory), including the Northern Laboratory in Cold Springs, the Central Laboratory in Frankfort, and the Jefferson Laboratory in Louisville, have voluntarily obtained accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) under its *Legacy* Accreditation Program.¹⁶⁴ As stated in the Factual Discussion, ASCLD/LAB now only permits laboratories to obtain accreditation under its *International* Program, which is a more rigorous program based on the 17025:2005 standards developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).¹⁶⁵

¹⁶² NAS REPORT 2009, *supra* note 2, at 195 (also recognizing that “accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes best practices in every case . . .”).

¹⁶³ *Id.* at 215.

¹⁶⁴ ASCLD/LAB Accredited Laboratories, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/accreditedlabs.html#ky> (last visited June 20, 2011); Interviews with Laura Sudkamp, *supra* note 9. The 2003 KSP Annual Report stated that the Ashland and Madisonville laboratories are “in need of a new facility in order to obtain their certification,” and we are unaware of any change in facilities. KY. STATE POLICE, 2003 ANNUAL REPORT 27 (2003), available at http://www.kentuckystatepolice.org/pdf/KSP_ANREP_03.pdf [hereinafter 2003 KSP ANNUAL REPORT]. KSP Northern Laboratory is ASCLD/LAB-accredited in controlled substances, toxicology (blood alcohol only) and biology (serology only); KSP Central Laboratory is ASCLD/LAB-certified in controlled substances, toxicology, trace evidence, biology, and firearms/toolmarks; and KSP Jefferson Laboratory is accredited in controlled substances, toxicology (blood alcohol only), biology (serology only), and firearms/toolmarks. 2003 KSP ANNUAL REPORT, *supra*. All three accreditations, originally effective August 3, 2005, were extended through August 2, 2011, as the laboratories apply for ASCLD/LAB-*International* accreditation. Letter from Ralph M. Keaton, Executive Director, ASCLD/LAB to Laura Sudkamp, Director, KSP Forensic Lab. (Jan. 26, 2011), available at http://www.ascl-d-lab.org/cert/extensions/KSP-2nd_Ext.pdf.

¹⁶⁵ *Programs of Accreditation*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited June 20, 2011). See also ABA, RECOMMENDATION 100E, 2010 Ann. Mtg. (adopted Aug. 9–10, 2010), available at www.abanet.org/leadership/2010/annual/docs/100e.doc (urging the federal government to provide funding and resources sufficient to facilitate the accreditation of crime laboratories under standards such as ISO/IEC 17025:2005); NAS REPORT 2009, *supra* note 2, at 215 (“In determining appropriate standards for accreditation and

KSP Laboratory submitted an application for ASCLD/LAB-*International* accreditation for all six of its laboratories in December 2010.¹⁶⁶

As a prerequisite for accreditation, both ASCLD/LAB-*Legacy* and -*International* programs require laboratories to take measures to ensure the validity, reliability, and timely analysis of forensic evidence. For example, the *Legacy* program requires the laboratory to possess clearly written procedures for handling and preserving the integrity of the evidence; preparing, storing, securing, and disposing of case records and reports; and for maintaining and calibrating equipment.¹⁶⁷ Similarly, the *International* program requires the laboratory to establish and maintain procedures for identifying, collecting, indexing, accessing, filing, storing, maintaining, and disposing of quality and technical reports.¹⁶⁸ Both programs also require the laboratory to maintain a written quality assurance manual.¹⁶⁹

As required, KSP Laboratory has adopted formal written policies and procedures to ensure the validity, reliability, and timely analysis of forensic evidence. Specifically, the KSP Laboratory adopted a Quality Assurance Manual and formal procedures providing for the proper collection and storage of all evidence submitted for testing and the appropriate manner of maintaining the chain of custody and security of such evidence.¹⁷⁰ Additionally, KSP Laboratory has written procedures for proper sterilization and calibration of instruments used during DNA testing, as well as requirements for documenting all aspects of DNA analysis procedure.¹⁷¹ According to the Manager of the KSP Central Forensic Laboratory, KSP Laboratory's written policies and procedures govern all six of KSP's laboratories, regardless of accreditation status.¹⁷²

Both ASCLD/LAB-*Legacy* and -*International* accreditation programs also require laboratory personnel to possess certain qualifications. For example, *Legacy* requires forensic examiners to possess a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony required, and an understanding of the necessary instruments, methods, and procedures.¹⁷³ The examiners must

certification, the National Institute of Forensic Science (NIFS) should take into account established and recognized international standards, such as those published by the International Organization for Standardization (ISO).")

¹⁶⁶ Interviews with Laura Sudkamp, *supra* note 9.

¹⁶⁷ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 24–25. Written procedures “minimize, to the greatest extent reasonably possible, potential bias and sources of human error in forensic practice.” NAS REPORT 2009, *supra* note 2, at 24.

¹⁶⁸ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at 1; *INTERNATIONAL SUPPLEMENTAL REQUIREMENTS*, *supra* note 55, at 2.

¹⁶⁹ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 24–25; ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 25, at 3; *INTERNATIONAL SUPPLEMENTAL REQUIREMENTS*, *supra* note 55, at 7.

¹⁷⁰ See, e.g., KSP FORENSIC LAB., KSP LABORATORY QUALITY ASSURANCE MANUAL (Nov. 25, 2010) (on file with author) (Standard 5.8.1 *Evidence Control System*); KSP EVIDENCE GUIDE, *supra* note 9; KSP FORENSIC LAB., CONTROLLED SUBSTANCES QUALITY ASSURANCE MANUAL (rev. June 7, 2010) (on file with author).

¹⁷¹ See, e.g., KSP FORENSIC LAB., FORENSIC BIOLOGY ANALYTICAL PROTOCOL MANUAL (rev. Nov. 19, 2010) (on file with author); KSP FORENSIC LAB., SEROLOGY TRAINING MANUAL (Apr. 8, 2010) (on file with author); KSP FORENSIC LAB., FORENSIC BIOLOGY/DNA DATABASE QUALITY ASSURANCE MANUAL (Mar. 31, 2010) (on file with author).

¹⁷² Interviews with Laura Sudkamp, *supra* note 9.

¹⁷³ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 11, 41–54. See also ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 52, at 25 (noting that ASCLD/LAB has “adopted a comprehensive Proficiency Review Program (PRP) and established a Proficiency Review Committee (PRC) for each of the accredited disciplines”);

also successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.¹⁷⁴

In practice, although personnel are not required by the Commonwealth to obtain certification, KSP Laboratory requires laboratory personnel at each of KSP's six laboratories to possess a degree and specialized training relevant to his/her crime laboratory specialty, as well as to undergo annual proficiency tests to ensure the proper analysis of each type of evidence.¹⁷⁵

However, inadequacies and recent criticism of the ASCLD/LAB-*Legacy* accreditation process underscore the need for Commonwealth crime laboratories to adhere to the standards set forth in ISO/IEC 17025:2005. Unlike the *Legacy* program, there are no optional requirements for quality management systems and technical operations of laboratories under the ASCLD/LAB-*International* standards; each requirement must be met for accreditation.¹⁷⁶ The *International* program has an additional requirement for an annual surveillance visit, during which "any issues that may have come to the attention of ASCLD/LAB and/or requirements selected by ASCLD/LAB are reviewed."¹⁷⁷ Furthermore, *International* accreditation bars ASCLD Consulting, a for-profit corporation that received criticism for working with applicant laboratories to meet *Legacy* accreditation requirements, from consulting with laboratories on their applications for *International* accreditation.¹⁷⁸ Finally, a criticism of both ASCLD/LAB accreditation programs is that the determination of whether to confer accreditation on a particular

NAS REPORT 2009, *supra* note 2, at 59 ("Because of the distinctly different professional tracks within larger laboratories, for example, technicians perform tests with defined protocols, and credentialed scientists conduct specialized testing and interpretation.").

¹⁷⁴ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 37–50; KSP FORENSIC LAB., LABORATORY ADMINISTRATIVE PROTOCOLS (2010) (effective Apr. 26, 2010) (on file with author) (listing the job qualifications and responsibilities of forensic scientists, evidence technicians, quality assurance managers, and technical leaders, among others).

¹⁷⁵ KSP FORENSIC LAB., LABORATORY ADMINISTRATIVE PROTOCOLS (2010) (effective Apr. 26, 2010) (on file with author) (including a section on *Proficiency Test Processing*); Interviews with Laura Sudkamp, *supra* note 9.

¹⁷⁶ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 52, at 13–14; ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 23, at 84, app. 3.

¹⁷⁷ NAS REPORT 2009, *supra* note 2, at 199; ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 52, at 23–28.

¹⁷⁸ Joseph Neff & Mandy Locke, *Forensic Groups Ties Raise Concerns*, NEWS & OBSERVER, Oct. 13, 2010, <http://www.newsobserver.com/2010/09/26/703376/forensic-groups-ties-raise-concerns.html> (last visited June 20, 2011). The deficiency of the ASCLD/LAB-*Legacy* accreditation program is perhaps best illustrated by the failures of North Carolina's *Legacy*-accredited State Bureau of Investigations (SBI). After the highly publicized exoneration of Gregory Taylor in 2010, an independent evaluation of the SBI's practices from January 1987 through January 2003, during which time the SBI was accredited through the ASCLD/LAB-*Legacy* program, raised "serious issues about laboratory reporting practices . . . and the potential that information that was material and even favorable to the defense of criminal charges was withheld or misrepresented." N. CAROLINA ATT'Y GEN. OFFICE, AN INDEPENDENT REVIEW OF THE SBI FORENSIC LABORATORY 4 (2010), *available at* http://www.ncaj.com/file_depot/0-10000000/0-10000/9208/folder/88864/Independent+Review+of+SBI+Forensic+LAB.pdf. Despite SBI's *Legacy*-accreditation since 1988, the independent review of SBI's practices during that time identified 230 cases in which laboratory reports similar to those in Taylor's case existed. For example

[C]ases in which the presumptive tests yielded 'positive indications for the presence of blood,' but were subsequent confirmatory tests reflecting 'negative' or 'inconclusive' results were omitted from the final report. The final report in such cases, then, would only indicate the positive results of the less sensitive presumptive test for blood.

Id. at 3.

laboratory is made by the ASCLD/LAB Board of Directors, a group of fellow laboratory directors from other ASCLD/LAB-accredited laboratories, effectively making any inspection of a Kentucky laboratory a peer review, which, in turn, may affect the impartiality of the accreditation process.¹⁷⁹

Finally, as noted in the Factual Discussion, various types of forensic testing, such as video and computer forensics, transcription, polygraph testing, serial number restoration, and ballistics testing, is conducted in non-laboratory settings in law enforcement agencies unaffiliated with KSP Laboratory throughout the Commonwealth.¹⁸⁰ In addition, the KSP Criminal Identification and Records Branch runs the Commonwealth's Automated Fingerprint Identification System (AFIS) in a separate laboratory in Frankfort, and the KSP's Communications and Computer Technology Branch provides forensic-based computer examination and technical assistance to the Commonwealth's law enforcement agencies.¹⁸¹ Neither of these additional KSP branches nor the Commonwealth's smaller law enforcement agencies conducting limited forensics are accredited by any national accrediting body, including ASCLD/LAB.¹⁸²

Medical Examiner and Coroners Offices

The Kentucky State Medical Examiner's Office

The Commonwealth does not require the Kentucky State Medical Examiner's Office (MEO) to obtain accreditation prior to conducting medicolegal death investigations.¹⁸³ However, one of

¹⁷⁹ See *supra* text accompanying notes 49, 80; see also Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000). Furthermore, while Lead Assessors or Inspectors conducting the requisite site-assessments are usually ASCLD employees, occasionally the Lead Assessor may be a volunteer from the ASCLD/LAB Delegates Assembly, which is also comprised of the ASCLD/LAB-accredited laboratories' directors. *Id.* ("This peer-to-peer composition of ASCLD Inspectors creates the potential for conflicts in the close-knit forensic community. If an Inspector is perceived as being too rough on a laboratory, it could limit his or her career opportunities at sister laboratories. Or consider the fact that representatives from the laboratory that I audit today may show up on my doorstep next month to audit my laboratory."); ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 23, at 8–9; ASCLD/LAB-INTERNATIONAL OVERVIEW, *supra* note 52, at 12–14.

¹⁸⁰ Interview with Sergeant Allen Dobson, *supra* note 86 (noting that although the Division may be capable to perform ballistics testing, Lexington does not currently employ staff able to perform the tests); *Bureau of Investigation Phone Directory*, LEXINGTON DIV. OF POLICE, <http://www.lexingtonky.gov/index.aspx?page=97> (last visited June 20, 2011); *Units/Sections*, LOUISVILLE METRO POLICE DEP'T, <http://www.louisvilleky.gov/MetroPolice/Units+and+Sections> (last visited June 20, 2011).

¹⁸¹ *Organizational Units*, KY. STATE POLICE, <http://www.kentuckystatepolice.org/text/ksporgan.htm> (last visited June 20, 2011).

¹⁸² *ASCLD/LAB Accredited Laboratories*, AM. SOC'Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#ky> (last visited June 20, 2011). See NAS REPORT 2009, *supra* note 2, at 200, (calling for the accreditation of all offices or laboratories performing forensic science analysis particularly because "some [forensic science] disciplines are practiced largely outside the laboratory environment (e.g., 66 percent of fingerprint analyses are not conducted in crime laboratories)" and noting "there is a substantial gap in the number of [non-laboratory] programs participating in accreditation").

¹⁸³ In 2010, the ABA adopted a resolution that "continues the ABA's advocacy in favor of accreditation of medical examiners offices, examiner certification, adequate funding of laboratories and medical examiners offices." ABA, RECOMMENDATION 100G, 2010 Ann. Mtg. (adopted Aug. 9–10, 2010), *available at* <http://www.abanet.org/leadership/2010/annual/pdfs/100g.pdf> (urging "federal, state and territorial governments [to] provide funding and enact legislation necessary to support requiring that all offices charged with conducting medico-legal death investigation meet mandatory accreditation, certification or professional practice standards

the four MEO locations, the Office of the Chief Medical Examiner (OCME) in Louisville, has voluntarily applied and received accreditation through the National Association of Medical Examiners (NAME).¹⁸⁴

As a precondition to accreditation, NAME requires medical examiner offices to adopt and implement minimum standardized written procedures to ensure that “an office has a functional governing code, adequate staff, equipment, training, and a suitable physical facility and produces a forensically documented accurate, credible death investigation product.”¹⁸⁵ According to Kentucky’s Chief Medical Examiner, the MEO has adopted a set of written policies and procedures governing the operations of all four MEO offices, regardless of accreditation status.¹⁸⁶ NAME accreditation also requires medical examiner offices to utilize forensic toxicology laboratories that are accredited by the American Board of Forensic Toxicology (ABFT), or the College of American Pathologists (CAP), or that comply with the guidelines of the Society of Forensic Toxicologists (SOFT).¹⁸⁷ As of November 2008, AIT Laboratories, Inc., an ABFT-accredited toxicology laboratory, performs all of the MEO’s forensic toxicology testing.¹⁸⁸ Furthermore, according to the Chief Medical Examiner, the MEO’s caseloads do not exceed the NAME-recommended annual maximum of 250 caseloads per year.¹⁸⁹

As required for NAME accreditation, Kentucky requires its Chief Medical Examiner and Associate Chief Medical Examiner to be forensic pathologists certified by the American Board of Pathology.¹⁹⁰ Other MEO medical examiners hired to assist the Chief Medical Examiner may be physicians licensed to practice medicine in the Commonwealth.¹⁹¹ According to the Commonwealth’s Chief Medical Examiner, As of January 2011 three of the four medical examiner offices in Kentucky are staffed by licensed physicians who are board-certified forensic pathologists and who have completed at least five years of postgraduate training to become proficient in forensic pathology.¹⁹² The Chief Medical Examiner also states that the forensic

within a reasonable time frame,” and listing NAME and AMBDI as examples of potential independent accreditation and certification entities).

¹⁸⁴ *Accredited Offices, NAT’L ASS’N OF MED. EXAMINERS*, http://www.thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited June 20, 2011) (noting Kentucky’s OCME has full accreditation through Sept. 7, 2012). The OCME is one of fifty-seven medical examiner offices in the country to receive full accreditation through NAME. *Id.*

¹⁸⁵ NAS REPORT 2009, *supra* note 2, at 258.

¹⁸⁶ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁸⁷ See NAME ACCREDITATION CHECKLIST, *supra* note 153, at 17–18.

¹⁸⁸ *ABFT Accredited Forensic Toxicology Laboratories*, AM. BD. OF FORENSIC TOXICOLOGY, http://abft.org/index.php?option=com_content&view=article&id=55&Itemid=64 (last visited June 20, 2011). The MEO’s Toxicology Laboratory, which had performed the toxicology testing for the MEO until 2008, was unaccredited. Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁸⁹ NAS REPORT 2009, *supra* note 2, at 257; Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁹⁰ KY. REV. STAT. ANN. § 72.240(1) (West 2011); NAME ACCREDITATION CHECKLIST, *supra* note 153, at 24.

¹⁹¹ KY. REV. STAT. ANN. § 72.240(2) (West 2011). The KRS also provides that “[t]he cabinet may designate county or district health officers as county or district medical examiners” *Id.*

¹⁹² Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113; see also *supra* note 140 (noting that one medical examiner office is staffed by a forensic pathologist no longer eligible to be board-certified). However, a February 2011 NPR/Frontline report on death investigation in the U.S. listed ten out of the twelve forensic pathologists employed by the Kentucky MEO as certified, noting two were uncertified. *Autopsy Data: County Medical & Coroner Systems*, NAT’L PUB. RADIO, <http://www.npr.org/2011/02/02/133381758/autopsy-data> (last visited June 20, 2011). Also in the report, “Kentucky Chief Medical Examiner Tracey Corey acknowledged the

autopsy technicians and histologists working within the four MEO locations “have the requisite education, training, and certification for their positions.”¹⁹³

Additionally, the MEO’s individual medical examiners and/or forensic pathologists may also obtain individual certification by voluntary professional certification boards.¹⁹⁴

Kentucky’s County Coroners

The Commonwealth does not require coroners’ offices to be accredited, nor must elected coroners be certified.¹⁹⁵ Furthermore, the Kentucky Assessment is unaware of any Kentucky coroner's office that has received voluntary accreditation under NAME or other national accreditation entity.¹⁹⁶ Deputy coroners, however, must receive and maintain certification as a condition of office.¹⁹⁷ In practice, all Kentucky coroners and deputy coroners are certified and participate in the annual training provided by DOCJT.¹⁹⁸

In addition to certification through DOCJT, NAME and the American Board of Medicolegal Death Investigators (ABMDI) are the primary national organizations that accredit coroners and

[Commonwealth] employs a doctor who is not even eligible to take the forensic pathology test because she failed the anatomic pathology exam, which is a prerequisite. ‘I’m comfortable having her work because I know her competence,’ Corey said.” A.C. Thompson, et al., *Shortage of Death Detectives to Perform Autopsies*, NAT’L PUB. RADIO, Feb. 1, 2011, <http://www.npr.org/2011/02/01/133305939/shortage-of-death-detectives-to-perform-autopsies> (last visited June 20, 2011).

¹⁹³ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

¹⁹⁴ *But see* KY. REV. STAT. ANN. § 72.240 (West 2011) (imposing *some* certification qualifications on the Commonwealth’s medical examiners). We are aware of at least one medical examiner in Kentucky who is currently certified through American Board of Medicolegal Death Investigators (ABMDI), discussed *supra* at notes 118–127 and accompanying text.

¹⁹⁵ *See* Chapter 4 Factual Discussion on the requisite qualifications of elected coroners, *supra* note 95 and accompanying text. According to the 2009 NAS Report, “[m]ost coroner systems cannot qualify for accreditation because of problems related to size, insufficient staff and equipment, and insufficiently trained personnel, which inhibit their ability to perform a competent physical examination, make and/or exclude medical diagnoses on dead bodies, and make determinations of the cause and manner of death.” NAS REPORT 2009, *supra* note 2, at 258. Due to such inadequacies, the NAS recommends the eventual elimination of the coroner systems within the United States with the goal of transitioning to medical examiner systems. *Id.* at 267. Absent removal of the coroner position from the Kentucky Constitution, the Kentucky Death Penalty Assessment Team recommends that Kentucky require the certification of all coroners and the accreditation of all coroner offices.

¹⁹⁶ KY. CONST. § 100; *NAME Accredited Offices*, NAT’L ASS’N OF MED. EXAMINERS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited June 10, 2011). For more information on NAME, please see the Factual Discussion, *supra* notes 151–161 and accompanying text.

¹⁹⁷ KY. REV. STAT. ANN. §§ 72.415(1)–(2) (requiring a high school diploma or its equivalent for deputy coroners), 72.405(5) (providing an exception for deputy coroners who are licensed physicians), 15.380(5)(b) (West 2011) (exempting coroners from certification requirements).

¹⁹⁸ KY. REV. STAT. ANN. § 72.405(5) (West 2011); Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113; Interview with David Jones, *supra* note 99. The DOCJT, which provides entry-level and in-service training and certification to coroners and other law enforcement personnel, was the nation’s first public safety training academy to be accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA) under its Public Safety Training Academy Accreditation program. *CALEA Client Database*, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/calea-client-database> (type KY in state box and follow results) (last visited June 24, 2011); *Overview of DOCJT*, KY. DEP’T OF CRIMINAL JUSTICE TRAINING (DOCJT), <http://docjt.jus.state.ky.us/overview.html> (last visited June 20, 2011). For more information on the DOCJT and CALEA accreditation, please see Chapter 3, *supra* notes 7, 110, 112, and accompanying text.

their offices.¹⁹⁹ As of June 2011, there were only seven coroners and deputy coroners certified by ABDMI as Registered Diplomates and one coroner certified as a Board Certified Fellow.²⁰⁰

A February 2011 PBS Frontline/NPR/ProPublica special report on Death Investigation in America (*PBS Special Report*) discussed the 2009 National Academy of Sciences report on forensic science (*NAS Report*), noting that the *NAS Report* recommended eventual abolition of the U.S. coroner system due, in particular, to the inability of coroners without medical training and expertise to identify and determine possible causes of death.²⁰¹ According to the *PBS Special Report*, the *NAS Report* was “the fourth time a national study has recommended that death investigation should be carried out by doctors, and particularly doctors who have special expertise.”²⁰² The *PBS Special Report* also noted that coroners, “[o]n their best day, if they do not have the training, the skills, the infrastructure, the facility, the access to forensic science, they can't do a good job. It's a question of competency. How can you train someone [to perform medicolegal death investigations] who is not a physician?”²⁰³ Unfortunately, we were unable to determine exactly how many coroners and deputy coroners have received any medical education and training. The Kentucky Coroners Association's 2011 Coroners Master Directory lists only four out of the 120 coroners and four of the 313 deputy coroners as licensed physicians.²⁰⁴ The Jefferson County coroner is a board-certified forensic pathologist and two Jefferson County deputy coroners are registered nurses.²⁰⁵

Conclusion

Kentucky does not require the accreditation of its crime laboratories, medical examiner offices, and coroner offices. However, one of the four MEO's regional offices has obtained voluntary national accreditation through NAME and all six of the locations of the KSP Laboratory have either voluntarily obtained or are in the process of obtaining national accreditation through ASCLD/LAB. No coroner offices have voluntarily obtained accreditation. Additionally, while

¹⁹⁹ NAME accredits coroner's offices; medical examiner systems, which includes satellite offices where autopsies are performed; and individual medical examiner offices. NAME MANUAL, *supra* note 114, at 2. ABMDI certifies individual personnel working within medical examiner or coroner offices. AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited June 20, 2011).

²⁰⁰ *Registry Diplomates*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-database> (last visited June 20, 2011) (typing Kentucky in state box and searching, listing eight coroners). In addition, one medical examiner from the Office of the Chief Medical Examiner and one technician at the KSP Eastern Regional Crime Laboratory in Ashland, Kentucky, are certified Registry Diplomates. *Id.*; *Board Certified Fellows*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-diplomates> (last visited June 20, 2011).

²⁰¹ Sandra Bartlett, *Coroners Don't Need Degrees To Determine Death*, NPR, Feb. 2, 2011, <http://www.npr.org/2011/02/02/133403760/coroners-dont-need-degrees-to-determine-death> (last visited June 20, 2011); *Interview Dr. Marcella Fierro*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/post-mortem/interviews/marcella-fierro.html> (last visited June 20, 2011) (former Virginia Chief Medical Examiner).

²⁰² *Post Mortem: Death in America*, FRONTLINE/NPR/PROPUBLICA, Feb. 2, 2011, available at <http://www.pbs.org/wgbh/pages/frontline/post-mortem> (video archive).

²⁰³ *Id.*

²⁰⁴ KY. CORONER DIR. 2011, *supra* note 92 (listing Anderson, Boyd, Boyle, Kenton, and Shelby Counties as having eight coroners or deputy coroners with medical degrees, and one Anderson County deputy coroner who is an R.N.).

²⁰⁵ *Coroner*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/Coroner> (last visited June 20, 2011); *Deputy Coroners*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/Coroner/deputy+coroners.htm> (last visited June 20, 2011).

Kentucky has adopted certification requirements for the Commonwealth's medical examiners and deputy coroners, Kentucky does not require certification of elected county coroners or all KSP Laboratory analysts and technicians.²⁰⁶ Accordingly, Kentucky is in partial compliance with Recommendation #1.

The Team urges the Commonwealth to adopt legislation that requires accreditation of any forensic science office and certification of all forensic specialists operating in the Commonwealth in order to bring Kentucky into compliance with this Recommendation.

Furthermore, it is the Kentucky Assessment Team's view that such legislation should adhere to the 2009 *NAS Report*, which recommended that "[s]cientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."²⁰⁷ While the Kentucky Assessment Team commends KSP for attempting to minimize law enforcement involvement in forensic analysis by employing civilian analysts and a civilian crime laboratory manager, the six laboratories within the KSP Laboratory system are the only laboratories conducting criminal forensic analysis within the Commonwealth.²⁰⁸ KSP continues to control KSP Laboratory's funding, forcing KSP Laboratory to compete with KSP's other divisions for a portion of the State Police's fixed budget. In turn, KSP Laboratory's budget fluctuates depending upon the annual needs of the various divisions housed within the Kentucky State Police.²⁰⁹ Furthermore, indigent defense service providers in Kentucky, such as the Department of Public Advocacy, including its Innocence Project, routinely send biological evidence to out-of-state, private forensic laboratories because of KSP Laboratory's affiliation with law enforcement.

The Kentucky Assessment Team recommends that the Commonwealth's crime laboratory system be housed as a separate department under the Justice and Public Safety Cabinet, operating wholly independent of the KSP. By creating a forensic laboratory system independent of law enforcement, the Commonwealth can minimize undue external or internal pressure, which could otherwise affect the integrity, validity, and reliability of forensic analysis.²¹⁰

B. Recommendation #2

²⁰⁶ While we have not uncovered certification requirements for all forensic analysts involved in cases in which capital punishment could be sought, we note that Kentucky does require certification of breath alcohol technicians. See 500 KY. ADMIN. REGS. § 8:010 (2010) (on certification of breath analysis operators as required by KRS 189A.103(3)(b)). Such technicians do not typically conduct analyses for use in capital cases.

²⁰⁷ NAS REPORT 2009, *supra* note 2, at 23 ("Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting.")

²⁰⁸ Interviews with Laura Sudkamp, *supra* note 9.

²⁰⁹ The 2009 NAS Report also supports independence of forensic laboratories from law enforcement to enable labs to "set their own budget priorities and not have to compete with the parent law enforcement agencies." NAS REPORT 2009, *supra* note 2, at 184.

²¹⁰ See also ABA, RECOMMENDATION 100E cmt., 2010 Ann. Mtg. (adopted Aug. 9–10, 2010), available at www.abanet.org/leadership/2010/annual/docs/100e.doc (urging the federal government to "[a]dopt legislation or provide for the creation of standards that will reasonably ensure public and private laboratory management and staff are free from undue pressure, internal or external, commercial, financial or otherwise, that may affect the quality or integrity of the laboratory examination or analysis").

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding is needed to ensure that crime laboratories and medical examiners offices maintain the equipment needed to develop accurate and reliable results and to hire and retain a sufficient number of competent forensic scientists and staff to timely analyze forensic evidence.

Crime Laboratories

The Kentucky State Police Forensic Laboratory (KSP Laboratory) requests and receives its annual operating budget directly from KSP, rather than through biennial appropriations from the Kentucky General Assembly, as well as from federal grant funding from the National Institute of Justice (NIJ).²¹¹ The amount provided to KSP Laboratory from KSP fluctuates each year, depending on the needs of the State Police.²¹²

Included in the budget are the salaries of approximately 105 biology, chemistry, firearm/toolmark, breath-alcohol, and other technicians and forensic analysts, as well as administrative staff and photography laboratory staff.²¹³ In fiscal year 2009–2010, KSP Laboratory received allocations from the General Fund (\$7,408,603), additional State Funds²¹⁴ (\$3,102,716), federal funding (\$1,012,442), and Other Agency Restricted Accounts (\$94,217), totaling \$11,617,978.²¹⁵

KSP Laboratory either receives federal funding directly from NIJ or allocations from the Commonwealth's Justice and Public Safety Cabinet (Cabinet).²¹⁶ The Commonwealth of Kentucky and Louisville-Jefferson County Metro Government were also awarded NIJ grants for DNA testing and DNA backlog reductions.²¹⁷ From 2004 to 2010, KSP Laboratory received a total of \$4,166,746 through the NIJ's *Forensic DNA Backlog Reduction Program* in order "to reduce forensic DNA sample turnaround time, increase the throughput of public DNA laboratories and reduce DNA forensic casework backlogs."²¹⁸ KSP Laboratory also relies on

²¹¹ KSP FORENSIC LAB., FY09–10 LAB. BUDGET BREAKDOWN (2010) (on file with author) (provided to Paula Shapiro by Laura Sudkamp, Director, KSP Forensic Lab.); Interviews with Laura Sudkamp, *supra* note 9.

²¹² Interviews with Laura Sudkamp, *supra* note 9.

²¹³ *Id.*

²¹⁴ This figure is comprised of amounts provided to KSP under the Commonwealth's Road Fund, DNA Court Fees Fund, and DUI Court Fees Fund authorized by statutory authority. KSP FORENSIC LAB., FY09–10 LAB. BUDGET BREAKDOWN (2010) (on file with author); Interviews with Laura Sudkamp, *supra* note 9.

²¹⁵ KSP FORENSIC LAB., FY09-10 LAB. BUDGET BREAKDOWN (2010) (on file with author).

²¹⁶ See, e.g., *FY2009 Coverdell Report to Congress—Funding Table*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-funding-table.xls> (last visited June 20, 2011) (noting that the grant will be shared between the MEO and KSP Laboratory) [hereinafter *FY2009 Coverdell*].

²¹⁷ *Solving Cold Cases with DNA*, DNA INITIATIVE, http://www.dna.gov/funding/cold_case (last visited June 20, 2011) (provided to the Louisville-Jefferson County Metro Government); *Convicted Offender and/or Arrestee DNA Backlog Reduction Grant Program*, DNA INITIATIVE, <http://www.dna.gov/funding/convicted/grants> (last visited June 20, 2011) (provided to the Commonwealth of Kentucky). We were unable to determine how this funding was allocated between the Commonwealth's agencies.

²¹⁸ See *Backlog Reduction Funding Awards, 2004-2010*, PRESIDENT'S DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-funding.htm> (last visited June 20, 2011).

additional funding from NIJ's Paul Coverdell Forensic Sciences Improvement Grant Program (Coverdell Grant Program) each year.²¹⁹

Despite appropriations from the Kentucky General Assembly and federal funding, the Commonwealth's crime laboratory system is overburdened with an increasing caseload and a continual backlog of cases.²²⁰ To lessen the backlog, KSP Laboratory has placed limitations on the services it provides by outsourcing paternity and genealogical DNA testing, certain types of drug testing, and the testing of evidence where a suspect or victim may be related to an analyst in the system.²²¹ KSP Laboratory also limits the number of items law enforcement may submit for testing,²²² and prohibits additional testing or examinations of evidence if "the same or similar evidence in an individual case has been subjected previously to a technical examination in the same scientific field."²²³

Despite the limitations on evidence submissions and testing described above, extensive backlogs persist with estimated turnaround times for results being anywhere from two weeks to ten months, depending on the case type and evidence submitted for testing. Table 1, below, illustrates KSP Laboratory's backlog as of January 4, 2011.

²¹⁹ Interviews with Laura Sudkamp, *supra* note 9; Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-651 (codified at 42 U.S.C. § 3797(j), *et seq.*); *see also Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/welcome.htm> (last visited June 20, 2011).

²²⁰ Interviews with Laura Sudkamp, *supra* note 9. *See also* Steve Tellier, *Hundreds of Untested Rape Kits at Ky. Crime Lab: Experts Say Backlogs Can Delay Prosecutions, Healing Process*, KLVY.COM, Nov. 20, 2009, <http://www.wlky.com/r/21682041/detail.html> (last visited June 20, 2011) (noting that as of November 20, 2009 "the Kentucky Crime Lab has a backlog of 813 cases of all kinds involving blood or DNA evidence, including 136 cases from Louisville Metro Police. Of those statewide cases, 355 are sexual assault cases, and 151 of those have been sitting idle for three months or more."). According to the 2003 Kentucky State Police Annual Report, in fiscal year 2003:

[W]orkload statistics indicate that the Kentucky State Police officers submitted a total of 8,547 cases, while law enforcement (other than KSP) submitted a total of 31,412 cases to one of six Forensic Laboratories for analysis. These requests equate to 79 percent of the laboratory workload attributed to non-KSP entities compared to only 21 percent attributed to the Kentucky State Police. As a result, data compiled for the fiscal year 2002-03 indicates that the Kentucky State Police encumbered an approximate cost of 5.83 million dollars to perform laboratory services for cases other than our own.

2003 KSP ANNUAL REPORT, *supra* note 164, at 25. This data has not been published in subsequent years.

²²¹ Interviews with Laura Sudkamp, *supra* note 9 (noting that the cost of outsourced testing is included in KSP Laboratory's operating budget).

²²² *See, e.g.,* KSP FORENSIC LAB., *Forensic Biology Case Acceptance Policy*, FORENSIC BIOLOGY ANALYTICAL MANUAL (effective Apr. 2, 2010) (on file with author) (limiting initial submissions in murder/death investigation cases to "up to ten (10) items" and permitting additional items "on a case by case basis if specific information about those items . . . is provided . . . at the time of submission"). For detailed information on KSP Laboratory policies regarding the testing of DNA evidence, see Chapter 2.

²²³ KSP EVIDENCE GUIDE, *supra* note 9, at 5 (noting that "[t]his limitation is necessary in the interest of economy as well as for the proper administration of justice."). Furthermore, "[r]equests for re-examination decisions are at the discretion of the Laboratory Director or the Court System." *Id.* *See also* KSP FORENSIC LAB., *Forensic Biology Case Acceptance Policy*, FORENSIC BIOLOGY ANALYTICAL MANUAL (effective Apr. 2, 2010) (on file with author).

Table 1

KSP Laboratory Case Backlog, As of January 4, 2011 ²²⁴		
Type of Case	Number of Cases Backlogged	Estimated Turnaround Time
DNA/Biology	716	4–6 months for homicide or sexual assault; 9–10 months for “touch DNA” ²²⁵ in robbery
DNA Database ²²⁶	25,257	Unknown; once backlog is eliminated, KSP Laboratory expects receipt of 1,500 samples per month with a 30-day turnaround time ²²⁷
Drug Chemistry	1,447	60 days
Firearms	69	60 days
Toxicology	2,279	3–4 months
Trace Evidence	165	4–6 months for hair/fiber; 2 weeks for arson

KSP Laboratory has experienced backlogs since at least 2003, when, in order to provide some short-term relief, KSP Laboratory began to outsource DNA testing to private labs.²²⁸ Today, KSP Laboratory performs its own testing on backlogged DNA samples.²²⁹ Furthermore, DNA testing on backlogged samples for inclusion in the Commonwealth’s “DNA Database” places additional constraints on KSP Laboratory’s existing resources.²³⁰ Criminal cases, including death penalty cases, have been delayed for months due to the backlog.²³¹ In 2007, it was reported that the backlog continued and that “[h]undreds of pieces of evidence from crime scenes all over Kentucky are sitting untouched at the state’s forensics lab in Frankfort,” causing delays throughout the criminal justice system as “courts await the results of DNA tests that often hold the key to a suspect’s guilt or innocence.”²³² The continued existence of testing backlogs illustrates KSP Laboratory’s need for additional funding.

Medical Examiner and Coroner Offices

Medical Examiners

²²⁴ Interviews with Laura Sudkamp, *supra* note 9.

²²⁵ Touch DNA “analyzes skin cells left behind when assailants touch victims, weapons or something else at a crime scene [It] doesn’t require you to see anything, or any blood or semen at all. It only requires seven or eight cells from the outermost layer of our skin.” *What is touch DNA?*, SCIENTIFIC AM., Aug. 8, 2008, <http://www.scientificamerican.com/article.cfm?id=experts-touch-dna-jonbenet-ramsey> (last visited June 20, 2011) (noting that the use of touch DNA analysis became available near or around 2003).

²²⁶ KY. REV. STAT. ANN. § 17.175 (West 2011); *see also* Chapter 2 Recommendation #4, *supra* note 180.

²²⁷ As of January 4, 2011, testing on backlogged DNA samples for inclusion in the DNA database were not conducted as Kentucky officials interpret new language in the controlling statute. Interviews with Laura Sudkamp, *supra* note 9; KY. REV. STAT. ANN. § 17.175 (West 2011).

²²⁸ 2003 KSP ANNUAL REPORT, *supra* note 164, at 26 (noting that the outsourcing was paid for and operated under the National Institute of Justice’s DNA Database Backlog Reduction Grant). The primary focus for the KSP Forensic Laboratory in 2003 “was centered around reducing the number of backlog cases/exams awaiting analysis as well as identifying time saving strategies focused on reducing time spent completing forensic exams.” *Id.* at 25.

²²⁹ Interviews with Laura Sudkamp, *supra* note 9.

²³⁰ KY. REV. STAT. ANN. § 17.175 (West 2011) (establishing Kentucky’s DNA Database).

²³¹ *See, e.g.,* Eric Flack, *Coroner: DNA Backlog Leaves Crimes Unsolved*, WLWT.COM, Mar. 24, 2009, <http://www.wlwt.com/r/19005175/detail.html> (last visited June 20, 2011) (“At the KSP crime labs, it takes seven and a half months for detectives to get results from DNA tests for murders, rapes, and other violent crimes. It can take closer to a year for lesser crimes.”).

²³² *Kentucky crime lab struggles to keep up with DNA testing*, WAVE3.COM, Feb. 23, 2007, <http://www.wave3.com/Global/story.asp?S=6132578> (last visited June 20, 2011).

The Kentucky MEO is funded primarily through appropriations from the Kentucky General Assembly and federal funds through the Paul Coverdell National Forensic Science Improvement Act,²³³ although it does obtain additional revenue from private autopsy services performed for other states.²³⁴ The MEO employs thirteen full-time pathologists and one part-time pathologist who conduct nearly 2,500 autopsies annually.²³⁵ Table 2, below, illustrates the variance between the amount of funding the MEO has requested annually and the amount appropriated by the Kentucky General Assembly, from 2002–2012.

Table 2

Medical Examiner Funding Requested versus Received from the Kentucky General Assembly			
Fiscal Year	Requested (in \$)	Enacted²³⁶ (in \$)	Difference (in \$)
2012 ²³⁷	5,058,800	4,386,500	(672,300)
2011 ²³⁸	4,925,000	4,386,500	(538,500)
2010 ²³⁹	5,066,300	4,410,500 ²⁴⁰	(655,800)
2009 ²⁴¹	4,843,000	4,093,400	(749,600)
2008 ²⁴²	4,830,400	4,120,400 ²⁴³	(710,000)
2007 ²⁴⁴	4,705,600	3,925,300	(780,300)
2006 ²⁴⁵	4,697,700	3,821,400 ²⁴⁶	(876,300)

²³³ NAS REPORT 2009, *supra* note 2, at 28 (noting that the Coverdell Grant is the “only federal grant program that names medical examiners and coroners as eligible for grants”).

²³⁴ See Manning, *supra* note 147, at 40 (“[T]he Louisville office earned \$200,000 last year doing private autopsies for Southern Indiana.”).

²³⁵ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113. The MEO also employed an Executive Director, who was responsible for all matters related to the administrative support of the Commonwealth’s four locations of the Medical Examiner’s Office. KY. REV. STAT. ANN. §§ 15A.020 (1)(e), 12.050 (West 2011). However, the Executive Director position was defunded and the MEO’s administrative duties are currently handled by the Justice and Public Safety Cabinet’s Office of the Secretary. Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113. The MEO also eliminated its forensic anthropologist position after the retirement of Dr. Emily Craig in December 2010. *Id.* The MEO now receives forensic anthropology services through the FBI Laboratory Division’s new Forensic Anthropology Program. *Id.*

²³⁶ For fiscal years 2010, 2008, 2006, and 2000, the amount of funding appropriated to the MEO during this year was revised to include additional appropriations; for fiscal years 2011 and 2012, the enacted fund figure is the amount recommended by the Kentucky General Assembly. See, e.g., 2010-2012 BUDGET, *supra* note 7, at 245.

²³⁷ 2010-2012 BUDGET, *supra* note 7, at 245.

²³⁸ *Id.*

²³⁹ KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2008-2010 323, available at http://www.osbd.ky.gov/NR/rdonlyres/1015785C-71AD-4CCC-9BB5-4F1B42511BA5/0/0810_BOC_Volume1.pdf [hereinafter 2008-2010 BUDGET].

²⁴⁰ 2010-2012 BUDGET, *supra* note 7, at 245. *But see Map Death in America, Post Mortem: Death Investigation in America*, PBS FRONTLINE NEWS, <http://www.pbs.org/wgbh/pages/frontline/post-mortem/map-death-in-america> (last visited June 23, 2011) (reporting the Kentucky MEO 2010 annual fiscal budget of \$4,328,240).

²⁴¹ 2008-2010 BUDGET, *supra* note 239, at 323.

²⁴² KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2006-2008 361, available at http://www.osbd.ky.gov/NR/rdonlyres/270A6FDB-A3CE-450C-9340-643B561947ED/0/0608_BOC_Volume1.pdf [hereinafter 2006-2008 BUDGET].

²⁴³ 2008-2010 BUDGET, *supra* note 239, at 323.

²⁴⁴ 2006-2008 BUDGET, *supra* note 242, at 361.

²⁴⁵ KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2004-2006 3, available at http://www.osbd.ky.gov/NR/rdonlyres/D7FA7219-C1BE-49AC-B28B-17F4D93C1007/0/0506BOC_Vol1C.pdf [hereinafter 2004-2006 KY. BUDGET].

²⁴⁶ 2006-2008 KY. BUDGET, *supra* note 242, at 361.

2005 ²⁴⁷	4,590,500	3,724,000	(866,500)
2004 ²⁴⁸	4,267,500	4,052,100	(215,400)
2003 ²⁴⁹	4,200,400	4,055,200	(145,200)
2002 ²⁵⁰	2,947,500	3,380,100	432,600

Notably, in almost every year since 2002, the Kentucky General Assembly has funded the MEO below the amount it has requested. Furthermore, Kentucky funded the MEO at \$.94 per capita in 2009,²⁵¹ which is far below the national average for States' per capita spending of \$1.76 on statewide medial examiner offices.²⁵² Due to the limited resources provided by the Commonwealth, the MEO has performed private autopsies for other states and has repeatedly sought federal Coverdell funding “to replace badly outdated equipment.”²⁵³ In 2008, the MEO also closed its Toxicology Office, and now obtains any necessary toxicology services from AIT Laboratories, Inc., in Indianapolis, Indiana.²⁵⁴ Furloughs of Commonwealth employees in 2010 and 2011 have also caused the MEO to be understaffed at times.²⁵⁵ Furthermore, the Chief Medical Examiner has stated that the MEO has not sought NAME accreditation for all four of its offices due to a lack of resources to support the application process.²⁵⁶ Despite budget constraints, Kentucky’s Chief Medical Examiner states that the MEO has no case backlog and is “still doing good, complete, thorough forensic examinations.”²⁵⁷

Coroners

It is the responsibility of the Commonwealth’s individual counties to provide compensation for each of the counties’ elected coroners and appointed deputy coroners. Pursuant to the Kentucky

²⁴⁷ 2004-2006 KY. BUDGET, *supra* note 245, at 3.

²⁴⁸ KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2002-2004 103, available at http://www.osbd.ky.gov/NR/rdonlyres/FFEA54DB-0257-46EC-9071-17D61933D6BD/0/0204BOC_Vol1B.pdf [hereinafter 2002-2004 KY. BUDGET].

²⁴⁹ 2002-2004 KY. BUDGET, *supra* note 248, at 103.

²⁵⁰ KY. OFFICE OF THE STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2000-2002 116 (2002), available at http://www.osbd.ky.gov/NR/rdonlyres/6F0835D5-1548-4250-9A0D-1885D01AC4AA/0/0002BOC_Vol1B.PDF [hereinafter 2000-2002 KY. BUDGET].

²⁵¹ In 2009, Kentucky allocated \$4,093,400 to the MEO. 2008-2010 KY. BUDGET, *supra* note 239, at 323. According to the US Census Bureau, the 2010 statewide population of Kentucky was 4,339,367. *Kentucky QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21000.html> (last visited June 20, 2011).

²⁵² NAS REPORT 2009, *supra* note 2, at 250.

²⁵³ Manning, *supra* note 147, at 40; *FY2009 Coverdell*, *supra* note 216. In fiscal year 2007, Coverdell funds were used to buy a “digital X-ray unit and digitizer to replace an outdated model” and other necessary microscopes. *FY2007 Paul Coverdell Forensic Science Improvement Act Program Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2007-funding-table.htm> (last visited June 20, 2011). See also *FY2008 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008-funding-table.xls> (last visited June 20, 2011) (noting funds will be allocated to the MEO “to replace an antiquated x-ray system in the Louisville Medical Examiner’s Office”); *FY2006 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy06-coverdell-funding.xls> (last visited June 20, 2011); *Awards in Fiscal Year 2004 Under the Paul Coverdell Forensic Sciences Improvement Grants Program*, NAT’L INST. OF JUSTICE, http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy2004_table.htm (last visited June 20, 2011).

²⁵⁴ Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See Manning, *supra* note 147, at 40; Interview with Dr. Tracey Corey & Mandy Combest, *supra* note 113.

Revised Statutes (KRS), minimum salaries for coroners and deputy coroners are based on a sliding scale related to county population and certification status of the coroner.²⁵⁸ In practice, coroners are typically compensated above the minimum salary prescribed by statute. For example, under KRS 64.185, Boone County's certified coroner must be compensated between \$13,200 and \$16,800 each year.²⁵⁹ However, in 2009 Boone County's coroner received an annual salary of \$35,870.²⁶⁰ Coroners and deputy coroners in Kentucky also may retain full- or part-time jobs in addition to fulfilling their duties as coroners, making it difficult to determine whether coroners are funded adequately for carrying out their statutory duties.²⁶¹

Table 3, below, provides the 2010 and 2011 operating budgets of county coroner offices in Boone, Fayette, Kenton, Jefferson, Warren, and Wayne Counties.²⁶² Included in each county's operating budget are the salaries for coroners and deputy coroners, travel expenses, and other incidentals.²⁶³ Table 3 also provides each county's per capita spending on coroner offices, based on the U.S. Census Bureau's 2010 estimated population for each of the six counties.²⁶⁴

²⁵⁸ KY. REV. STAT. ANN. § 64.185 (West 2011) (noting that certification, basically a completion of continuing education, is issued jointly by the DOCJT, Justice and Public Safety Cabinet, and the MEO).

²⁵⁹ See generally KY. REV. STAT. ANN. § 64.185(1), (3) (West 2011).

²⁶⁰ BOONE COUNTY FISCAL COURT, BUDGET: FY 2011 EXPENSES 1 (2010), available at <http://www.boonecountyky.org/finance/budget/FY11/Expenses.pdf>. According to the U.S. Census Bureau, Boone County's population estimate in 2010 was 118,811 persons; in 2000, the estimate was 85,991 persons. *Boone County, Kentucky QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21015.html> (last visited June 20, 2011).

²⁶¹ Kentucky coroners and deputy coroners may also be funeral home directors and/or embalmers, which raises ethical issues. See, e.g., *Meet the Candidates*, MADISON COURIER, May 12, 2010, <http://madisoncourier.com/main.asp?SectionID=178&SubSectionID=286&ArticleID=56746> (last visited June 20, 2011); Amy Hagedorn, *Kappel, Billings, Running for County Coroner Position*, COURIER-J. (Louisville, Ky.), Oct. 7, 2010, at H6; see also Erin L. McCoy, *Coroner Candidates Debate Ethics of Association with Funeral Home*, KY. STANDARD, Feb. 3, 2011, <http://www.kystandard.com/content/coroner-candidates-debate-ethics-association-funeral-home> (last visited June 20, 2011).

²⁶² The Kentucky Death Penalty Assessment Team was unable to obtain coroner funding information for every county in Kentucky. The counties selected above represent a geographic diversity of Kentucky, and also includes the Commonwealth's largest counties by population: Jefferson and Fayette.

²⁶³ See, e.g., BOONE COUNTY FISCAL COURT, BUDGET: FY 2011 EXPENSES 1 (2010), available at <http://www.boonecountyky.org/finance/budget/FY11/Expenses.pdf>.

²⁶³ KENTON COUNTY KY. TREASURER, KENTON COUNTY 2011 BUDGET 7 (2010), available at http://www.kentoncounty.org/county_departments/county_finance/treasurer/docs/Budget_11.pdf.

²⁶⁴ We have used the U.S. Census Bureau's 2010 estimated populations for each of the Kentucky counties to calculate the per capita spending. See *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/maps/kentucky_map.html (last visited June 20, 2011).

Table 3

Select County Coroners' Operating Budgets from 2010–2011						
(County Seat)	Boone County (Burlington)	Fayette County (Lexington)	Jefferson County (Louisville)	Kenton County (Covington)	Warren County ²⁶⁵ (Bowling Green)	Wayne County (Monticello)
Population Estimate	118,811	295,803	741,096	159,720	113,792	20,813
2011 Budget	\$118,690 ²⁶⁶	\$738,330 ²⁶⁷	\$1,151,500 ²⁶⁸	\$149,000 ²⁶⁹	\$87,413	\$39,189 ²⁷⁰
2011 Per Capita Spending	\$1.00	\$2.50	\$1.55	\$0.93	\$0.77	\$1.88
2010 Budget	\$101,980 ²⁷¹	\$726,100 ²⁷²	\$1,149,700 ²⁷³	\$142,350 ²⁷⁴	\$87,904	\$38,812 ²⁷⁵
2010 Per Capita Spending	\$0.86	\$2.45	\$1.55	\$0.89	\$0.77	\$1.86

In 2010, per capita funding of coroners' offices ranged from \$.77 to \$2.45 in the above counties, indicating vast disparity in the resources dedicated to coroners' services across the Commonwealth. For example, Fayette County funded its coroner office at three times the per capita rate of Warren County. Furthermore, each of the selected counties fund their coroner offices at a rate below the national average for states' per capita spending on county-based coroner or medial examiner systems.²⁷⁶ Finally, while Fayette County funds its coroner office at

²⁶⁵ Telephone Interview by Paula Shapiro with Jerry Pearson, Treasurer, Warren County, Ky. Gov't, Nov. 30, 2010 (on file with author) (providing each of the Budget figures in this column).

²⁶⁶ BOONE COUNTY FISCAL COURT, BUDGET: FY 2011 EXPENSES 1–2 (2010), available at <http://www.boonecountyky.org/finance/budget/FY11/Expenses.pdf>.

²⁶⁷ LEXINGTON-FAYETTE URBAN COUNTY GOV'T, ADOPTED BUDGET: FY 2010-2011 13 (2010), available at <http://lexingtonky.gov/Modules/ShowDocument.aspx?documentid=12200>.

²⁶⁸ LOUISVILLE-JEFFERSON COUNTY, LOUISVILLE METRO OPERATING BUDGET: FY 2010-2011, 182 (2010), available at <http://www.louisvilleky.gov/NR/rdonlyres/4B5821CE-1AFC-4F69-A19C-C646FA9FF09B/0/eCoroner.pdf> [hereinafter LOUISVILLE BUDGET 2010-2011].

²⁶⁹ KENTON COUNTY, KY. TREASURER, KENTON COUNTY 2011 BUDGET 7 (2010), available at http://www.kentoncounty.org/county_departments/county_finance/treasurer/docs/Budget_11.pdf.

²⁷⁰ WAYNE COUNTY FISCAL COURT, FY 2012 BUDGET REPORT 12 (2010), available at <http://www.waynecounty.ky.gov/NR/rdonlyres/2B3F88D3-0672-446E-8208-9FEEB760ACA1/240703/budgetfy12.pdf>.

²⁷¹ BOONE COUNTY FISCAL COURT, BUDGET: FY 2010 EXPENSES 1 (2009), available at <http://www.boonecountyky.org/finance/budget/FY10/FY10Expenses.pdf>.

²⁷² LEXINGTON-FAYETTE URBAN COUNTY GOV'T, ADOPTED BUDGET: FY 2009-2010 6 (2009), available at <http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=7700> [hereinafter LEXINGTON 2009-2010 BUDGET].

²⁷³ LOUISVILLE BUDGET 2010-2011, *supra* note 268, at 182.

²⁷⁴ KENTON COUNTY, KY. TREASURER, KENTON COUNTY 2010 BUDGET 7 (2009), available at http://www.kentoncounty.org/county_departments/county_finance/treasurer/docs/Budget_10.pdf.

²⁷⁵ WAYNE COUNTY FISCAL COURT, FY 10 BUDGET REPORT 10 (2010), available at <http://www.waynecounty.ky.gov/NR/rdonlyres/2B3F88D3-0672-446E-8208-9FEEB760ACA1/240713/budgetreportfy10.pdf>.

²⁷⁶ NAS REPORT 2009, *supra* note 2, at 250 (“county systems’ per capita cost ranged from \$1.31 to \$9.19, with a mean of \$2.89”). We note that the per capital spending averages described in the 2009 NAS Report encompass

the highest per capita rate of the counties selected for analysis, since 2004, this coroner office has received at least \$65,000 less than the amount adopted in the county's annual budget.²⁷⁷

Conclusion

As evidenced by testing backlogs, demonstrated resource limitations, and funding levels below national averages, Kentucky's forensic laboratories, MEO, and county coroner systems are not adequately funded. Therefore, based on the Kentucky Assessment Team's information, the Commonwealth of Kentucky is not in compliance with Recommendation #2.

various forms of medical examiner and coroner systems, only a few of which resemble that of the Commonwealth's system whereby coroners and medical examiners perform medicolegal investigation.

²⁷⁷ For example, in 2004, the county adopted an annual budget of \$514,580 for the county's coroner office, although the coroner actually received \$449,577, a deficit of \$65,003. LEXINGTON-FAYETTE URBAN COUNTY GOV'T, 2004 BUDGET IN BRIEF 8 (2004), *available at* <http://lexingtonky.gov/modules/ShowDocument.aspx?documentid=2881>; LEXINGTON-FAYETTE URBAN COUNTY GOV'T, ADOPTED BUDGET: FY 2005-2006 41 (2005), *available at* <http://lexingtonky.gov/modules/ShowDocument.aspx?documentid=2883>; LEXINGTON-FAYETTE URBAN COUNTY GOV'T, ADOPTED BUDGET: FY 2007-2008 24 (2007), *available at* <http://lexingtonky.gov/modules/ShowDocument.aspx?documentid=2889>; LEXINGTON 2009-2010 BUDGET, *supra* note 272. We were only provided data on the Lexington-Fayette County Coroner funding for 2004, and 2006–2008.

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversarial system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, the existence of prosecutorial misconduct can affect innocent lives and society at large. Nationwide, between 1970 and 2003, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions, or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.¹

Prosecutorial misconduct can encompass various actions, such as failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.² The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

Solutions to the problem of prosecutorial misconduct and wrongful convictions include adequate funding to prosecutors' offices, adoption of standards to ensure manageable workloads for prosecutors, and requiring that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions against prosecutors who engage in misconduct.

¹ Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY (2004), <http://www.publicintegrity.org/pm> (last visited Nov. 11, 2011).

² *Id.*; see also *Police and Prosecutorial Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Nov. 11, 2011).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. *Kentucky's Unified Prosecutorial System*

Kentucky is divided into 120 counties, which are arranged into fifty-seven circuit court districts.³ Each circuit court district elects a Commonwealth's Attorney, who primarily practices in the district's circuit courts, and each county elects a County Attorney who practices primarily in the county's district court.⁴ To assist with their responsibilities, the Attorney General, each Commonwealth's Attorney, and each County Attorney may appoint assistant prosecutors and hire additional support staff, such as investigators and paralegals.⁵

Furthermore, since 1978, Kentucky has operated a Unified Prosecutorial System, administered by the Kentucky Prosecutors Advisory Council (Council), "in order to maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth" and to encourage cooperation among law enforcement officials.⁶ Under this system, the Attorney General acts as the chief law enforcement officer and chief prosecutor of Kentucky.⁷

1. Commonwealth's Attorneys

Each of Kentucky's fifty-seven circuit court districts elects a Commonwealth's Attorney, who represents the Commonwealth's interests in circuit courts for six-year renewable terms.⁸ To be eligible, Commonwealth's Attorneys must be at least twenty-four years old, have been a resident of Kentucky for at least two years, have resided in the county and district in which s/he serves for at least one year, and have practiced law for at least four years.⁹ All Commonwealth's Attorneys and Assistant Commonwealth's Attorneys, who must be practicing attorneys licensed within the Commonwealth, are prohibited from acting as a defense attorney, except in cases in which s/he is a party.¹⁰

³ *AOC Map of Kentucky Judicial Districts*, KY. CT. OF JUSTICE, <http://courts.ky.gov/districtcourt/mapdistrict.htm> (last visited Nov. 11, 2011) (showing 120 counties and fifty-seven circuit court districts); KY. CONST. §§ 112 (establishing a circuit court in each circuit court district), 113 (establishing a district court for every county).

⁴ KY. CONST. §§ 97 (Commonwealth's Attorney in each circuit court district), 99 (County Attorney in each county); KY. REV. STAT. ANN. § 15.725 (West 2011); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 11, 2011).

⁵ KY. REV. STAT. ANN. §§ 15.100 (Attorney General), 15.150 (stenographic, investigative, and clerical help), 15.760 (Commonwealth's Attorney), 15.770 (West 2011) (County Attorney).

⁶ KY. REV. STAT. ANN. § 15.700 (West 2011); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 11, 2011).

⁷ KY. REV. STAT. ANN. §§ 15.010(1) ("The Attorney General is the head of the Department of Law"), 15.020 ("[t]he Attorney General is the chief law officer . . . and the legal advisor . . ."), 15.700 (West 2011) (" . . . the Attorney General as chief law enforcement officer . . . [and] chief prosecutor of the Commonwealth.").

⁸ KY. CONST. § 97. The Kentucky General Assembly has authority to abolish a Commonwealth's Attorney position anytime, and at the end of the incumbent's term his/her duties may be taken over by the appropriate County Attorney. KY. CONST. § 108. However, we are unaware of any instance of this occurring.

⁹ KY. CONST. § 100.

¹⁰ KY. REV. STAT. ANN. §§ 15.740, 15.760(3) (West 2011).

As of January 1, 2008, Kentucky employed fifty-one full-time Commonwealth's Attorneys and six part-time Commonwealth's Attorneys, who are permitted to maintain private law practices.¹¹ Commonwealth's Attorneys and Assistant Commonwealth's Attorneys who hold full-time offices or who represent a circuit court district containing a first-class city, second-class city or urban-county government, or a third-class city with a population of 68,000 or more, are not permitted to engage in the private practice of law.¹² Part-time Commonwealth's Attorneys and part-time Assistant Commonwealth's Attorneys are not prohibited from engaging in the private practice of law.¹³ Each Commonwealth's Attorney may hire stenographic, secretarial, and clerical staff, and investigative and other personnel, the number of which is "based on real need" and approved by the Council.¹⁴ Commonwealth's Attorneys also may employ "private counsel to assist [them] in the prosecution of [] criminal case[s]."¹⁵

The Commonwealth's Attorney has the duty to prosecute violations of the criminal and penal laws which are tried in the circuit court of his/her judicial circuit.¹⁶ Specifically, Commonwealth's Attorneys are responsible for all felony prosecutions, including all capital-eligible cases.¹⁷ In addition, the Commonwealth's Attorney has "the primary responsibility within his[her] judicial circuit to present evidence to the grand jury concerning such violations."¹⁸ Commonwealth's Attorneys also are responsible for serving as special prosecutors in cases where regularly elected prosecutors have been disqualified¹⁹ and assisting on multi-disciplinary teams involving child sexual abuse cases.²⁰

2. County Attorneys

Kentucky's Unified Prosecutorial System also is composed of County Attorneys, who are elected in each of the 120 counties to four-year terms, and practice primarily in county district courts.²¹ County Attorneys and their assistants prosecute violations by adults or juveniles subject to the criminal and penal laws within his/her district court's jurisdiction, such as "DUI, domestic

¹¹ OFFICE OF THE KY. STATE BUDGET DIR., 2010–2012 BUDGET OF THE COMMONWEALTH 35–38 (Jan. 19, 2010), available at <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf> [hereinafter 2010-2012 BUDGET]. Part-time Commonwealth's attorneys may become a full-time Commonwealth's attorney by (a) not engaging in private practice, and (b) giving written notice, at least ninety or more days prior to the commencement of a budget cycle, to the Council of his intent to become full-time. KY. REV. STAT. ANN. § 15.757(1), (2) (West 2011) (prohibiting full-time from reverting to part-time).

¹² KY. REV. STAT. ANN. §§ 15.755(3), 15.760(3) (West 2011).

¹³ KY. REV. STAT. ANN. § 15.755(3) (West 2011).

¹⁴ KY. REV. STAT. ANN. § 15.760(1)–(2) (West 2011).

¹⁵ Commonwealth v. Hubbard, 777 S.W.2d 882, 883 (Ky. 1989).

¹⁶ KY. REV. STAT. ANN. §§ 15.725(1), 69.010(2) (West 2011) (noting an exception for Commonwealth's Attorneys whose county contains a city of the first or second class or urban-county government).

¹⁷ 2010-2012 BUDGET, *supra* note 11, at 37 ("those prosecutions in which the penalty of death may be imposed").

¹⁸ KY. REV. STAT. ANN. § 15.725(1) (West 2011).

¹⁹ KY. REV. STAT. ANN. § 15.735 (West 2011); *see also* KY. REV. STAT. ANN. §§ 15.730 (Commonwealth's Attorneys to serve as special prosecutors in criminal cases as required by the Kentucky Attorney General), 15.733–.735 (West 2011) (listing the scenarios in which the prosecuting attorney is disqualified and a special prosecutor must be appointed).

²⁰ KY. REV. STAT. ANN. § 15.727 (West 2011).

²¹ KY. CONST. § 99; *supra* note 3.

violence, child abuse, all juvenile crime, traffic violations, misdemeanor theft, and assault.”²² Preliminary hearings in felony cases are handled by County Attorneys, unless otherwise determined by agreement with the Commonwealth’s Attorney, in which case the Commonwealth’s Attorneys Office handle the hearings, such as in Fayette and Warren Counties.²³

Both Commonwealth’s and County Attorneys are required to submit annual reports to the Council on activity within their jurisdictions.²⁴ Finally, Commonwealth’s and County Attorneys and their assistant prosecutors are required, by statute, to successfully complete training on domestic violence and sexual assault crimes.²⁵

3. Office of the Kentucky Attorney General

a. Qualifications of Attorney General

Kentucky’s Attorney General is elected to a four-year term, and may serve two consecutive terms plus additional terms after a period of four years.²⁶ The Attorney General must be at least thirty years old, must have been a Kentucky resident for at least two years before his/her election, and must have been a licensed, practicing lawyer for at least eight years before his/her election.²⁷ During his/her term in office, the Attorney General is prohibited from engaging in the private practice of law.²⁸

The Attorney General must appoint a Deputy Attorney General who must be licensed to practice law in Kentucky, must have resided in the Commonwealth for the two years preceding his/her taking office, and must have been a licensed attorney for at least eight years.²⁹ S/he will “serve at the pleasure of the Attorney General and [] perform the duties [s/]he may designate.”³⁰ The Attorney General may appoint Assistant Deputy Attorneys General, hire additional prosecutors and special attorneys, and may employ any stenographic, investigative and other clerical help, as s/he deems necessary and advisable to carry out the business of the Kentucky Department of Law.³¹

²² KY. REV. STAT. ANN. § 15.725(1) (West 2011); *Frequently Asked Questions*, KY. COUNTY ATTORNEYS ASS’N, <http://kycountyattorneys.org/faq.php> (last visited Nov. 11, 2011). In addition, “[m]ost counties have Family Court, Drug Court, and/or truancy Court requiring representation” by the County Attorney. 2010-2012 BUDGET, *supra* note 11, at 38.

²³ See KY. REV. STAT. ANN. § 15.725(3) (West 2011) (“Each Commonwealth’s attorney and county attorney may enter into agreements to share or redistribute prosecutorial duties in the Circuit and District courts.”).

²⁴ KY. REV. STAT. ANN. § 15.720(1)–(2) (West 2011) (reports include “suggestions and recommendations for the uniform enforcement of the criminal laws of the Commonwealth”).

²⁵ KY. REV. STAT. ANN. § 15.718(2) (West 2011).

²⁶ KY. CONST. §§ 91, 93.

²⁷ KY. CONST. §§ 91, 92.

²⁸ KY. REV. STAT. ANN. § 15.015 (West 2011).

²⁹ KY. CONST. § 122 (eligibility of circuit judges); KY. REV. STAT. ANN. § 15.100(1) (West 2011) (requiring the Deputy Attorney General to have the same qualifications as a Kentucky circuit judge).

³⁰ KY. REV. STAT. ANN. § 15.100(1) (West 2011).

³¹ KY. REV. STAT. ANN. §§ 15.100(1)–(4), 15.150 (West 2011) (limiting the hiring of clerical staff to be within the limits of appropriations made for that purpose and noting that “[i]nvestigative personnel as designated by the Attorney General shall have the power of peace officers”).

b. Responsibilities of the Attorney General

As the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions, as well as the legal adviser to these entities and state officers, the Attorney General, upon request, must furnish written opinions regarding any of his/her official duties.³² Among his/her “range of legal, investigative, and administrative duties,” the Attorney General is responsible for appearing on behalf of the Commonwealth in all Kentucky Supreme Court or Court of Appeals cases in any case in which the Commonwealth has an interest, including criminal cases.³³ The Attorney General’s Office of Criminal Appeals handles the direct appeals and post-conviction proceedings for all capital cases arising within the Commonwealth.³⁴

Upon the written request of any Commonwealth’s or County Attorney, the Governor, or any of the Commonwealth’s courts and grand juries, the Attorney General may assist in criminal proceedings or appoint other Commonwealth’s or County Attorneys to provide assistance.³⁵ If authorized by the Council to “initiate, intervene, or supersede a local prosecutor,” the Attorney General must petition the circuit court to disqualify the Commonwealth’s or County Attorney and, if sustained, must also file and prosecute a complaint against that local prosecutor.³⁶

In conjunction with the Council, the Attorney General is responsible for the legal education and training of the Commonwealth’s prosecutors, including mandatory education courses concerning “the dynamics of domestic violence, child physical and sexual abuse . . . [,] available community resources and victims services, and reporting requirements.”³⁷ The Attorney General is required to develop and distribute to every Commonwealth prosecutor a manual on domestic violence crimes.³⁸ There is no statutorily-mandated training on the prosecution of death penalty cases. The Attorney General must submit biennial reports to the Kentucky General Assembly and Governor on the activities of the unified prosecutorial system, including “suggestions and recommendations for the uniform enforcement of the criminal laws of the Commonwealth.”³⁹

³² KY. REV. STAT. ANN. §§ 15.020, 15.025 (West 2011) (conditions requiring an opinion from the Attorney General).

³³ 2010-2012 BUDGET, *supra* note 11, at 35 (noting that the Office of the Attorney General “has ten organizational units to support the mission of the office”); KY. REV. STAT. ANN. §§ 15.020, 15.090 (West 2011) (“The Attorney General may prosecute an appeal, without security, in any case from which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it.”).

³⁴ KY. REV. STAT. ANN. §§ 15.020, 15.090 (West 2011); 2010-2012 BUDGET, *supra* note 11, at 35 (“The Office of Criminal Appeals represents the Commonwealth in all state and federal criminal appeals in which the Commonwealth has an interest.”).

³⁵ KY. REV. STAT. ANN. §§ 15.190, 15.200, 15.205 (West 2011). *See generally* KY. REV. STAT. ANN. § 15.730 (West 2011) (Commonwealth’s Attorneys and County Attorneys as special prosecutors).

³⁶ KY. REV. STAT. ANN. § 15.715(1)–(3) (West 2011).

³⁷ KY. REV. STAT. ANN. §§ 15.718, 15.705(4) (West 2011). The Attorney General is also mandated to have specially trained staff available to assist prosecutors in child sexual abuse cases. KY. REV. STAT. ANN. § 15.948 (West 2011).

³⁸ KY. REV. STAT. ANN. § 15.717 (West 2011).

³⁹ KY. REV. STAT. ANN. § 15.720(1) (West 2011). Commonwealth’s and County attorneys are required by the Council to annually report on its activities during the preceding calendar year. KY. REV. STAT. ANN. § 15.720(2) (West 2011).

4. The Prosecutors Advisory Council

In 1976, the Commonwealth established the Council to administer the unified prosecutorial system, including the 177 Commonwealth's and County Attorneys and their employees.⁴⁰ The Council consists of nine members, all of whom are Kentucky residents, and includes the Attorney General, who serves as chairperson of the Council.⁴¹ The other eight members are appointed by the Governor and consist of three Commonwealth's Attorneys, three County Attorneys and two non-attorney citizen members, all from geographically diverse locations across the Commonwealth.⁴²

The Council oversees the financial administration of Kentucky's Unified Prosecutorial System.⁴³ The Council is also responsible for program development and continuing legal education for Kentucky prosecuting attorneys, including "programs on the investigation and prosecution of abuse, neglect, and exploitation of the elderly and other crimes against the elderly."⁴⁴ The Council co-sponsors, with the Attorney General, the annual Kentucky Prosecutors Conference, provides basic training courses for newly-elected Commonwealth's and County Attorneys, and sponsors the Kentucky Prosecutors Institute, a week-long trial skills course for new prosecutors.⁴⁵ The Council also is responsible for the Attorney General's Victim and Witness Protection program, for overseeing the preparation of the Child Sexual Abuse Prosecution Manual, and for publishing an annual data collection report on sexual offenses involving minors.⁴⁶

The Council has the power to issue subpoenas for witnesses, "records, books, papers, and documents as it may deem necessary for investigation of any [authorized] matter."⁴⁷ Finally, the Council is supported by the Kentucky Attorney General's Office, and it may delegate to the Attorney General responsibilities the Council deems necessary.⁴⁸

B. Funding of Kentucky's Unified Prosecutorial System

⁴⁰ KY. REV. STAT. ANN. § 15.705(1) (West 2011); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 11, 2011).

⁴¹ KY. REV. STAT. ANN. § 15.705(2)–(3) (West 2011) (noting that each "serve at the pleasure of the Governor").

⁴² KY. REV. STAT. ANN. § 15.705(2) (West 2011) (members chosen from lists prepared by the Commonwealth's Attorneys Association and the County Attorneys Association).

⁴³ KY. REV. STAT. ANN. §§ 15.705(4), 15.708 (West 2011) ("The Prosecutors Advisory Council may apply for and receive funds, public or private, for the purpose of assisting Commonwealth's and county attorneys in providing crime victim assistance or in criminal prosecution . . .").

⁴⁴ KY. REV. STAT. ANN. §§ 15.705(4), 15.775 (West 2011). While Commonwealth's Attorneys and County Attorneys are not required to complete this training, Assistant County Attorneys and Assistant Commonwealth's Attorneys are mandated to complete a four hour program initially and a two hour update on the abuse training every five years. KY. REV. STAT. ANN. § 15.775(2)–(3) (West 2011).

⁴⁵ *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 11, 2011).

⁴⁶ KY. REV. STAT. ANN. § 15.706 (West 2011) (authorizing the Council to promulgate administrative regulations to specify the information collected on sexual offenses involving minors); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 11, 2011).

⁴⁷ KY. REV. STAT. ANN. § 15.707 (West 2011)

⁴⁸ KY. REV. STAT. ANN. § 15.710 (West 2011).

The Council and the Kentucky Attorney General’s Office receive funding through appropriations from the Kentucky General Assembly.⁴⁹ Commonwealth’s and County Attorney offices may receive funding from the General Assembly and the local jurisdiction in which the office is located.⁵⁰ Each Commonwealth’s Attorney and County Attorney submits a biennial proposed budget to the Council, which then includes this proposal in the budget of the unified prosecutorial system submitted as part of the Attorney General’s budget.⁵¹ The General Assembly’s biennial appropriations are distributed to the Attorney General and also to the Council for distribution to each Commonwealth’s and County office based upon the proposed budgets submitted by each office.⁵²

Table 1, below, lists the 2000 to 2012 appropriations from the Kentucky General Assembly to the Attorney General, Commonwealth’s Attorneys, and County Attorneys, for the operations of all office responsibilities, including criminal prosecutions.⁵³

Table 1 – General Assembly Appropriations to Unified Prosecutorial System, 2000–2012

Fiscal Year	Attorney General	Commonwealth’s Attorneys	County Attorneys	Unified Prosecutorial System
2000	23,323,600	22,122,700	18,682,200	40,804,900
2001	23,755,200	23,634,200	20,113,200	43,747,400
2002	24,240,700	24,837,900	21,396,900	46,234,800
2003	23,609,000	26,953,200	21,673,800	48,627,000
2004	23,034,800	27,510,200	22,634,000	50,144,200
2005	26,804,400	29,018,800	23,454,000	52,472,800
2006	27,201,500	30,402,378	25,804,200	56,206,578
2007*	26,443,500	32,315,800	27,384,200	59,700,000
2008*	28,603,700	33,893,000	29,141,500	61,272,300
2009^	25,868,800	34,940,300	29,220,300	N/A
2010*	27,679,100	38,183,400	32,100,200	69,517,300

⁴⁹ KY. REV. STAT. ANN. § 15.750(1) (West 2011).

⁵⁰ *Id.*

⁵¹ *Id.* “Nothing contained herein shall be construed as limiting, restricting, or terminating the authority of local governmental units, including cities, counties, and urban counties, to provide financial support for the office of any prosecutor.” *Id.*

⁵² *Id.* See also KY. REV. STAT. ANN. § 15.725(4) (West 2011) (The Council “shall in allocating resources between the Commonwealth’s and county attorney take the agreements [sharing responsibilities] into account.”). The Commonwealth’s General Fund and Restricted Fund constitute the appropriations for prosecutorial services in Kentucky.

⁵³ 2010-2012 Budget, *supra* note 11, at 35–38 (explaining that 2011 and 2012 figures are “Enacted” amounts); OFFICE OF THE KY. STATE BUDGET DIR., 2008–2010 BUDGET OF THE COMMONWEALTH 40–44 (2008), available at http://www.osbd.ky.gov/NR/rdonlyres/1015785C-71AD-4CCC-9BB5-4F1B42511BA5/0/0810_BOC_Volume1.pdf; OFFICE OF THE KY. STATE BUDGET DIR., 2006–2008 BUDGET OF THE COMMONWEALTH 40–44 (2006), available at http://www.osbd.ky.gov/NR/rdonlyres/270A6FDB-A3CE-450C-9340-643B561947ED/0/0608_BOC_Volume1.pdf; OFFICE OF THE KY. STATE BUDGET DIR., 2005–2006 BUDGET OF THE COMMONWEALTH 26–30 (2005), available at http://www.osbd.ky.gov/NR/rdonlyres/FC7DE3BF-B95B-4EF6-96E1-5AB012FFD9BA/0/0506BOC_Vol1A.pdf; OFFICE OF THE KY. STATE BUDGET DIR., 2002–2004 BUDGET OF THE COMMONWEALTH 34–38 (2002), available at http://www.osbd.ky.gov/NR/rdonlyres/1C77FAD4-A6FC-475D-8CE0-481FF804F16C/0/0204BOC_Vol1A.pdf; OFFICE OF THE KY. STATE BUDGET DIR., 2000–2002 BUDGET OF THE COMMONWEALTH 19–24 (2000), available at http://www.osbd.ky.gov/NR/rdonlyres/AD41201D-EE1D-4FA2-83E6-D5DB94A1BE5D/0/0002BOC_Vol1A.PDF.

2011*	26,277,500	37,761,700	31,549,300	68,717,400
2012*	24,275,700	37,220,300	31,161,700	67,903,000

* enacted appropriations, not actual;

^ no reference to Unified Prosecutorial System budget in this year

Appropriations from the General Assembly cover expenses incurred by Commonwealth’s Attorneys, the Attorney General and his/her assistants, County Attorneys in performance of their criminal prosecution duties, and salaries of all of the Commonwealth’s prosecutors.⁵⁴ Counties may provide additional compensation to each Commonwealth’s or County prosecutor out of the county treasury or fiscal court.⁵⁵ For example, for fiscal year 2011 to 2012, the Louisville-Jefferson County Metro Council approved funds totaling \$7,263,100 for the Jefferson County Attorney Office and \$1,170,200 for the Jefferson County Commonwealth’s Attorney.⁵⁶

In 2010, the Attorney General received an annual salary of \$108,720⁵⁷ and every full-time, elected Commonwealth’s Attorney earned an annual salary of \$110,346.⁵⁸ Salaries of assistant prosecutors are commensurate with the attorney’s education, experience, training, and responsibility, and are based on the Council’s established guidelines, which are comparable to the salary guidelines of similar positions maintained by the Kentucky Personnel Cabinet pursuant to KRS 64.640.⁵⁹ In Jefferson County, for example, in 2010 the salary of some Assistant Commonwealth’s Attorneys who prosecute death penalty cases ranged from \$56,832 to \$73,416.⁶⁰

⁵⁴ KY. CONST. §§ 96 (mandating a salary for the Attorney General), 98 (mandating salaries for Commonwealth’s attorneys out of the State Treasury); KY. REV. STAT. ANN. §§ 15.750(2)–(3) (West 2011). 15.170 (“actual and necessary expenses” incurred by the Attorney General and Assistant Attorneys General), 15.755(1)–(2) (compensation for Commonwealth’s Attorneys and their staff out of State Treasury), 15.760(2), (4), 15.765(2), 15.770(1)–(2), (5) (West 2011) (compensation for county attorneys and their staff paid out of the State Treasury). Such funding is included in the appropriations and enacted amounts listed in Kentucky budget documents created by the Kentucky Office of Personnel Management. Telephone Interview by Paula Shapiro with Christina Gordley, Policy and Budget Analyst, Ky. Governor’s Office of Policy and Management, July 6, 2011 (on file with author). See also DPA Budget Request, *supra* note 11, at 11 (noting that 90% of Kentucky prosecutor’s costs are personnel).

⁵⁵ KY. CONST. § 98; KY. REV. STAT. ANN. § 15.750(1) (West 2011). A county’s fiscal court or urban-county council covers the County Attorney’s Office expenses incurred “in the performance of his duties as legal adviser to the county.” KY. REV. STAT. ANN. § 15.750(4) (West 2011).

⁵⁶ LOUISVILLE METRO GOV’T, SUMMARY OF APPROPRIATIONS—ALL FUNDS, 2011–2012 APPROVED BUDGET 2 (2011), available at <http://www.louisvilleky.gov/NR/rdonlyres/5B9CA378-9801-48CC-AD95-B90361AC11DE/0/SummaryofAppropriationsAllFunds.pdf>. The County Council appropriated \$6,987,700 for the Jefferson County Attorney and \$1,021,500 for the Commonwealth’s Attorney for fiscal year 2010–2011. *Id.*

⁵⁷ *Government Salary Database*, KY. COURIER-JOURNAL.COM, <http://datacenter.courier-journal.com/government/salaries> (type Conway into last name box) (last visited Nov. 11, 2011).

⁵⁸ Telephone Interview by Sarah Turberville with Willie Morrison, Research Assistant, Justice Programs Office, American Univ., Apr. 28, 2011 (on file with author). Kentucky’s six part-time Commonwealth’s Attorneys earned an annual salary of \$66,207 in 2010. *Id.*

⁵⁹ KY. REV. STAT. ANN. §§ 15.760(4), 15.770(5) (West 2011).

⁶⁰ *Kentucky Payroll Database*, LEXINGTON HERALD-LEADER.COM, <http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=661837411371008> (last visited Nov. 11, 2011) (indicating a monthly salary of \$4,736);

Kentucky Payroll Database, LEXINGTON HERALD-LEADER.COM, <http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=381837417851034> (last visited Nov. 11, 2011) (indicating a monthly salary of \$4,790);

Kentucky Payroll Database, LEXINGTON HERALD-LEADER.COM,

C. Professional and Ethical Responsibilities of Prosecutors

1. The Kentucky Rules of Professional Conduct

The Kentucky Supreme Court promulgated the Kentucky Rules of Professional Conduct (Rules), which establish the minimum ethical responsibilities of all attorneys, including prosecutors.⁶¹ The Rules set out special responsibilities of prosecutors in criminal cases, noting that “a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁶² Specifically, Rule 3.8 requires that a prosecutor in a criminal case shall

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;⁶³
- (b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;⁶⁴
- (c) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, [unless there is] a protective order of the tribunal;⁶⁵
- (d) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless . . . [“there is a genuine need to intrude into the client-lawyer relationship”];⁶⁶
- (e) Refrain, except for statements that are necessary . . . , from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons under the supervision of the prosecutor . . . from making [these] extrajudicial statement[s].⁶⁷

In addition, the Rules require all attorneys, including prosecutors, to report professional misconduct.⁶⁸ Rule 8.3 states, “[a] lawyer who knows that another lawyer has committed a violation of the Rules [] that raises a substantial question as to that lawyer’s honesty,

<http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=447183741450428> (last visited Nov. 11, 2011) (indicating a monthly salary of \$6,118).

⁶¹ See generally Ky. Sup. Ct. Rule (SCR) 3.130(1.1)–(8.4) (hereinafter KY. R. PROF’L CONDUCT 1.1–8.4).

⁶² KY. R. PROF’L CONDUCT 3.8 cmt. 1 (“This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”)

⁶³ KY. R. PROF’L CONDUCT 3.8(a).

⁶⁴ KY. R. PROF’L CONDUCT 3.8(b).

⁶⁵ KY. R. PROF’L CONDUCT 3.8(c). Under this rule, a Kentucky prosecutor has an affirmative obligation to disclose favorable evidence or information, either on the guilt issue or the punishment issue, without the necessity of the defense to make a motion and obtain an appropriate court order. See KY. R. PROF’L CONDUCT 3.8(c) cmt. 2.

⁶⁶ KY. R. PROF’L CONDUCT 3.8(d), cmt. 3.

⁶⁷ KY. R. PROF’L CONDUCT 3.8(e), cmt. 4 (noting extrajudicial statements by prosecutors also are problematic as they may contribute to increased public condemnation of the accused).

⁶⁸ See KY. R. PROF’L CONDUCT 8.3.

trustworthiness or fitness as a lawyer in other respects, shall inform the [Kentucky Bar] Association's Bar Counsel."⁶⁹ Kentucky Supreme Court commentary emphasizes the need for such reporting because one incident can indicate a pattern of misconduct that only a disciplinary investigation may uncover.⁷⁰

The Rules prohibit Kentucky lawyers from falsifying evidence or counseling clients or witnesses to do so, from making frivolous discovery requests, and from making personal statements about the credibility of witnesses or the guilt or innocence of the accused.⁷¹ Further, lawyers should make reasonable efforts to comply with discovery requests.⁷² All lawyers are forbidden from making "extrajudicial statements they know or should know will be publicized and will have the substantial likelihood of materially prejudicing the case."⁷³

2. The Kentucky Revised Statutes

The Kentucky Revised Statutes (KRS) requires any prosecutor to disqualify him/herself in any proceeding in which s/he, his/her spouse, or immediate family member, is a party, has any interest, or may likely be a material witness.⁷⁴ Upon a showing of actual prejudice, any prosecuting attorney may be disqualified in a pending proceeding and a special prosecutor appointed in his/her place.⁷⁵ Any Commonwealth prosecutor indicted by a state or federal grand jury on a felony charge is immediately disqualified from further prosecuting any criminal case or proceeding.⁷⁶ Furthermore, if a Commonwealth's or County Attorney refuses to disqualify him/herself in the event of his/her "incapacity, refusal without sufficient grounds, inability, conflict of interest," or failure to act in a certain case,⁷⁷ the Attorney General must petition the circuit court to disqualify the prosecutor based upon a showing of good cause that s/he should not participate in the prosecution.⁷⁸ If the circuit court sustains this petition, the Attorney General must "file and prosecute a complaint against the local prosecutor" and a hearing may be held to determine the amount of the prosecutor's pay reduction.⁷⁹

3. Investigating Prosecuting Attorneys and Disciplining Members of the Bar

⁶⁹ KY. R. PROF'L CONDUCT 8.3(a).

⁷⁰ KY. R. PROF'L CONDUCT 8.3 cmt. 1. This rule also provides qualified immunity for reporting lawyers to encourage the reporting of misconduct and to prevent retaliation. *Id.* at cmt. 5.

⁷¹ KY. R. PROF'L CONDUCT 3.3–3.4.

⁷² KY. R. PROF'L CONDUCT 3.4(d) ("A lawyer shall not in a pretrial procedure, make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."), 3.1.

⁷³ KY. R. PROF'L CONDUCT 3.6 & cmt. 1 (noting that a balance has to be struck between not prejudicing a trial and the public's need for information because of safety and informed policy making).

⁷⁴ KY. REV. STAT. ANN. § 15.733(2) (West 2011).

⁷⁵ KY. REV. STAT. ANN. §§ 15.733(3)–(4), 15.735, 15.730 (West 2011); *supra* note 36 and accompanying text. In the event an Assistant Commonwealth's or County Attorney is disqualified, the jurisdiction's Commonwealth's or County Attorney will suspend the offending prosecutor. KY. REV. STAT. ANN. § 15.734(2) (West 2011).

⁷⁶ KY. REV. STAT. ANN. § 15.734(1) (West 2011). The attorney is also automatically suspended from the practice of law in the Commonwealth. SCR 3.166(1). In addition, "[d]isciplinary proceedings against such attorney shall be initiated by the Inquiry Commission . . . unless already begun or unless the suspended attorney resigns under terms of disbarment." SCR 3.166(6).

⁷⁷ KY. REV. STAT. ANN. § 15.715(1) (West 2011).

⁷⁸ KY. REV. STAT. ANN. § 15.715(2) (West 2011).

⁷⁹ KY. REV. STAT. ANN. §§ 15.715(3), 61.120 (West 2011) (salary deduction for failure to perform duties).

As authorized by the Kentucky Supreme Court, the KBA is the entity responsible for investigating and prosecuting complaints about violations of the Rules by any licensed attorney in Kentucky, including those attorneys prosecuting death penalty cases.⁸⁰ Any violation or attempted violation of the Rules constitutes misconduct.⁸¹ The KBA's Office of Bar Counsel investigates and prosecutes charges of professional misconduct issued by the Inquiry Commission, "an independent body appointed by the [Kentucky Supreme] Court to receive and process complaints from any source which allege professional misconduct by lawyers."⁸² However, as the entity that licenses attorneys, only the Court can reprimand an attorney, suspend an attorney's license, or order permanent disbarment from the practice of law.⁸³

If an attorney is disbarred or suspended for more than sixty days s/he must notify, within ten days of the date the discipline becomes effective, all courts in which s/he has matters pending and all of his/her active clients, that s/he can no longer provide representation.⁸⁴ Findings of misconduct and sanctions are available publicly in the Southwest Reporter, but if no misconduct is found, information on the discipline proceedings will not be published.⁸⁵

D. Other Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

If the Commonwealth's Attorney decides to seek the death penalty, the prosecutor is required to provide a notice of aggravating circumstances prior to the commencement of the trial.⁸⁶ Specifically, "[t]his notice requirement is satisfied by timely filing a formal notice of intent to seek the death penalty and the aggravating circumstances upon which the Commonwealth intends to rely."⁸⁷ The notice must be provided to the defense with "reasonable time and opportunity for preparation," although the notice need not be reduced to writing.⁸⁸ During the

⁸⁰ KY. REV. STAT. ANN. § 21A.150 (West 2011) (authorizing the KBA "to conduct hearings, administer necessary oaths, take testimony under oath, compel the attendance of witnesses, and compel the production of records and other evidence" in disciplinary proceedings); *see also* SCR 3.130–3.530; *Office of Bar Counsel Overview*, KY. BAR ASS'N, <http://www.kybar.org/234> (last visited Nov. 15, 2011).

⁸¹ KY. R. PROF'L CONDUCT 8.3, 8.4.

⁸² *Office of Bar Counsel Overview*, KY. BAR ASS'N, <http://www.kybar.org/234> (last visited Nov. 15, 2011); SCR 3.155 (the KBA Board may appoint Bar Counsel "responsible for investigating and prosecuting all disciplinary cases and such other duties as the Board may designate"), 3.140 (appointment of the Inquiry Commission).

⁸³ SCR 3.380.

⁸⁴ SCR 3.390.

⁸⁵ SCR 3.150(5), 3.440 (final orders in disciplinary cases are published as are other opinions of the Kentucky Supreme Court). "[N]otice of all public discipline imposed against a lawyer and reinstatements" also is transmitted to the American Bar Association's National Discipline Data Bank. SCR 3.150(7).

⁸⁶ KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011) (requiring only that the Commonwealth give notice of any aggravators prior to trial).

⁸⁷ *Soto v. Commonwealth*, 139 S.W.3d 827, 843 (Ky. 2004) (citing *Furnish v. Commonwealth*, 95 S.W.3d 34, 41 (Ky. 2002); *Commonwealth v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000); *cf. Smith v. Commonwealth*, 845 S.W.2d 534, 536–538 (Ky. 1993)).

⁸⁸ *Smith*, 845 S.W.2d at 537; *Francis v. Commonwealth*, 752 S.W.2d 309 (Ky. 1988) (notice need not be in writing); *see Epperson v. Commonwealth*, 197 S.W.3d 46 (Ky. 2006) (notice need not be in writing).

penalty phase of a capital trial, “only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible.”⁸⁹

Inadequate notice has been determined to be grounds for the reversal of a death sentence.⁹⁰ In *Smith v. Commonwealth*, the Kentucky Supreme Court reversed a capital conviction and remanded for re-sentencing where the prosecution provided defense counsel with only six days notice of its intent to seek the death penalty.⁹¹ In this case, notice of aggravating factors had been provided to the defense counsel nineteen months prior to trial, however, the Commonwealth had represented to defense counsel on a number of occasions that it would not seek the death penalty.⁹² In reversing the death sentence, the Court stated that a defendant is entitled to rely on a prosecutor’s express representations that it would not seek the death penalty, and, as a result, defense counsel was not given adequate notice to prepare for the penalty phase of the capital trial.⁹³

2. Plea Agreements

A defendant has no constitutional right to a plea agreement or plea negotiation.⁹⁴ Kentucky law provides prosecuting attorneys broad discretion whether to enter into plea negotiations with a defendant.⁹⁵ The Kentucky Supreme Court has stated that “if the offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his[/her] detriment in reliance on the offer, then the agreement becomes binding and enforceable.”⁹⁶ However, the ultimate decision to accept or reject a particular plea bargain rests with the trial

⁸⁹ KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011).

⁹⁰ *Maricle*, 15 S.W.3d at 379 (“a defendant cannot be made to face the sentencing phase of a capital trial unless he or she is first given sufficient notice of the Commonwealth’s intention to seek the death penalty”); *Smith*, 845 S.W.2d at 536–38.

⁹¹ *Smith*, 845 S.W.2d 534. *See also Maricle*, 15 S.W.3d at 378–79 (holding that the trial court did not abuse its discretion in its determination to exclude the death penalty where notice was given forty-six days before trial and the Commonwealth admitted it was not sufficient time to prepare).

⁹² *Smith*, 845 S.W.2d 534.

⁹³ *Smith v. Commonwealth*, 845 S.W.2d 534, 536–37 (Ky. 1993) (noting that “[t]he Commonwealth’s Attorney is under a strict obligation to see that every defendant receives a fair trial”) (internal citation omitted).

⁹⁴ *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.”); *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989). *See also Wiley v. Commonwealth*, 575 S.W.2d 166 (Ky. Ct. App. 1978) (plea bargain denotes reduction of charge to lesser offense or reduction of counts of charge whereas sentence negotiation denotes discussion regarding amount of time to be served after plea of guilty).

⁹⁵ KY. REV. STAT. ANN. § 15.725(1) (West 2011) (Commonwealth’s attorney to prosecute all criminal violations tried in circuit court); *Hoskins v. Maricle*, 150 S.W.3d 1, 11–12 (Ky. 2004) (citing *Moore v. Commonwealth*, 983 S.W.2d 479, 487 (Ky. 1998) (prosecutor has broad discretion as to what crime to charge and what penalty to seek); *Commonwealth v. McKinney*, 594 S.W.2d 884, 888 (Ky. Ct. App. 1979) (decision whether to prosecute and what charge to bring is within discretion of prosecutor); *Reyes*, 764 S.W.2d at 64 (“The prosecutor may engage in [plea bargaining] or not at his[/her] sole discretion. If he wishes, he may go to trial.”); *Waincott v. Commonwealth*, 562 S.W.2d 628 (Ky. 1978) (prosecutor can seek higher penalty at trial after defendant refuses to plead guilty and take lesser sentence to same charge); *O’Neil v. Commonwealth*, 114 S.W.3d 860, 864 (Ky. Ct. App. 2003) (“[W]hen a defendant breaches a plea agreement, the Commonwealth has the option of withdrawing its offer and proceeding upon the charge in the original indictment, or it may re[-]indict if those charges have already been dismissed in connection with the plea agreement.”).

⁹⁶ *Smith v. Commonwealth* 845 S.W.2d 534, 537 (Ky. 1993) (citing *Reyes*, 764 S.W.2d at 65 (where the Commonwealth was ordered to carry out its plea agreement promising not to seek the death penalty)).

court.⁹⁷ Prior to accepting a plea agreement, the court should make an inquiry that sufficiently ensures that the defendant entered the plea knowingly, intelligently, and voluntarily.⁹⁸ Failure of a trial court to follow a prosecutor’s sentencing recommendation does not render a guilty plea involuntary, although if “the defendant was misled by the action of the trial court, refusal to allow withdrawal of his guilty plea would amount to an abuse of discretion,” requiring reversal.⁹⁹

3. Discovery

a. Discovery Requirements

There is no constitutional right to discovery in criminal cases.¹⁰⁰ However, state and federal law entitles a defendant to receive all exculpatory information or evidence—known as *Brady* material—during trial.¹⁰¹ The prosecutor “is not required to deliver his[her] entire file to defense counsel,” but must “disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”¹⁰²

In capital cases, this obligation requires that the Commonwealth disclose evidence that supports mitigating circumstances at the penalty phase of the trial, and evidence that would be exculpatory during the guilt phase, including the disclosure of impeachment evidence that could be used to show bias or interest on the part of a witness for the Commonwealth.¹⁰³ Accordingly, the Commonwealth is under a duty to reveal any deal or agreement, even an informal one, where leniency has been promised to a Commonwealth witness who has criminal charges pending against him/her, in exchange for testimony against the defendant.¹⁰⁴ A prosecutor also must disclose favorable evidence known to the others acting on the government’s behalf in the case, such as the police.¹⁰⁵

⁹⁷ See, e.g., *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) (where the judge refused to approve the plea agreement and imposed the death penalty, which was overturned on appeal, and the Court then held that the Commonwealth was not bound by its original offer to recommend life without parole for twenty-five years); *Bush v. Commonwealth*, 702 S.W.2d 46 (Ky. 1986) (defendant entered a valid plea to a new plea bargain after the trial judge rejected the first bargain and the guilty plea made in reliance upon that bargain).

⁹⁸ *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brady v. United States*, 397 U.S. 742 (1970). Furthermore, RCr 8.08 “expressly prohibits acceptance of a guilty plea without a prior determination that it is voluntary.” *Haight v. Commonwealth*, 760 S.W.2d 84, 87–88 (Ky. 1988).

⁹⁹ *Haight*, 769 S.W.2d at 88; *Couch v. Commonwealth*, 528 S.W.2d 712, 713–15 (Ky. 1975).

¹⁰⁰ See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

¹⁰¹ *Brady v. Maryland*, 373 U.S. 83 (1963); see also *Carter v. Commonwealth*, 782 S.W.2d 597, 601 (Ky. 1990) (*Brady* requires “the Commonwealth, upon request, to notify the defense in advance of trial of exculpatory evidence known to the prosecution.”). See also KY. R. PROF’L CONDUCT 3.8(c).

¹⁰² *United States v. Bagley*, 473 U.S. 667, 675 (1985).

¹⁰³ *Brady*, 373 U.S. at 87 (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *Funk v. Commonwealth*, 842 S.W.2d 476, 481–82 (Ky. 1992) (holding that it was reversible error for the prosecutor, in a capital case, to withhold a report that contradicted the Commonwealth’s pathologist testimony). See also KY. R. PROF’L CONDUCT 3.8(c).

¹⁰⁴ See *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

¹⁰⁵ *Anderson v. Commonwealth*, 864 S.W.2d 909 (Ky. 1993); *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007), as modified, (Aug. 30, 2007) (finding the Commonwealth’s failure to disclose numerous police reports suggesting the possibility of an alternative suspect in the victim’s death was a reversible *Brady* violation).

Kentucky Rule of Criminal Procedure (RCr) 7.42 requires the prosecutor, upon a written request by the defendant, to make available certain evidence or statements, including “the substance, [] time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness.”¹⁰⁶ The Commonwealth’s Attorney must also, upon written request, permit the defendant to inspect and copy documents known by or in the possession of the Commonwealth,¹⁰⁷ including any (a) relevant written or recorded confessions by the defendant, (b) results or reports of physical or mental examinations and scientific tests or experiments in connection with the case, and (c) written summaries of any expert testimony the Commonwealth intends to introduce at trial.¹⁰⁸

Furthermore, upon the filing of a pretrial discovery motion, the court may order the Commonwealth’s Attorney “to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth,” if the defendant shows that (a) the items sought may be material to the preparation of the defense, and (b) the request is reasonable.¹⁰⁹ This provision requires the Commonwealth to permit inspection of official police reports.¹¹⁰ It does not, however, require the Commonwealth to disclose any “memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses.”¹¹¹

The Commonwealth has a reciprocal right to discovery, which is triggered if the Commonwealth, after having complied with the defendant’s discovery request under RCr 7.24(1)(b), makes a written request for discovery to the defense.¹¹² For example, if the defendant requests “reports of physical or mental examinations and of scientific tests or experiments” from the Commonwealth, then the Commonwealth’s Attorney has a reciprocal right to request these documents from the defendant.¹¹³ The prosecution is limited to discovery of items that are within the defendant’s “possession, custody, or control,” and those items the defendant “intends

¹⁰⁶ KY. R. CRIM. P. 7.24(1); *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008) (“nondisclosure of a defendant’s incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made”). *But see* *Haight v. Commonwealth*, 41 S.W.3d 436, 445 (Ky. 2001) (“[D]iscovery is not authorized in a post-conviction proceeding.”), *overruled on other grounds by* *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

¹⁰⁷ *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979) (the only materials discoverable under Rule 7.24 are those within the possession, custody, and control of the Commonwealth), *overruled on other grounds by* *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983).

¹⁰⁸ KY. R. CRIM. P. 7.24(1).

¹⁰⁹ KY. R. CRIM. P. 7.24(2).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² KY. R. CRIM. P. 7.24(3)(A)(i) (noting that this is “subject to objection for cause”). The Commonwealth and defense may enter into an agreement for reciprocal discovery, which would be binding on the parties. *See, e.g., Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006) (non-capital) (trial court erred by not following parameters of the Commonwealth’s and defendant’s reciprocal agreement); *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky. 2010) (non-capital) (same).

¹¹³ KY. R. CRIM. P. 7.24(3)(A).

to introduce” at the trial.¹¹⁴ However, in all instances, the Commonwealth must first comply with the discovery requests of the defendant before the Commonwealth can obtain discovery from the defendant.¹¹⁵ Both parties also are under a continuing duty to disclose discoverable material.¹¹⁶

Finally, at least forty-eight hours prior to trial, the Commonwealth’s Attorney must provide the defense with any witness statement, in writing, that is in his/her possession “which relates to the subject matter of the witness’s testimony and which (a) has been signed or initialed by the witness, or (b) is or purports to be a substantially verbatim statement made by the witness.”¹¹⁷

b. Challenges to Discovery Violations

RCr 7.24(9) provides for relief when either the prosecution or the defense fails to comply with any applicable discovery rule or related court order.¹¹⁸ The court has the discretion to order the non-complying party “to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.”¹¹⁹

Following the trial, a defendant may obtain relief for the prosecution’s failure to disclose *Brady* material at trial by showing

- (1) The defendant made a proper request for production of the evidence, unless the evidence was obviously exculpatory and helpful to the defendant, then State is required to produce the information whether or not it is requested;¹²⁰
- (2) The evidence at issue is favorable to the accused because it is either exculpatory or impeachment material;¹²¹
- (3) The evidence must have been suppressed by the State, either willfully or inadvertently;¹²² and
- (4) Prejudice resulted from the failure to disclose the evidence.¹²³

¹¹⁴ KY. R. CRIM. P. 7.24(3)(A)–(B). However, the Kentucky Supreme Court recently noted that there is nothing in the language of RCr 7.24 or discovery case law that the Commonwealth discovery burden is any greater than the defense’s burden. *Jones v. Commonwealth*, 237 S.W.3d 153, 159 (Ky. 2007).

¹¹⁵ KY. R. CRIM. P. 7.24(3)(A)(i)–(ii).

¹¹⁶ KY. R. CRIM. P. 7.24(8) (“If subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule, that party shall promptly notify the other party or the other party’s attorney, or the court, of the existence thereof.”).

¹¹⁷ KY. R. CRIM. P. 7.26(1). A trial court privately will examine a statement, if the Commonwealth claims a document does not relate to the subject matter of a witness’s testimony, to excise the unrelated portions before turning the document over to the defense. KY. R. CRIM. P. 7.26(2) (the entire statement is sealed and preserved in court records in the event of an appeal by the defendant.).

¹¹⁸ KY. R. CRIM. P. 7.24(9).

¹¹⁹ *Id.*

¹²⁰ *See United States v. Agurs*, 427 U.S. 97, 107 (1976).

¹²¹ *United States v. Bagley*, 473 U.S. 667, 676 (1985).

¹²² *See Agurs*, 427 U.S. at 110 (1976).

¹²³ *Bagley*, 473 U.S. at 678.

Prejudice results and reversal of the conviction or sentence is required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.¹²⁴

4. Limitations on Arguments

a. Substantive Limitations

Generally, “wide latitude [is] afforded to prosecutors in making closing arguments” to the jury.¹²⁵ However, the prosecutor has a “responsibility of a minister of justice and not simply that of an advocate.”¹²⁶ Therefore, prosecutors cannot deny a defendant a fair and impartial criminal proceeding by appealing to a jury on improper grounds.¹²⁷

As such, there are some limitations on the permitted scope of prosecutors’ questioning and opening and closing arguments.¹²⁸ A prosecutor may not reference his/her personal opinions during opening and closing statements,¹²⁹ discuss the jury’s lack of responsibility in making the ultimate decision,¹³⁰ suggest that the jury has a duty to impose death,¹³¹ argue that the jury “send a message” in sentencing the defendant to death,¹³² or make Biblical or scriptural references.¹³³

¹²⁴ *Bagley*, 473 U.S. 667; *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980); *Strickler v. Greene*, 527 U.S. 263 (1999); *Agurs*, 427 U.S. at 112–13. The Kentucky Supreme Court will review de novo whether particular evidence is material under *Brady*. See *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000).

¹²⁵ *Winstead v. Commonwealth*, 327 S.W.3d 386, 400–01 (Ky. 2010) (citing *Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002) (“When prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor Additionally, prosecutors are allowed wide latitude during closing arguments and may comment upon the evidence presented.”); *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *Napier v. Commonwealth*, 105 S.W.2d 595, 598 (1937)) (reversing based on the prosecutor’s “acquittal is equivalent to murder” argument).

¹²⁶ KY. R. PROF’L CONDUCT 3.8 cmt. 1 (“This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”).

¹²⁷ *Smith v. Commonwealth*, 845 S.W.2d 534, 536 (Ky.1993).

¹²⁸ *Brown v. Commonwealth*, 313 S.W.3d. 577 (Ky. 2010).

¹²⁹ See *United States v. Young*, 470 U.S. 1, 9 (1989); *Morris v. Commonwealth*, 766 S.W.2d 58, 62 (Ky. 1989) (Stephens, C.J., dissenting) (citing *Young*, 470 U.S. 1); *Turner v. Commonwealth*, 240 S.W.2d 80, 81 (Ky. 1951) (“The office of an opening statement is to outline to the jury the nature of the charge against the accused and the law and facts counsel relies upon to support it It is never proper in an opening statement for counsel to argue the case or to give his personal opinions or inferences from the facts he expects to prove.”); see also KY. R. PROF’L CONDUCT 3.4(e). However, the prosecutor may express his view of defendant’s guilt “as long as it is based upon the evidence in the case.” *Koonce v. Commonwealth*, 452 S.W.2d 822, 826 (1970).

¹³⁰ *Caldwell v. Mississippi*, 472 U.S. 320 (1985); see also *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984) (prosecutor’s emphasis in closing argument that jury’s sentence was only a recommendation was improper and s/he cannot convey a message that jurors’ responsibility is lessened by fact that their decision is not final); *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988) (the word “recommend” may not be used in capital cases with reference to jury’s sentencing responsibilities in voir dire, instructions, or closing argument).

¹³¹ *Young*, 470 U.S. at 8–9. See also *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985).

¹³² *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009) (noting that an exception could be during the penalty phase of a capital trial, if the argument is narrowly focused on deterrence objectives and does not attempt to bring community pressure on the jury).

¹³³ See *Ice*, 667 S.W.2d at 676; *Grooms v. Commonwealth*, 756 S.W.2d 131, 145 (Ky. 1988) (Stephens, C.J. concurring and dissenting). Moreover, “[u]sing a defendant’s religious faith as a reason to execute him is a contention which does not belong in a court of law in this Commonwealth.” *Morris*, 766 S.W.2d at 62 (Stephens, C.J., dissenting) (arguing that the Commonwealth’s Attorney should face discipline for his trial tactics).

Also, in capital cases, “a prosecutor may not make improper comments designed to completely undercut the defendant’s sole mitigation theory, effectively denying him fair jury consideration.”¹³⁴ Prosecutors are not permitted to knowingly introduce perjured testimony.¹³⁵ The Court also has stated that “a defendant should not be criticized to the jury for not disclosing a witness list to the Commonwealth.”

b. Challenges to Prosecutorial Arguments

Following a prosecutor’s improper remarks during trial, the defense must make a timely and proper objection requesting particular relief to the court, which the court may sustain or overrule.¹³⁶ The trial judge may offer a curative instruction to the jury or may, in the event of particularly egregious misconduct, declare a mistrial.¹³⁷

An appellate court will reverse a conviction “for prosecutorial misconduct in a closing argument only if the misconduct is ‘flagrant’ or if each of the following three conditions is satisfied: (1) [p]roof of defendant’s guilt is not overwhelming; (2) [d]efense counsel objected; and (3) [t]he trial court failed to cure the error with a sufficient admonishment to the jury.”¹³⁸ Kentucky uses “a four-part test to determine if a prosecutor’s improper comments rise to the level of flagrant misconduct . . . (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.”¹³⁹

The Kentucky Supreme Court reviews actions of lower courts by considering “the Commonwealth’s conduct in context and in light of the trial as a whole,” focusing “on the overall fairness of the trial, and not the culpability of the prosecutor.”¹⁴⁰ When determining whether the cumulative effect of the Commonwealth’s conduct deprived a capital defendant of a fair trial, the Court has noted that “a trial of this magnitude will invariably be marred with occasional minor or surface knicks which, when cured by the trial court, cause no substantial error.”¹⁴¹ Trial judges’ admonitions of prosecutors’ improper statements to the jury, when appropriate, at times are enough to ensure a fair trial.¹⁴²

¹³⁴ *Broom v. Mitchell*, 441 F.3d 392, 412 (6th Cir. 2006) (“When a prosecutor’s actions are so egregious that they effectively foreclose the jury’s consideration of . . . mitigating evidence, the jury is unable to make a fair, individualized determination as required by the Eighth Amendment,” requiring reversal) (internal citation omitted).

¹³⁵ *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655–56 (Ky.1999) (quoting *Giglio v. United States*, 405 U.S. 150, 153 (1972)) (“When [such] perjured testimony could ‘in any reasonable likelihood have affected the judgment of the jury,’ the knowing use by the prosecutor of perjured testimony results in a denial of due process under the Fourteenth Amendment and a new trial is required.”). See also KY. R. PROF’L CONDUCT 3.3.

¹³⁶ KY. R. CRIM. P. 9.22; *Jenkins v. Commonwealth*, 477 S.W.2d 795, 797 (Ky. 1979).

¹³⁷ *Jenkins*, 477 S.W.2d 795; *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (“failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted”).

¹³⁸ *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994)); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996).

¹³⁹ *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010) (internal citations omitted).

¹⁴⁰ *Alexander v. Commonwealth*, 862 S.W.2d 856, 858–59 (Ky. 1993) (non-capital case) (noting that “[a]lleged errors are not to be considered in a vacuum”); *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411–12 (Ky. 1987).

¹⁴¹ *Stanford v. Commonwealth*, 734 S.W.2d 781, 791 (Ky. 1987).

¹⁴² See *Alexander*, 862 S.W.2d at 858–59; *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001); *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006) (“A jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error.”).

To successfully challenge a prosecutor's introduction of perjured testimony, "the defendant must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false."¹⁴³

¹⁴³ Commonwealth v. Spaulding, 991 S.W.2d 651, 654 (Ky. 1999) (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)).

II. ANALYSIS

The Kentucky Death Penalty Assessment Team was unable to determine whether the Commonwealth is in compliance with several of the Recommendations contained in this Chapter. The Team has relied on publicly available data on training, budgets, and discipline of Kentucky prosecutors, as well as Kentucky statutory and case law describing prosecutors' charging and discovery practices. The Assessment Team also 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 as information on training and qualification requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices.¹⁴⁴ 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."¹⁴⁵ The Kentucky Assessment Team addressed all further inquiries to the Council and subsequent efforts to obtain information were unsuccessful.¹⁴⁶

A. 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.

Kentucky law does not require Commonwealth prosecutors to maintain written policies governing the exercise of prosecutorial discretion in capital cases. The Assessment Team was also unable to determine whether any entity within Kentucky's Unified Prosecutorial System maintains written policies governing any aspect of its practice.

Kentucky Rules Governing Prosecutorial Discretion

As previously described in the Factual Discussion, Rule 3.8 of the Kentucky Rules of Professional Conduct (Rules) requires prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."¹⁴⁷ The Rules do not include any specific directives related to capital cases.¹⁴⁸

Kentucky Commonwealth's Attorneys Charging Practices

¹⁴⁴ See Kentucky Questionnaire on Kentucky's Prosecutorial Services, *infra* Appendix.

¹⁴⁵ Letter to Sarah Turberville from Janet M. Graham, Assistant Deputy Attorney General, Exec. Dir. Office of Prosecutors Advisory Council, July 15, 2010 (on file with author). For the extent of the correspondence between the Kentucky Team via Sarah Turberville, Director of the Death Penalty Moratorium Implementation Project, and Janet Graham, Assistant Deputy Attorney General for Kentucky, see the Appendix Materials to this Report [hereinafter collectively referred to as Ky. Prosecutor Correspondence].

¹⁴⁶ See Ky. Prosecutor Correspondence, *infra* Appendix.

¹⁴⁷ KY. R. PROF'L CONDUCT R. 3.8(a), 2009 cmt. 1 (describing the prosecutor as "a minister of justice"). Attorneys also may not knowingly "offer evidence that the lawyer knows to be false." KY. R. PROF'L CONDUCT 3.3(3).

¹⁴⁸ See KY. R. PROF'L CONDUCT 1.1–8.4.

With respect to capital cases, Kentucky confers broad discretion to Commonwealth's Attorneys in the fifty-seven circuit court districts across Kentucky for determining whether to seek the death penalty, to negotiate, accept, or reject a potential plea agreement, and whether to prosecute any given case.¹⁴⁹ Kentucky prosecutors are permitted to seek the death penalty in any case in which the evidence supports a finding of any one of eight aggravators listed in the capital punishment statute.¹⁵⁰ In order to seek the death penalty, Kentucky prosecutors must provide the defense notice of evidence in aggravation within a "sufficient" time prior to trial or risk being unable to proceed capitally.¹⁵¹ Although a sufficient time has not been precisely defined, Kentucky trial courts have found that notice given forty-six days prior to trial is insufficient and have precluded the Commonwealth from seeking the death penalty under such circumstances.¹⁵² Notice of intent to seek the death penalty, or notice of aggravators, need not be in writing.¹⁵³

It appears some Commonwealth's Attorneys in Kentucky seek the death penalty in any murder case where evidence of an aggravating circumstance may be found.¹⁵⁴ The effect of such a practice may be best illustrated by the 2010 U.S. Department of Justice Bureau of Justice Statistics (BJS) Report which found that Kentucky public defender agencies undertake representation in the greatest number of capital-eligible felony cases out of eleven statewide public defender programs in capital jurisdictions that were examined in its study.¹⁵⁵ According to the BJS Report, in 2007, Kentucky's public defender agencies undertook representation in ninety-seven death penalty cases.¹⁵⁶ However, few of these cases result in the imposition of a death sentence. For example, in the over thirty years since Kentucky reinstated the death penalty, Kentucky courts have sentenced seventy-eight defendants to death, and only three death

¹⁴⁹ See *Moore v. Commonwealth*, 983 S.W.2d 479, 487 (Ky. 1998).

¹⁵⁰ The statute also permits consideration of any non-statutory aggravators "otherwise prohibited by law." KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011); *Harris v. Commonwealth*, 793 S.W.2d 802, 808–09 (Ky. 1990) ("Certainly, KRS 532.025(2) allows aggravating circumstances other than those specifically enumerated in that section to be taken into consideration by the jury in its deliberations, but *in addition*, by using the conjunctive 'and,' the statute requires at least one of the enumerated statutory circumstances to be found before the death penalty or life without parole for twenty-five (25) years can be imposed."). See also *Jacobs v. Commonwealth*, 58 S.W.3d 435, 449–50 (Ky. 2001) (remanding a capital conviction for a new non-death sentencing phase because kidnapping is not an aggravator authorized by law but rather a separate capital offense).

¹⁵¹ *Smith v. Commonwealth*, 845 S.W.2d 534 (Ky. 1993); *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1995), *as corrected on denial of reh'g*, (Mar. 21, 1996) (defense was put on notice at all stages of proceedings that Commonwealth would seek death penalty); *White v. Commonwealth*, 178 S.W.3d 470 (Ky. 2005) (sufficient notice); *Ernst v. Commonwealth*, 160 S.W.3d 744 (Ky. 2005) (sufficient notice even though notice did not specify aggravating circumstance).

¹⁵² *Commonwealth v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000) ("We cannot say that the trial court abused its discretion in finding that forty-six days was insufficient notice under *Smith*"). *C.f. Smith*, 845 S.W.2d 534 (verbal notice three weeks prior to trial and formal notice filed six days prior is insufficient).

¹⁵³ *Epperson v. Commonwealth*, 197 S.W.3d 46 (Ky. 2006) (notice need not be in writing).

¹⁵⁴ Gerald Neal, *Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act: a Symbol, a Statement of Legal Principle, and a Commitment to Systemic Fundamental Fairness*, 26 ADVOCATE 9, Mar. 2004, at 16–20; Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. KY. L. REV. 273, 279–80 (2010).

¹⁵⁵ BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES, 2007, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007 11 (Sept. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf> (including caseload data from all of Kentucky's public defender agencies in 2007) [hereinafter BJS REPORT].

¹⁵⁶ BJS REPORT, *supra* note 235, at 11. The BJS reported that the state with the second highest number of capital cases at trial was Maryland, where the public defender undertook representation in thirty capital trials. *Id.*

row inmates have been executed.¹⁵⁷ Kentucky prosecutors have filed notice of intent to seek the death penalty in cases which ultimately resulted in acquittal or convictions for lesser crimes, such as manslaughter or robbery.¹⁵⁸ 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, raises an issue as to whether current charging practices ensure the fair, efficient, and effective enforcement of criminal law.

Geographic Disparity in Capital Charging Practices

¹⁵⁷ See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix. In total, there have been seventy-eight capital defendants sentenced to death in Kentucky since 1976. The total number of death sentences imposed is greater than seventy-eight as, in some cases, a defendant was sentenced to death for more than one murder, a defendant was given more than one death sentence for a single murder, or a defendant's initial death sentence was reversed on appeal and a subsequent rehearing resulted in the defendant again being sentenced to death. For example, death row inmate Michael D. St. Clair has been sentenced to death four times, three of which were eventually reversed, and another capital murder trial is scheduled in Hardin County. See, e.g., *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004); *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005); *St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010); Brett Barrouquere, *Oklahoman prison escapee resentenced to death*, ASSOCIATED PRESS, Nov. 16, 2011, Ky. 15:56:15. Current death row inmates Roger Dale Epperson and Benny Lee Hodge have also been sentenced to death in three separate trials. See, e.g., *Epperson v. Commonwealth*, 809 S.W.2d 835 (Ky. 1990) (direct appeal for both Hodge and Epperson); see 17 SW3d 824, 834 (Ky. 2000), citing 766 S.W.2d 58,61 (Ky. 1989) (1987 conviction reversed); *Epperson*, 197 S.W.3d 46; *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000). For additional statistical data on Kentucky's death row, please see Chapter One.

¹⁵⁸ Examples of cases that went to trial with death as a possible sentence but resulted in acquittal, reckless homicide, or manslaughter verdicts include (1) *Commonwealth v. Joshua Cottrell*, No. 03-CR-00465 (Hardin Cir. Ct. Mar. 1, 2005) (capital defendant received second degree manslaughter and sentenced to twenty years with Persistent Felony Offender (PFO), eligible for parole 2.5 years after sentencing); (2) *Commonwealth v. Larry Osborne*, No. 98-CR-000006-001 (Whitley Cir. Ct. Feb. 28, 2002) (death row inmate acquitted on retrial); (3) *Commonwealth v. C.H. Brown*, No. 87-CR-00506-001 (Fayette Cir. Ct. June 28, 1988) (capital defendant acquitted on murder charges and found guilty of first degree robbery; on retrial, pled guilty to theft by unlawful taking and received maximum sentence of three years); (4) *Commonwealth v. Mark Dixon*, No. 95-CR-00577 (Fayette Cir. Ct. 1996) (charged with capital murder, first degree robbery, and three counts of wanton endangerment, acquitted on all charges); (5) *Commonwealth v. Carlos Cortez*, No. 99-CR-00369-002 (Fayette Cir. Ct. Mar. 18, 2002) (charged with capital murder, first degree robbery, and first degree burglary; acquitted on all charges); (6) *Commonwealth v. Earl Cheeks*, No. 90-CR-00049-002 (Fayette Cir. Ct. Dec. 21, 1990) (charged with capital murder, first degree robbery and PFO; convicted of second degree manslaughter (twenty years for PFO) acquitted of robbery); (7) *Commonwealth v. Myron Wilkerson*, No. 98-CR-00631-002 (Jefferson Cir. Ct. 1998) (charged with capital murder, first degree burglary and first degree robbery; found guilty of second-degree manslaughter (ten year sentence) and robbery (twenty years), not guilty burglary); (8) *Commonwealth v. Nashawn Stoner*, No. 98-CR-2446 (Jefferson Cir. Ct. 1998) (charged with capital murder and first degree robbery, acquitted on all charges); (9) *Commonwealth v. Donnez Porter*, No. 97-CR-1951 (Jefferson Cir. Ct. 1998) (charged with two counts of capital murder, first degree robbery and first degree assault; acquitted on all charges). See Email to Sarah Turberville from Ed Monahan, Public Advocate, Ky. Dep't of Pub. Advocacy (DPA), June 20, 2010 (on file with author). In response to prosecutors' filing of a notice of aggravators, the public defenders also have filed pretrial motions to request the court to find as a matter of law that there are no aggravating factors present as described in KRS 532.025 to support sending the case to the jury on the issue of imposing the death penalty. See, e.g., *Order, Commonwealth v. Levering*, No. 10-CR-00031 (Lawrence Cir. Ct. Apr. 1, 2011) (granting defense motion to preclude using the two aggravators filed by the prosecutor due to lack of evidence supporting the aggravating circumstances); DPA Interview, *supra*.

There exists some geographic disparity in Kentucky with respect to capital charging practices and conviction rates.¹⁵⁹ In 2006, a *Louisville Courier-Journal* article compared conviction and sentencing data of murder cases in Fayette and Jefferson Counties, noting that in Fayette, seventy-one percent of murder defendants have been sentenced to more than ten years in prison, compared with thirty-two percent of murder defendants in Jefferson County.¹⁶⁰ Furthermore, fifty-three percent of Fayette County murder cases since 2003 have gone to trial, while only twenty-five percent in Jefferson County have gone to trial.¹⁶¹ The article notes that “Jefferson County prosecutors say they are at a disadvantage, trying murder cases in an urban area with more gangs and drugs, and more liberal juries that are less likely to convict,” while in Fayette County “prosecutors say they have less discretion to plea bargain; that taking murders to trial is not only encouraged but expected; and that the results are tracked on the [C]ommonwealth[’s] [A]ttorney’s Web site.”¹⁶² Similarly, in Appalachia, where murders are more frequent than “they are anywhere else in Kentucky . . . ,” cases selected for capital murder charges “may vary so widely both in their legal and extra-legal characteristics that no distinctive [charging] patterns may be found.”¹⁶³

Furthermore, in 2006, Kentucky professors Thomas Keil and Gennaro Vito, who had previously conducted a number of studies on the effect of race on Kentucky’s death penalty administration,¹⁶⁴ released a study that examined whether the race of the defendant or race of the victim affected a prosecutor’s decision to seek the death penalty.¹⁶⁵ Keil and Vito concluded that based on the 575 cases of persons charged, indicted, convicted, and sentenced for murder in Kentucky between December 22, 1976 and December 31, 1991,¹⁶⁶ a “statistically significant” difference emerged where “*Blacks who kill Whites* have the largest probability of being charged with a capital offense (46.7%), followed by *Whites who kill Whites* (28.6%). *Blacks who kill Blacks* (16.0%) and *Whites who kill Blacks* (16.7%) had a close to equal chance of being tried on capital charges.”¹⁶⁷ Based on their research, Keil and Vito concluded that “capriciousness is a significant aspect of the decision to charge persons with a capital crime in Kentucky,” and that “the decision as to who will be charged with a capital crime is far more random among white defendants than it is among black defendants.”¹⁶⁸

¹⁵⁹ Thomas Keil & Gennaro Vito, *Capriciousness or Fairness? Race and Prosecutorial Decisions to Seek the Death Penalty in Kentucky*, 4(3) J. ETHNICITY CRIM. JUST. 27, 41 (2006) (one of the reasons why capriciousness is strong where victims are white is “[t]here might be a strong geographic/political cultural explanation”).

¹⁶⁰ Jason Riley, *Fayette much more likely to ‘go full tilt’ on murder trials*, COURIER-J. (Louisville, Ky.), Sept. 30, 2006, <http://www.courier-journal.com/article/20070125/NEWS01/101250207/Fayette-much-more-likely-go-full-tilt-murder-trials> (last visited Nov. 15, 2011).

¹⁶¹ *Id.* (quoting Fayette County Commonwealth’s Attorney as stating “Our rule is murder cases go to trial.”).

¹⁶² *Id.* (noting that the Fayette Commonwealth’s Attorney must sign off on a plea bargain before approval while in Jefferson County, the Commonwealth’s Attorney only approves plea bargains in capital murder cases).

¹⁶³ Keil & Vito, *supra* note 159, at 41–42.

¹⁶⁴ See Chapter Twelve on Racial and Ethnic Minorities, *supra* note 12 and accompanying text.

¹⁶⁵ Keil & Vito, *supra* note 159, at 32.

¹⁶⁶ Keil & Vito, *supra* note 159, at 32–33 (noting that this number does not include cases missing data, where the original pool of cases was 949). The study controlled for other variables including whether the offense involved (1) multiple murders, (2) the defendant having a history of violent offenses, (3) more than one aggravator, (4) a “heinous” crime, (5) killing a stranger, and/or (6) a female victim. *Id.* at 33–34.

¹⁶⁷ *Id.* at 35–36 (the data “show[s] that race of the victim matters in the decision as to whether an alleged murderer will be charged with a capital crime by Kentucky prosecutors and that it matters even more if the killer happens to be Black”).

¹⁶⁸ *Id.* at 39–40.

A number of death row inmates have challenged their death sentences by arguing that “Kentucky’s capital sentencing scheme is inherently arbitrary due to the alleged unlimited discretion enjoyed by prosecutors in determining whether to seek the death penalty in a given case.”¹⁶⁹ The Kentucky Supreme Court has rejected this argument, stating that “we disagree and respond that ‘the death penalty is not imposed arbitrarily or capriciously in Kentucky.’”¹⁷⁰ According to the Court, “as the Commonwealth’s representative, the Commonwealth’s Attorney, not the judiciary, is properly vested with the discretion of determining whether to plea bargain, go to trial, or even dismiss the indictment.”¹⁷¹

Furthermore, a Kentucky circuit court has recently considered the constitutionality of Kentucky’s prosecutorial discretion in determining whether to seek the death penalty.¹⁷² In *Commonwealth v. Parker*, the defendant claimed discretion in Commonwealth prosecutorial charging practices created an arbitrary and capricious process where a “person who commits a crime in one county may face death while a person who commits the same crime in another county may not face death.”¹⁷³ As of October 1, 2011, the Kenton Circuit Court had denied a defense motion to hold a pretrial hearing on the issue and denied the motion to exclude the death penalty.¹⁷⁴

Based on this information, it does not appear that all Kentucky prosecutors exercise discretion in a way that ensures the fair, efficient, and effective enforcement of criminal law. However, because we are unable to obtain information as to whether any of the fifty-seven Commonwealth’s Attorneys offices have adopted written policies addressing prosecutorial discretion in death penalty cases, we have insufficient information to determine if Kentucky is in compliance with Recommendation #1.¹⁷⁵

The Kentucky Death Penalty Assessment Team is concerned about current charging practices throughout the Commonwealth. Capital prosecutions occur in far more cases than result in death sentences, which places a significant burden on Commonwealth courts, prosecutors, and defense counsel to treat many cases as capital that will never result in a death sentence, taxing the Commonwealth’s limited judicial and financial resources. 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, adoption of written policies will help guide

¹⁶⁹ *Meece v. Commonwealth*, 348 S.W.3d 627, 727 (Ky. 2011), *reh’g denied* (Oct. 27, 2011); *Hunt v. Commonwealth*, 304 S.W.3d 15, 55 (Ky. 2009).

¹⁷⁰ *Meece*, 348 S.W.3d at 727 (citing *Fields*, 274 S.W.3d at 419; *Tamme*, 973 S.W.2d at 40–41); *see also Hunt*, 304 S.W.3d at 55.

¹⁷¹ *Hoskins v. Maricle*, 150 S.W.3d 1, 39 (Ky. 2004) (citing *Flynt v. Commonwealth*, 105 S.W.3d 415, 424–25 (Ky. 2003) (describing the duties of Commonwealth’s Attorneys) (“In defining the duties of Commonwealth’s attorneys, the General Assembly clearly contemplated that they would perform executive prosecutorial functions both before and after indictment . . .”).

¹⁷² *Kenton County case to be used as Ky. death penalty test*, CINCINNATI ENQUIRER, July 2, 2010 (on file with author). *Commonwealth v. Parker* also is the case cited by the Prosecutors’ Advisory Council as its basis for voting not to respond to the survey submitted to Commonwealth prosecutors by the Kentucky Assessment Team. *See Ky. Prosecutor’s Correspondence, infra Appendix.*

¹⁷³ *Id.*

¹⁷⁴ Telephone Interview by Paula Shapiro with Joanne Lynch, Assistant Public Advocate, Ky. Dep’t of Pub. Advocacy, Sept. 13, 2011 (on file with author).

¹⁷⁵ As previously discussed, the Prosecutor’s Advisory Council declined to respond to our request for information relative to the analysis of this and other Recommendations. *See Ky. Prosecutor’s Correspondence, infra Appendix.*

prosecutors in their charging decisions to support the even-handed, non-discriminatory application of the death penalty across the Commonwealth.

The Assessment Team, therefore, recommends that Kentucky adopt guidelines governing the exercise of prosecutorial discretion in death penalty cases.¹⁷⁶ The Attorney General should promulgate the 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’s office must adopt policies for implementation of the guidelines, subject to approval by the Attorney General. If an office fails to maintain such a policy, the Attorney General shall set the policy. This will further ensure that “[a]rbitrary or impermissible factors—such as a defendant’s race, ethnicity, or religion—will not inform any stage of the decision-making process.”¹⁷⁷

Finally, the Assessment Team notes its difficulty in obtaining data on all death-eligible cases in the Commonwealth or cases in which prosecutors unsuccessfully sought the death penalty. Therefore, as suggested in other parts of this Report, the Assessment Team recommends that the Commonwealth establish a statewide database for collecting data on these cases. These data ought to include, at minimum, details on the race of the defendants and the victims, the circumstances of the crime, the nature and strength of the evidence, and for those cases where the death penalty is sought, the aggravating and mitigating circumstances presented and established at trial. The creation of such a database would provide policymakers better information as they continue to assess Kentucky’s capital punishment system—specifically, the system’s effectiveness and fairness. Such data would also provide insight into the charging practices of Commonwealth’s Attorneys throughout Kentucky.

B. Recommendation #2

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

It has been established that among the many factors that lead to wrongful convictions nationwide, eyewitness misidentification and confessions are the most problematic.¹⁷⁸ According to the Innocence Project, eyewitness identification has played “a role in more than 75% of convictions overturned through DNA testing.”¹⁷⁹ In other cases, “statements from

¹⁷⁶ Other jurisdictions may provide useful examples as to what kind of information should be contained in written guidelines governing the exercise of discretion in capital cases. *See, e.g.*, U.S. ATTORNEYS CRIMINAL RESOURCE MANUAL, U.S. ATTORNEYS OFFICE 9-10.030 (June 2007), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.030 (Purposes of the Capital Case Review Process); OFFICE OF THE ILL. ATT’Y GEN. & ILL. STATE’S ATTORNEYS ASS’N, DEATH PENALTY DECISION GUIDELINES 2 (2006); NEW JERSEY COUNTY PROSECUTOR ASS’N, PROSECUTORS’ GUIDELINES FOR DESIGNATION OF HOMICIDE CASES FOR CAPITAL PROSECUTION (1989).

¹⁷⁷ U.S. ATTORNEYS CRIMINAL RESOURCE MANUAL, *supra* note 176.

¹⁷⁸ *See* Samuel R. Gross, et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529–530, 544 (2005).

¹⁷⁹ *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 15, 2011).

people with incentives to testify—particularly incentives that are not disclosed to the jury—are the central evidence in convicting an innocent person.”¹⁸⁰ Furthermore, social science research has shown that false confessions may occur as a result of a number of variables, including common police questioning techniques, and the suspect’s background, IQ, and state of mind at the time of questioning.¹⁸¹

The Commonwealth of Kentucky, however, does not require prosecutors’ offices to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or testimony of jailhouse snitches, informants and other witnesses who receive a benefit. We were also unsuccessful in obtaining information on whether any prosecuting entity within the Commonwealth maintains policies and procedures for evaluating cases like those described in this Recommendation.

Kentucky Statutory and Case Law on Identifications, Confessions, and Informant Testimony

However, Kentucky law does require consideration of certain factors to determine the admissibility, reliability, and sufficiency of evidence in criminal cases.¹⁸² The Kentucky Supreme Court has held that trial courts have discretion to admit expert testimony regarding the reliability of eyewitness identifications.¹⁸³ *Brady v. Maryland* and its progeny also require prosecutors to fully disclose to the accused all exculpatory, mitigating, and impeachment evidence favorable to the defense.¹⁸⁴ For more information on discovery obligations, see Recommendations #3 and 5, below.

Use of Eyewitness Identifications, Confessions, and Informants in Kentucky Capital Cases

¹⁸⁰ *Understanding the Causes: Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Nov. 15, 2011) (stating that “[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial.”).

¹⁸¹ *Understanding the Causes: False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Nov. 15, 2011) (stating that “[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty”).

¹⁸² *Riley v. Commonwealth*, 620 S.W.2d 316, 318 (Ky. 1981) (adopting *Neil v. Biggers*, 409 U.S. 188 (1972)). For example, the Kentucky Supreme Court requires the consideration of five factors to determine, under a totality of the circumstances, whether an eyewitness identification is reliable, including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. *Id.* See also Chapter Three on Law Enforcement Identification and Interrogations.

¹⁸³ KY. R. EVIDENCE 702 (expert testimony); *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002). See *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997) (creating the rule for when expert opinion evidence is admissible). Further, Kentucky law mandates that a “confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed.” Ky. R. Crim. P. 9.60. The Kentucky Supreme Court has interpreted this rule to require corroboration that the offense has been committed, and does not require independent evidence of the defendant’s participation in the crime. *Lofthouse v. Commonwealth*, 13 S.W.3d 236 (Ky. 2000).

¹⁸⁴ See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 US 419 (1995); *Giglio v. United States*, 405 US 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985); *Commonwealth v. Bussell*, 226 S.W.3d 96, 99–100 (Ky. 2007); *Wilson v. Parker*, 515 F.3d 682, 701 (6th Cir. 2008).

Despite the existence of some evidentiary standards that must be met where a criminal prosecution relies upon an eyewitness identification or a confession, a review of cases in which the death penalty was sought or imposed in Kentucky reveal that some capital prosecutions have rested on the sort of unreliable evidence described in this Recommendation. For example, in the case of one current death row inmate, the Kentucky Supreme Court stated that “the only evidence against [the defendant] was the testimony of one person”—the inmate’s son.¹⁸⁵ In another capital case in which the defendant received five life sentences without the possibility of parole, “[n]o physical evidence was presented linking [the defendant] to the murders. Prosecutors’ main witnesses were jailhouse snitches who testified about contradictory statements [the capital defendant] had made about the fire or the scene.”¹⁸⁶

In another case, Larry Osborne, once the youngest man on Kentucky’s death row, was acquitted at retrial after having spent three years on death row for the 1997 murder of an elderly couple in Whitley County, Kentucky.¹⁸⁷ A friend of Osborne “fail[ed]” a polygraph test, implicated Osborne in the murder, and testified before a grand jury that he had seen Osborne break into the couple’s home and later come out with a pocketful of cash.¹⁸⁸ However, this witness died several months prior to Osborne’s capital trial, and the conviction and sentence were later reversed based on inadmissible hearsay evidence.¹⁸⁹ During the direct appeal, the Kentucky Supreme Court dismissed the inmate’s assertion that without the inadmissible “grand jury testimony, there was insufficient competent evidence to convict [the inmate] of these crimes” as not within the Court’s province to determine.¹⁹⁰ However, the second jury to hear his case acquitted Osborne of all charges, and he was freed immediately.¹⁹¹

In another capital case, a conviction rested on eyewitness and jailhouse snitch testimony. The Kentucky Supreme Court found the evidence, taken as a whole, to be sufficient to support the conviction,¹⁹² describing the evidence to include (1) “[w]itnesses [who] saw appellant near the time of the incident on the railroad tracks,” (2) the capital defendant’s initial statements, later retracted, placing blame on an alternative suspect, and (3) a jailhouse informant who “testified to appellant’s candid admission while in jail of shooting and beating” the victim.¹⁹³ During post-

¹⁸⁵ *Garland v. Commonwealth*, Nos. 2009–SC–000035–MR, 2009–SC–000361–MR, 2011 WL 2438371, at *2, 5 (Ky. May 19, 2011); *Garland v. Commonwealth*, 127 S.W.3d 529, 535 (Ky. 2003) (describing the inmate’s son as “the star witness against his father” and noting that “[n]o physical evidence linked Appellant to the crime scene”).

¹⁸⁶ Dori Hjalmarson, *Jury recommends life without parole for man charged with Leslie County murders*, LEXINGTON HERALD-LEADER, Apr. 9, 2011 <http://www.kentucky.com/2011/04/08/1701700/jury-recommends-life-without-parole.html#ixzz1Xld9CCia> (last visited Nov. 15, 2011) (prosecutors noted that “if more evidence is discovered, Jackson or another conspirator could be prosecuted in the deaths of” the parents as well).

¹⁸⁷ *Commonwealth v. Osborne*, 43 S.W.3d 234, 239–41 (Ky. 2001); *Innocence Cases: 1994–2003*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-cases-1994-2003> (last visited Nov. 15, 2011).

¹⁸⁸ *Osborne*, 43 S.W.3d at 237.

¹⁸⁹ *Osborne*, 43 S.W.3d at 238.

¹⁹⁰ *Osborne*, 43 S.W.3d at 245.

¹⁹¹ Associated Press, *Youngest man on death row in Kentucky freed after acquittal in retrial*, Aug. 2, 2002, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/1886> (last visited Nov. 15, 2011) (“not having access to [the dead friend’s] testimony in the retrial left prosecutors ‘not a whole lot to work with’”).

¹⁹² Although the Court noted “despite the absence of direct evidence,” the Court found that “the jury could reasonably find appellant guilty from the totality of the evidence.” *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986).

¹⁹³ *Id.* See also *Commonwealth v. Marlowe*, No. 2004-SC-0459-MR, 2005-SC-984-MR, 2006 WL 3386629, at *3 (Ky. 2006) (upholding post-conviction court’s grant of new sentencing hearing) (“In this case, a jail house

conviction proceedings, it was determined that, unbeknownst to the defendant at the time of trial, the informant's "bond on pending robbery charges was reduced from a cash bond to release on his own recognizance shortly after [the informant] disclosed [the former inmate's] alleged inculpatory statements."¹⁹⁴

Because we were unable to determine whether all Commonwealth prosecutors maintain policies for evaluating cases described within this Recommendation, we are unable to ascertain whether the Commonwealth of Kentucky is in compliance with Recommendation #2. However, given the documented instances in which Kentucky death penalty cases have significantly relied on eyewitness identifications, confessions, or informant testimony—evidence now known to be leading causes of wrongful conviction nationwide—the Kentucky Death Penalty Assessment Team recommends that the Commonwealth require Kentucky prosecutors to adopt policies or procedures for evaluating the reliability of such evidence that will be considered prior to making a decision to seek the death penalty. Furthermore, as discussed in Chapter Three on Law Enforcement Identifications and Interrogations, the Assessment Team recommends that the Kentucky Rules of Court 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.

C. 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.

State and federal law requires prosecutors to disclose evidence that is favorable to the defendant when such evidence is material to either the defendant's guilt or punishment. This includes all exculpatory, mitigating, and impeachment evidence as well as "favorable evidence known to others acting on the government's behalf in the case."¹⁹⁵ The Kentucky Rules of Professional Conduct also impose on prosecutors an ethical obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of

informant, Tony Mallory, testified at Appellant's trial that Appellant had confessed to murdering seventy-eight year old Henry Hamlin with his own gun. This testimony was crucial, Appellant argues, since this is the only evidence which inculpated Appellant for the actual shooting of the victim. Appellant's own statements indicate that he was present during the crime but did not actually shoot or rob the victim. Moreover, other evidence merely links Appellant to the crime scene but not necessarily to the shooting itself."

¹⁹⁴ *Marlowe*, 2006 WL 3386629, at *3 (noting that this was a *Brady* violation but not reversible error because the snitch's testimony was already sufficiently impeached). The inmate's death sentence was reversed during post-conviction proceedings. *Marlowe*, 2006 WL 3386629, at *1 (upholding post-conviction court's remand for a new sentencing hearing due to ineffective assistance of counsel at the original trial). *See also* *West v. Commonwealth*, 780 S.W.2d 600, 603 (Ky. 1989) (Stephens, C. J. dissenting) ("In view of the purely circumstantial nature of the Commonwealth's case, and the relative weakness of the evidence, I have concluded that the conduct of the prosecutor in this case was of such a nature as to merit a reversal of the conviction.")

¹⁹⁵ *Commonwealth v. Bussell*, 226 S.W.3d 96, 99–100 (Ky. 2007); *Wilson v. Parker*, 515 F.3d 682, 701 (6th Cir. 2008). *See also* *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985).

the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor”¹⁹⁶

Furthermore, when disclosing evidence, the Kentucky Rules of Criminal Procedure require prosecutors to permit defendants to “inspect and copy or photograph” discoverable evidence that is within the Commonwealth’s “possession, custody, or control.”¹⁹⁷ Such evidence that is subject to this requirement includes, but is not limited to, the defendant’s relevant written and recorded statements, documents or other tangible objects that were obtained from or belong to the defendant and are material to preparing the defense or evidence the Commonwealth intends to use in the trial, and “reports of physical or mental examinations, and of scientific tests or experiments.”¹⁹⁸

Based upon this information, it appears that Kentucky has the necessary framework in place to require prosecutors to fully and timely disclose all information, documents, and tangible objects to the defense before and during a capital trial. It also appears that this framework permits reasonable inspection, copying, testing, and photographing of the disclosed documents and tangible objects. However, some Kentucky prosecutors still fail to comply with discovery requirements despite this framework.

The Kentucky Supreme Court has reversed one death sentence due to a prosecutor’s failure to disclose exculpatory material to the defense prior to trial.¹⁹⁹ In 2005, a post-conviction court found the Commonwealth’s failure to disclose exculpatory evidence in the case of Charles Bussell reversible error, and granted relief to the former death row inmate.²⁰⁰ We are also aware of one capital case where the prosecutor intentionally erased, in anticipation of an order by the court requiring that copies be provided to the defendant, tape-recorded statements of witnesses who testified against the defendant.²⁰¹ In 2011, it was discovered that Jefferson County Assistant Commonwealth’s Attorneys failed to disclose to defense counsel evidence that suggested a defendant’s innocence.²⁰² In this case, in March 2010, “a cooperating government witness told a [Louisville Metro Police] detective and two [Jefferson County] prosecutors that Kerry R. Porter—imprisoned 13 years for a murder he says he didn’t commit—was innocent and that another man, Juan Leotis Sanders, had killed” the victim for which Porter was

¹⁹⁶ KY. R. PROF’L CONDUCT R. 3.8(c) (except when the prosecutor is relieved of this responsibility by a protective order of the tribunal).

¹⁹⁷ KY. R. CRIM. P. 7.24.

¹⁹⁸ *Id.*

¹⁹⁹ *Bussell*, 226 S.W.3d 96. *See also* *Barnett v. Commonwealth* 763 S.W.2d 119, 123 (Ky. 1988) (reversible error in non-capital case not to disclose key conclusions in serologist report); *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005) (Commonwealth’s failure to disclose trooper’s assault report in non-capital case prejudiced defendant’s ability to prepare defense and was reversible error); *see also* KY. R. CRIM. P. 7.24.

²⁰⁰ *Bussell*, 226 S.W.3d at 105 (unanimously upholding the grant of post-conviction relief, which was also based in part on his trial counsel’s ineffective assistance).

²⁰¹ *Sanborn v. Commonwealth*, 754 S.W.2d 534, 539 (Ky. 1988) (referring to the prosecutor’s actions in erasing audio tapes as “misconduct of constitutional proportions”).

²⁰² Andrew Wolfson, *Convicted murderer’s lawyer never told about witness who says he is innocent*, COURIER-J. (Louisville, Ky.), Aug. 29, 2011.

imprisoned.²⁰³ However, prosecutors did not disclose this information until defense counsel learned of this evidence from a *Louisville Courier-Journal* reporter in late August 2011.²⁰⁴

Notably, Kentucky prohibits discovery in post-conviction proceedings, which is the primary vehicle through which previously undisclosed evidence in the possession of the prosecution is later uncovered.²⁰⁵ Kentucky also prohibits a petitioner from using the Open Records Act to obtain materials during post-conviction proceedings in the possession of the police or prosecution.²⁰⁶ Thus, the total number of capital-eligible cases in which *Brady* or statutory discovery violations have occurred is unknown.

The Center for Public Integrity has also examined Kentucky criminal appeals, including both death penalty and non-death penalty cases from 1970 to 2003, which revealed 121 cases in which a defendant alleged prosecutorial error or misconduct.²⁰⁷ In thirty-seven of these cases, judges reversed or remanded a defendant's conviction, sentence, or indictment due to prosecutorial misconduct that prejudiced the defendant.²⁰⁸ Of these thirty-seven cases, three involved the prosecution withholding exculpatory evidence from the defense.²⁰⁹

Furthermore, we were unable to determine the number of capital cases in which the Kentucky Supreme Court determined that a prosecutor's failure to disclose potentially exculpatory, mitigating, or impeachment evidence to a defendant prior to trial was harmless error. However, the Center for Public Integrity found that in the majority of cases in which the defendant alleged prosecutorial misconduct (eighty-one out of 121), the court found the prosecutor's conduct to be in error or tantamount to misconduct, but concluded that the conduct was harmless.²¹⁰

Although Kentucky has the necessary framework in place to permit prosecutors to fully and timely disclose evidence, and many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, there are documented instances where Commonwealth prosecutors have failed to do so. Moreover, the lack of discovery in post-conviction proceedings impedes the ability of death row inmates to present viable claims of

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See *Haight v. Commonwealth*, 41 S.W.3d 436, 445 (Ky. 2001) (holding that RCr 7.42 is inapplicable in the post-conviction context), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 910 (Ky. 1998), *overruled on other grounds by Leonard*, 279 S.W.3d 151; see generally KY. R. CRIM. P. 7.42. For more information on discovery in Kentucky courts, see Chapter Eight on Post-Conviction Proceedings.

²⁰⁶ The Kentucky Attorney General is responsible for enforcement of the Kentucky Open Records Act. See generally KY. REV. STAT. ANN. § 61.880 (West 2011). The Attorney General has issued opinions stating that Kentucky law enforcement may deny a request for inspection of records where a party requests investigative records related to a case in which an individual's full sentence has not been carried out. See, e.g., KY. OP. ATTY. GEN. 10-ORD-094. "[t]herefore, under *Skaggs v. Redford*, 844 S.W.2d 389 (Ky. 1992), the [law enforcement agency] properly denied inspection of criminal case records where the sentences had not been fully carried out.").

²⁰⁷ *Harmful Error*, CTR. FOR PUB. INTEGRITY, <http://projects.publicintegrity.org/pm/states.aspx?st=KY> (last visited Nov. 15, 2011).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Nationwide Numbers, CTR. FOR PUB. INTEGRITY*, <http://projects.publicintegrity.org/pm/search.aspx?act=nat&hid=y> (last visited Nov. 15, 2011). In an additional three cases, the alleged prosecutorial misconduct was not addressed by Kentucky appellate courts. *Id.*

innocence as such individuals may be unable to learn of possible exculpatory information in the possession of the prosecution that was not disclosed at trial—even if the failure to disclose such information was inadvertent.

We, therefore, conclude that the Commonwealth of Kentucky only is in partial compliance with Recommendation #3.

In death penalty cases, trial counsel’s failure to seek all discoverable material, or the prosecution’s failure to disclose—inadvertently or deliberately—exculpatory or discoverable material, can lead to a wrongful conviction or unjust imposition of a death sentence. It is the Kentucky Death Penalty Assessment Team’s view that new mechanisms should be instituted to better assist the prosecution and defense to comply with all relevant discovery obligations.

Full open file discovery should be permitted in every capital trial, with a continuing duty to disclose new material in the possession of the prosecution, law enforcement, or other entities under the prosecution’s direction or control, as it becomes available. Such disclosure will improve the fairness of a capital trial, will eliminate the human error which can lead to an inadvertent failure to disclose exculpatory material, and may obviate the need for extensive litigation of discovery violations on appeal. Under this rule, defense counsel will still be permitted to file a formal request for discovery prior to and during trial.

Furthermore, as described in Chapter Eleven on Judicial Independence, trial courts should help facilitate full discovery in capital cases. Kentucky should adopt a procedure requiring trial courts to conduct a conference prior to the commencement of a capital trial to ensure that all parties are aware of their respective disclosure obligations.²¹¹

D. 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.

Instances of Prosecutorial Misconduct in Kentucky Death Penalty Cases

Out of the seventy-eight persons sentenced to death in the Commonwealth since the reinstatement of the death penalty, fifty defendants’ death sentences have been overturned by Kentucky or federal courts.²¹² Of these fifty reversals, fifteen have been based, in whole or in part, on prosecutorial misconduct or error.²¹³ As many of the capital defendants on Kentucky’s

²¹¹ See Chapter Eleven on Judicial Independence, Recommendation #6.

²¹² See Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, *infra* Appendix; Kentucky Capital Case Basis for Reversals, 1976 to 2011, compiled by the ABA Death Penalty Moratorium Implementation Project (on file with author) [hereinafter Ky. Capital Reversals].

²¹³ See Ky. Capital Reversals, *supra* note 212. Two additional death row inmates were granted clemency by a Kentucky Governor and are now serving life sentences without the possibility of parole. See Chapter Nine on Clemency.

death row have additional appeals pending or not yet filed, no opinion on prosecutorial conduct in those cases is yet available. We were also unable to determine the total number of instances in which the court recognized prosecutorial misconduct or error in capital cases but found such conduct “harmless” or found the defendant procedurally barred from raising the issue on appeal.²¹⁴ We also were unable to calculate the number of instances of misconduct in capital-eligible cases where the death penalty was sought but not imposed.

An examination of Kentucky death penalty reversals reveals that prosecutorial misconduct or error in the reviewed cases is not conduct that would likely constitute a violation of the Kentucky Rules of Professional Conduct to warrant investigation or discipline by the Kentucky Bar Association (KBA). However, individual Commonwealth’s Attorneys offices should retain and implement policies to appropriately discipline prosecutors and law enforcement under their direction or control who engage in unfair conduct, particularly when a defendant’s life is at stake.

For example, in the majority of cases reversed due to prosecutorial misconduct or error, prosecuting attorneys were alleged to have made inappropriate arguments during opening or closing statements.²¹⁵ In a number of cases, the Kentucky Supreme Court found that prosecutors committed reversible error by repeatedly minimizing the responsibility of the jury in determining whether the defendant should be sentenced to death.²¹⁶ Two convictions were reversed because

²¹⁴ See, e.g., *Brown v. Commonwealth*, 313 S.W.3d 577, 630 (Ky. 2010) (“[W]e are convinced that the prosecutor’s impropriety, if any, did not constitute a manifest injustice or render Brown’s trial fundamentally unfair.”); *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001) (prosecutor’s improper argument was cured by court’s admonition to the jury); *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006) (“A jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error.”); *Marlowe v. Commonwealth*, 709 S.W.2d 424, 430–31 (Ky. 1986) (“We believe after reviewing the record that the jury would have returned the same verdict of guilty even without the prosecutor’s comments.”).

²¹⁵ See *Ky. Capital Reversals*, *supra* note 212. See, e.g., *Dean v. Commonwealth*, 777 S.W.2d 900, 908 (Ky. 1989) (“From the catalog of 14 improprieties identified, the following illustrations best depict the Commonwealth attorney’s flagrant conduct.”); *Gall v. Commonwealth*, 231 F.3d 265, 311–12 (6th Cir. 2000) (“After a close review of the record, we find that the Commonwealth’s misconduct was sufficiently egregious to render the entire trial fundamentally unfair.”); *Morris v. Commonwealth*, 766 S.W.2d 58, 61 (Ky. 1989) (“Another alleged error is the conduct of the Commonwealth Attorney during his opening statement, his questioning of witnesses, his closing arguments, and the penalty phase of the trial. These allegations of error are well taken, as seldom have we seen such flagrant disregard for the rules of evidence.”); *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984); *Perdue v. Commonwealth*, 916 S.W.2d 148, 163–64 (Ky. 1995); *Sanborn v. Commonwealth* 754 S.W.2d 534, 543–44 (Ky. 1988) (“The record is replete with instances where the prosecutor misstated the evidence, and misstated the law relating both to guilt and to punishment. Perhaps the most serious misstatement was the closing argument . . .”).

²¹⁶ *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985) (“In short, the prosecutor clearly sought to divert from the minds of the jurors their true responsibility in this case by implying that the ultimate responsibility would fall to the trial judge, this court, other appellate courts, or to the Governor. This is clearly an error of reversible magnitude.”); *Clark v. Commonwealth*, 833 S.W.2d 793, 795–96 (Ky. 1991) (“Fundamental fairness requires the highest level of reliability in the jury’s determination that death is the appropriate punishment. Comments by the prosecutor in this case leave broad doubt whether the death penalty was imposed because 1) the prosecutor determined to seek it, or 2) the Legislature decreed it, or 3) the jury thought it only a recommendation, or 4) the jury determined it to be the appropriate punishment.”); *Dean*, 777 S.W.2d at 906–07 (“We agree that the pattern established by the drumbeat of “recommend” did indisputably denigrate the jury’s responsibility for determining an appropriate sentence for appellant.”); *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988); *Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993) (error using the word “recommend” rather than “fix” requires error); *Ice*, 667 S.W.2d at 676 (“emphasis on the jury’s sentence as only a recommendation is improper The

“the prosecution made deliberate and undue reference to [the two co-defendants’] failure to make a statement upon questioning after they were given their ‘*Miranda* rights.’”²¹⁷ Finally, one capital conviction was reversed during post-conviction review due, in part, to a *Brady* violation.²¹⁸

Furthermore, as discussed in Recommendation #3, the Center for Public Integrity, in its study of capital and non-capital criminal appeals in the Commonwealth from 1970 to 2003, found that in thirty-seven of 121 cases in which the defendant alleged prosecutorial error or misconduct, judges reversed or remanded a defendant’s conviction, sentence, or indictment due to the prosecutor’s prejudicial conduct.²¹⁹ Of these thirty-seven cases, thirty-four involved improper trial tactics or arguments by the prosecution.²²⁰

Because we were unable to obtain information on prosecutors’ policies or procedures regarding discipline of counsel who engage in misconduct, it is unknown the extent to which appropriate discipline was imposed in any of the above-mentioned cases to correct or prevent future errors from occurring.²²¹

In the event that a prosecutor’s conduct does rise to the level constituting a violation of professional ethics, Kentucky has entrusted the KBA and its Office of Bar Counsel with investigating grievances and disciplining practicing attorneys who violate the Kentucky Rules of Professional Conduct.²²² All attorneys also are required to report professional misconduct of other attorneys to the KBA.²²³ In addition, at any time Kentucky attorneys may submit questions to the Ethics Committee and the Unauthorized Practice Committee for official advisory opinions.²²⁴ As the entity that licenses attorneys, however, only the Kentucky Supreme Court can reprimand an attorney, suspend an attorney’s license, or order permanent disbarment from the practice of law.²²⁵

prosecutor broke this rule, telling the jurors that they simply “recommend” the death penalty and “are not killing [the inmate].”)

²¹⁷ *Holland v. Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985) (reversing the conviction and death sentences of Jack Joe Holland and Larry James).

²¹⁸ *Bussell v. Commonwealth*, 226 S.W.3d 96, 99–103 (Ky. 2007); *see infra* Kentucky Death Sentences Imposed, Reversed and Commuted, 1976–2011, at Appendix.

²¹⁹ *Harmful Error*, CTR. FOR PUB. INTEGRITY, <http://projects.publicintegrity.org/pm/states.aspx?st=KY> (last visited Nov. 15, 2011).

²²⁰ *Id.*

²²¹ We note that, in contrast, we were able to obtain some information on the discipline of defense counsel in death penalty cases, which revealed that at least some defense counsel were subsequently disbarred for conduct in a death penalty cases. *See* Chapter Six on Defense Services.

²²² KY. REV. STAT. ANN. § 21A.150 (West 2011); SCR 3.130–3.530; *Office of Bar Counsel Overview*, KY. BAR ASS’N, <http://www.kybar.org/234> (last visited Nov. 15, 2011).

²²³ KY. R. PROF’L CONDUCT 8.3(a). The Kentucky Supreme Court revised Rule 8.3 to impose a mandatory reporting of professional misconduct requirement, effective July 15, 2009. *In Re: Order Amending Rules of the Supreme Court (SCR) 2009-05*, KY. SUP. CT. (effective July 15, 2009), available at <http://courts.ky.gov/NR/rdonlyres/AA868FA5-6B4B-4C20-A06C-D5C4FC0D1596/0/RevisedSCRruleseffective7152009.pdf>.

²²⁴ SCR 3.530.

²²⁵ SCR 3.380.

We are aware of one prosecutor who was disciplined by the KBA after “certain taped statements of witnesses who were called to testify for the Commonwealth had been erased in anticipation of an order by the court requiring that copies be provided to the defendant pursuant to [RCr] 7.26(1).”²²⁶

Although the Commonwealth of Kentucky has established a procedure by which grievances are investigated and members of the Kentucky Bar are disciplined, this process is often not well-suited to investigate or institute appropriate discipline when prosecutorial misconduct or error occurs in death penalty cases. The high instance of reversals and citations of prosecutorial misconduct or error in capital cases acutely demonstrates the need for appropriate discipline to deter and prevent reoccurrence of such conduct, particularly when a life is at stake and judicial resources are scarce. While we were unable to determine whether Commonwealth’s Attorneys maintain established policies to discipline prosecutors or others under their control who engage in misconduct, Commonwealth courts should be commended on the level of error correction they have engaged in to remedy the prejudicial impact of misconduct by some Kentucky prosecutors. Therefore, it appears the Commonwealth is in partial compliance with Recommendation #4.

E. 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.

The Kentucky Supreme Court has stated that a prosecutor’s responsibility to disclose exculpatory and mitigating information “known to the prosecution but unknown to the defense . . . means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”²²⁷ RCr 7.24 requires Kentucky prosecutors, upon defense motion, to disclose evidence “in the possession, custody or control of the Commonwealth” that

may be material to the preparation of the defense, including official police reports, but not [] memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or [] statements made to them by witnesses or by prospective witnesses (other than the defendant).²²⁸

²²⁶ Ky. Bar Ass’n v. Hamilton, 819 S.W.2d 726, 726 (Ky. 1991). See Sanborn v. Commonwealth, 754 S.W.2d 534, 539 (Ky. 1988) (finding “three prosecutorial errors so substantial that each would require the judgment be reversed,” including prosecutor’s intentional erasing of tape-recorded statements of witnesses who testified against the defendant).

²²⁷ Commonwealth v. Bussell, 226 S.W.3d 96, 102 (Ky. 2007), as modified, (Aug. 30, 2007) (finding the Commonwealth’s failure to disclose numerous police reports suggesting the possibility of an alternative suspect in the victim’s death was a reversible *Brady* violation) (internal italics omitted) (citing Kyles v. Whitley, 514 U.S. 419 (1995) (prosecutor under a concomitant “duty to learn of any favorable evidence known to . . . the police.”)).

²²⁸ KY. R. CRIM. P. 7.24(1)–(2).

In order to obtain relief, a defendant must show the evidence is “material,” or, in other words, that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”²²⁹

If the Commonwealth fails to disclose evidence material to guilt, then the defendant could receive a new trial; alternatively, if the Commonwealth fails to disclose evidence material to punishment, the defendant could receive a new sentencing hearing.²³⁰ These potential outcomes encourage all law enforcement agencies, laboratories, and other experts under the control of the prosecutor to comply with their obligation to inform the prosecutor of any potentially exculpatory or mitigating evidence.

Although the Kentucky Death Penalty Assessment Team requested information on whether prosecutors maintain policies or procedures ensuring 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, we did not receive any information relevant to this Recommendation.²³¹ Therefore, we do not have sufficient information to determine whether Kentucky prosecutors are meeting the requirements of Recommendation # 5.

F. 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.

The Kentucky Prosecutors Advisory Council (Council) and the Kentucky Attorney General’s Office are responsible for providing training to the Commonwealth’s prosecutors.²³² While there are no required training programs relevant to capital prosecutions, all attorneys licensed in Kentucky must complete at least twelve-and-a-half hours of continuing legal education each year, two hours of which must be related to ethics and professional responsibility.²³³ Commonwealth prosecutors are also statutorily required to complete, upon employment and at least once every two years, training and continuing education courses relating to domestic violence and sexual assault.²³⁴

²²⁹ United States v. Bagley, 473 U.S. 667, 668 (1985); Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972); Commonwealth v. Bussell, 226 S.W.3d 96, 99–100 (Ky. 2007); Wilson v. Parker, 515 F.3d 682, 701 (6th Cir. 2008).

²³⁰ See *Agurs*, 427 U.S. at 112–13; *Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. at 668; *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980); *Strickler v. Greene*, 527 U.S. 263 (1999). The Kentucky Supreme Court will review de novo whether particular evidence is material under *Brady*. See *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000).

²³¹ See Ky. Prosecutors Questionnaire, Ky. Prosecutors Correspondence, *infra* Appendix.

²³² KY. REV. STAT. ANN. §§ 15.705(4), 15.775 (West 2011); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT’Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 15, 2011).

²³³ SCR 3.600–3.690.

²³⁴ KY. REV. STAT. ANN. § 15.718 (West 2011) (requiring training “concerning the dynamics of domestic violence, child physical and sexual abuse, rape, effects of crime on adult and child victims, legal remedies for protection, lethality and risk issues, profiles of offenders, model protocols for addressing domestic violence, child abuse, rape, available community resources and victims services, and reporting requirements”).

Although we requested information from the Council on the resources available to train Kentucky prosecutors to handle capital cases, we were unable to determine whether the Commonwealth routinely provides funding for the provision of and attendance at trainings relevant to capital prosecutions.²³⁵ However, it appears that the Council and the Attorney General's Office offer prosecutor training programs, including the week-long Kentucky Prosecutors Institute for new prosecutors,²³⁶ and the annual Kentucky Prosecutors Conference, in which at least one program in 2010 related to the prosecution of capital cases.²³⁷ While the KBA and its Continuing Legal Education Commission provide continuing education seminars, lectures, and tele-seminars throughout the Commonwealth,²³⁸ we are unaware of whether such trainings are relevant to capital prosecutions.

However, according to the Kentucky Attorney General's Office, Kentucky's prosecutors have recently "faced the worst fiscal crisis in the history of the Unified Prosecutorial System. During fiscal year 2009, the Commonwealth's and County Attorneys were drastically underfunded," resulting in mandatory, unpaid furloughs for three full weeks and jeopardizing funding for victim and witness protection programs.²³⁹ We were unable to determine whether this fiscal crisis affected funds earmarked for effective training, professional development, and continuing legal education of Kentucky prosecutors involved in death penalty cases.²⁴⁰

Despite the availability of some educational training, the presence of misconduct discussed throughout this chapter calls into question the sufficiency of prosecutor training. Furthermore, it appears that Kentucky's recent and ongoing fiscal crisis will adversely affect the availability of funds for effective training and professional development of all Commonwealth prosecutors, including those involved in death penalty cases. Based on the information available, however, we were unable to determine whether the Commonwealth is in compliance with Recommendation #6.

²³⁵ See Ky. Prosecutors Questionnaire, *infra* Appendix. Capital prosecutors in Kentucky may be permitted to acquire training with national training organizations, such as the National District Attorneys Association and its research and training affiliate, the American Prosecutor's Research Institute, and the National College of District Attorneys, but we were unable to confirm this information.

²³⁶ KY. REV. STAT. ANN. §§ 15.705(4), 15.775 (West 2011); *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited Nov. 15, 2011).

²³⁷ *Prosecutors Advisory Council*, OFFICE OF THE KY. ATT'Y GEN., <http://ag.ky.gov/criminal/pac/> (last visited June 15, 2011); PROSECUTORS ADVISORY COUNCIL & OFFICE OF THE KY. ATT'Y GEN., KPC 2010: KENTUCKY PROSECUTORS CONFERENCE (Aug. 25–27, 2010), *available at* http://www.kyprosecutors.com/kpc/2010/materials/materials/00-Program_CLE_Travel/KPC%202010%20Program%20Agenda.pdf (providing a CLE session entitled "The Nuts and Bolts of a Capital Murder Case").

²³⁸ *CLE Overview*, KY. BAR ASS'N, <http://www.kybar.org/113> (last visited Aug. 16, 2011); *KBA CD Programs*, KY. BAR ASS'N, <http://www.kybar.org/658> (last visited Nov. 16, 2011) (trainings available for purchase online).

²³⁹ OFFICE OF THE KY. ATT'Y GEN., 2009 BIENNIAL REPORT 26 (The Kentucky General Assembly, in response, "provided necessary funding to the prosecutors in the 2009 Extraordinary Session" which helped to avoid additional layoffs or furloughs during fiscal year 2010.).

²⁴⁰ Budget documents obtained from the Office of the Kentucky State Budget Director do not identify funding amounts allocated to prosecutor training or education. See, e.g., 2010-2012 BUDGET, *supra* note 11, at 35–38.

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore across the country, a comprehensive 2000 study¹ shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.² The 2000 study found that between 1973 and 1995, state and federal courts across the U.S. undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in sixty-eight percent of the cases reviewed.³ In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants may often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, pro bono representation in capital cases, most pro bono representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally-mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

¹ JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman>.

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ Liebman, *supra* note 1.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. *Kentucky's Indigent Legal Representation System*

1. Overview

Kentucky's current indigent legal representation system for capital defendants and death row inmates consists of the Department of Public Advocacy (DPA) and the Louisville Metro Public Defender's Office (Metro Defender).⁴ In addition, private counsel will undertake representation if a conflict of interest arises with public defender representation in capital cases.⁵

In 1972, the Kentucky General Assembly adopted Chapter 31 of the Kentucky Revised Statutes (KRS), creating a statewide public defender system and requiring every county in the Commonwealth to develop a plan for the representation of its indigents.⁶ DPA was established that year as the Commonwealth's statewide public defender and provides representation at trial, direct appeal, during state and federal post-conviction proceedings, and during clemency proceedings for all indigent capital defendants and death row inmates in 119 of 120 Commonwealth counties.⁷ The Metro Defender, an independent non-profit corporation, provides representation in criminal cases, both capital and non-capital, occurring in Jefferson County.⁸ Fayette County Legal Aid, an independent non-profit organization, provided civil and criminal legal representation to Fayette County's (Lexington) indigent persons from 1964 until its board voted in 2007 to permit DPA to "take over management and funding of the office after realizing that it could not continue to operate without an increase in funding" from the county and Commonwealth.⁹

⁴ KY. DEP'T OF PUB. ADVOCACY, FISCAL YEAR 2011 ANNUAL LITIGATION REPORT 3, 8–10 (2011), *available at* <http://dpa.ky.gov/NR/rdonlyres/183A4143-6A0B-4F03-9ECO-72DB51045A71/0/2011AnnualReportFINALfullpage0923112.pdf> [hereinafter DPA 2011 ANNUAL REPORT]; *see also infra* notes 11–48 and accompanying text.

⁵ DPA 2011 ANNUAL REPORT, *supra* note 4, at 3; SCR 3.130(1.7) (prohibiting a lawyer from representing a client if the representation involves a concurrent conflict of interest and no waiver is obtained).

⁶ KY. REV. STAT. ANN. §§ 31.010, 31.050–31.060 (West 2011). A statewide system of public defense "function[s] entirely under the direction of a central office that fund[s] and administer[s] all public defender offices in the state." U.S. BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES, 2007, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007 1 (Sept. 2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf> [hereinafter BJS REPORT].

⁷ KY. REV. STAT. ANN. §§ 31.030, 31.050, 31.060, 31.065 (West 2011). *See also* KY. REV. STAT. ANN. § 31.220(1) (West 2011) (authorizing Commonwealth defense attorneys to represent a needy person in U.S. federal court if "the matter arises out of or is related to an action pending or recently pending in a [Kentucky] court of criminal jurisdiction").

⁸ The Metro Defender is sometimes referred to as DPA's thirtieth regional trial office or DPA's Jefferson Region Branch.

⁹ Beth Musgrave, *State to Run Legal Aid; Public Defender's Office has Budget Woes*, LEXINGTON HERALD-LEADER, July 12, 2007, *available at* <http://www.nlada.org/DMS/Documents/1184254879.97/121619.html>. At the time of the transition to a regional office of DPA, all sixteen lawyers and seven support staff were asked to stay on as DPA employees. *Id.*

In 2011, there were 325 attorneys in the Commonwealth's public defender offices who provided representation in 180,036 cases, including 152,727 new trial cases, 101 of which were capital felony cases.¹⁰

a. The Department of Public Advocacy

DPA was “established as an independent agency of [the Commonwealth’s] government, attached for administrative purposes to the Justice and Public Safety Cabinet, in order to provide for the establishment, maintenance, and operation of a state-sponsored and controlled” public defender system.¹¹ DPA is responsible for the representation of the Commonwealth’s indigent criminal defendants, including capital defendants and death row inmates, at trial, direct appeal, state post-conviction, and federal habeas proceedings.¹² DPA has thirty regional trial offices, some of which serve up to eight Commonwealth counties, and two capital trial branch offices.¹³

In addition to administering Kentucky’s statewide public defender system, the authority and duties of DPA include, but are not limited to

a) Providing technical aid to local counsel representing indigents;

¹⁰ DPA 2011 ANNUAL REPORT, *supra* note 4, at i, 6. On December 4, 2009, the Kentucky Bar Association Criminal Justice Roundtable (Roundtable) unanimously adopted a resolution establishing common case counting principles to be used by the Kentucky Administrative Office of the Courts, Unified Prosecutorial System, and DPA, in order to make the comparison of both prosecutors and defenders caseload figures easier and more comprehensible and to ensure adequate funding for the proper functioning of the Commonwealth’s criminal justice system. See KY. BAR ASS’N, CRIMINAL JUSTICE ROUNDTABLE FINDINGS AND RECOMMENDATIONS, *available at* http://dpa.ky.gov/NR/rdonlyres/5F1F627A-EF50-46BD-9C11-36C6E186CAB7/0/KBACriminalJusticeRoundtableFindingsandRecommendationsFinalApproved_3_.pdf. In order to more accurately identify the actual workloads of prosecutors and defenders, the Roundtable agreed to several common principles, including to “identify total cases as the number of cases opened each year, plus the cases carried over into the next year,” to count probation revocation cases in the total case number, and not to count Persistent Felony Offender cases as separate cases. *Id.* Previously, DPA included in its case totals parole and probation revocations, contempt hearings, and Persistent Felony Offender charges as separate cases, and only included cases that were opened during the fiscal year, rather than including ongoing cases handled by DPA that were opened in previous years. Email to Sarah Turberville and Paula Shapiro from Edward Monahan and Glenn McClister, Ky. Dep’t of Pub. Advocacy, Mar. 8, 2011 (on file with author). DPA estimates that use of the agreed upon case counting method increased DPA’s overall caseloads by ten to fifteen percent. *Id.*

¹¹ KY. REV. STAT. ANN. § 31.010 (West 2011), H.B. 461, 1972 Gen. Assemb., Reg. Sess. (Ky. 1972) (appointing DPA responsible for representing the Commonwealth’s “indigent persons accused of crimes or mental states which may result in their incarceration or confinement” and ensuring the protection of the rights of Kentuckians with disabilities); SPANGENBERG GRP., STATE INDIGENT DEFENSE COMMISSIONS 17 (Dec. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_state_indigentdefense_feb07.authcheckdam.pdf.

¹² KY. REV. STAT. ANN. §§ 31.030(1), 31.219(1) (West 2011); KY. R. CRIM. P. 3.05(2); *Division Overview*, KY. DEP’T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div> (last visited July 21, 2010) (also representing indigent persons in DUI cases, involuntary commitment cases, juvenile cases, and criminal cases); Interview by Sarah Turberville and Paula Shapiro with the Ky. Dep’t of Pub. Advocacy (DPA), June 14, 2010 (on file with author).

¹³ DPA 2011 ANNUAL REPORT, *supra* note 4, at 3, 6; *Trial Division*, KY. DEP’T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/trial.htm> (last visited July 21, 2010). The thirty regional trial offices include the Metro Defender in Louisville. *Supra* note 8; DPA 2011 ANNUAL REPORT, *supra* note 4, at 6.

- b) Assisting local counsel on appeals or taking appeals for local counsel, in the same manner as such appeals for the Commonwealth are presently handled by the Attorney General;
- c) Developing and promulgating standards and regulations, rules, and procedures for the administration of the defense of indigent defendants in criminal cases which the public advocate, statutes, or the courts determine are subject to public assistance;
- d) Appointing assistant public advocates;
- e) Reviewing local plans for providing counsel for indigents;
- f) Conducting research into, and developing and implementing methods of, improving the operation of the criminal justice system with regard to indigent defendants and other defendants in criminal actions;
- g) Issuing such rules, regulations, and standards as may be reasonably necessary to carry out the provisions of this chapter, the decisions of the United States Supreme Court, the decisions of the Kentucky Supreme Court, Court of Appeals, and other applicable court decisions or statutes;
- h) Being authorized to seek and apply for and solicit funds for the operation of the defense of the indigent, or protection of the persons with disabilities programs from any source, public or private, and to receive donations, grants, awards, and similar funds from any legal source;
- i) Being authorized to assign a substitute attorney, for good cause, at any stage of representation, including appeal or other post-conviction proceeding; and
- j) Do such other things and institute such other programs as are reasonably necessary to carry out the provisions of this chapter¹⁴

DPA is administered by the Public Advocate and is divided into four divisions: Trial, Post Trial, Law Operations, and Protection and Advocacy.¹⁵

The Public Advocate

The Commonwealth's Public Advocate, appointed to renewable four-year terms by the Governor upon recommendation from the Public Advocacy Commission (described below), is the chief administrator of DPA.¹⁶ S/he must be an attorney licensed in Kentucky, with at least five years of experience practicing law.¹⁷ In addition to serving as a member of the Public Advocacy Commission, the Public Advocate appoints a Deputy Public Defender, assistant public defenders,

¹⁴ KY. REV. STAT. ANN. § 31.030 (West 2011).

¹⁵ *Division Overview*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div> (last visited July 21, 2010). Divisions of DPA not directly involved in the representation of capital defendants include the Law Operations and the Protection and Advocacy Divisions. *Law Operations*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/div/lawops.htm> (last visited July 19, 2010); *P & A History*, PROTECTION & ADVOCACY DIV., <http://www.kypa.net/drupal/?q=taxonomy/term/141> (last visited Nov. 19, 2011).

¹⁶ KY. REV. STAT. ANN. § 31.020(2) (West 2011) (the appointment may be renewed upon the expiration of each term). *See also infra* note 33 and accompanying text.

¹⁷ *Id.*

and other DPA personnel.¹⁸ The Office of the Public Advocate is “responsible for the oversight of the agency and includes the Public Advocate, Deputy Public Advocate [and] General Counsel, and all strategic planning and education functions.”¹⁹ The Public Advocate must submit an annual report to DPA “showing the number of persons represented [], the crimes involved, the outcome of each case, and the expenditures, totaled by kind, made in carrying out the responsibilities imposed by” KRS Chapter 31.²⁰

Trial Services Division

DPA’s Trial Services Division is composed of seven full-time regional trial branches, including the Northern, Bluegrass, Eastern, Central, Western, and Jefferson²¹ Region Branches, and the Lexington Capital Trial Branch (CTB).²² Trial public defenders are supported by investigators, alternative sentencing workers, clerks, paralegals, social workers, and secretaries.²³ The CTB is split into two entities, Capital East and Capital West, and employs one Branch manager, one supervisory directing attorney, eight staff attorneys, two investigators, and two mitigation specialists.²⁴ CTB attorneys, along with capital-qualified attorneys from the other six branches of the Trial Services Division, primarily represent capital defendants.²⁵ However, if a conflict of interest bars any DPA attorney from providing representation in a particular case, each regional office within the Trial Services Division will contract with private “conflict” counsel to represent a capital client.²⁶

Post Trial Services Division

¹⁸ KY. REV. STAT. ANN. § 31.020(3)–(5) (West 2011). The Public Advocate also appoints a seventeen-member citizen advisory board to oversee DPA’s Protection and Advocacy Division. KY. REV. STAT. ANN. § 31.035 (West 2011).

¹⁹ OFFICE OF KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2008-2010 345 (Jan. 29, 2008), available at http://www.osbd.ky.gov/NR/rdonlyres/1015785C-71AD-4CCC-9BB5-4F1B42511BA5/0/0810_BOC_Volume1.pdf [hereinafter 2008-2010 BUDGET].

²⁰ KY. REV. STAT. ANN. § 31.050(7) (West 2011).

²¹ The Louisville Metro Public Defender’s Office represents DPA’s Jefferson Region Trial Branch. *Supra* note 8.

²² *Trial Division*, KY. DEP’T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/trial.htm> (last visited Nov. 19, 2011).

²³ *Id.*

²⁴ Telephone Interview by Paula Shapiro with Tom Griffiths, CTB Manager, Ky. Dep’t of Pub. Advocacy, Oct. 28, 2010 (on file with author). There have been a number of capital attorney positions vacant in recent years. *Id.*; Email from Ed Monahan, *supra* note 10.

²⁵ Interview with Tom Griffiths, *supra* note 24; KY. DEP’T OF PUB. ADVOCACY, FISCAL YEAR 2010 ANNUAL REPORT 21 (2011), available at http://dpa.ky.gov/NR/rdonlyres/FB7F07A7-B412-4D3E-90BB-DA19EC0E4DE3/0/DPA_2010_CaseloadReportFINALandcover.pdf (“When multiple co-defendants are involved in a case, DPA many times must seek “conflict” representation. A single DPA office can only represent one of that set of defendants because of attorney ethical rules unless there is a waiver of the conflict. Without such a waiver, the other indigent clients from that same incident must be represented either by other DPA offices or by outside counsel. In these instances, DPA contracts with outside “conflict” attorneys at hourly rates”) [hereinafter DPA 2010 ANNUAL REPORT]; KY. R. CRIM. P. 8.30; SCR 3.130(1.7).

²⁶ DPA 2011 ANNUAL REPORT, *supra* note 4, at 3; *Trial Division*, KY. DEP’T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/trial.htm> (last visited Nov. 17, 2011) (“Each of the full-time [trial] offices contract with attorneys in private practice to provide conflict representation.”); KY. R. CRIM. P. 8.30; SCR 3.130(1.7).

DPA's Post Trial Services Division provides defense services for convicted indigent persons in the Commonwealth's state and federal court systems and to juveniles in treatment facilities.²⁷ The Post Trial Division includes the Juvenile Post Disposition Branch, Appellate Branch, and Post-Conviction Branch.²⁸ The Appellate Branch, which processes and assigns DPA representation in all appeals from state court judgments, is primarily responsible for representation of the Commonwealth's death row inmates on direct appeal.²⁹ The Post-Conviction Branch represents Kentucky's incarcerated inmates, both capital and non-capital, in state post-conviction cases and federal habeas corpus proceedings.³⁰ The Post-Conviction Branch includes five full-time capital attorneys, two investigators, and a mitigation specialist.³¹

b. The Public Advocacy Commission

In 1982, the Kentucky General Assembly established the Kentucky Public Advocacy Commission (Commission) to oversee the Public Advocate and the public advocacy system generally, perform budgetary responsibilities including supporting DPA requests for funding to the Kentucky General Assembly, and ensure DPA's "independence through public education about the purposes of the public advocacy system."³² The Commission also selects three candidates to recommend to the Governor for Public Advocate, and assists the Public Advocate in selecting his/her staff.³³ The Commission must meet quarterly each year.³⁴

The Commission consists of twelve members, six of whom must be appointed by the Governor, including a child advocate, three individuals appointed from recommendations from the Kentucky Bar Association's Board of Governors, and one who is appointed upon the recommendation of the joint advisory boards of the Protection and Advocacy Division of DPA.³⁵ Other members include two individuals appointed by the Kentucky Supreme Court and the dean or his/her designee from each of Kentucky's three law schools.³⁶ The Public Advocate is also a member of the Commission and serves as its Secretary.³⁷ No member of the Commission may be a prosecutor, law enforcement official, or judge.³⁸ Each Commission member serves a

²⁷ KY. REV. STAT. ANN. § 31.110(2)(c) (West 2011); *Post Trial Division*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/pt.htm> (last visited Nov. 17, 2011).

²⁸ DPA 2011 ANNUAL REPORT, *supra* note 4, at 12; *Post Trial Division*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/pt.htm> (last visited Nov. 17, 2011).

²⁹ DPA 2011 ANNUAL REPORT, *supra* note 4, at 12; KY. REV. STAT. ANN. § 31.219 (West 2011).

³⁰ DPA 2011 ANNUAL REPORT, *supra* note 4, at 12; *Post Trial Division*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/pt.htm> (last visited Nov. 17, 2011); KY. REV. STAT. ANN. § 31.220 (West 2011).

³¹ Interview with DPA, *supra* note 12.

³² KY. REV. STAT. ANN. § 31.015(6)(c) (West 2011) (effective July 15, 1982). In 2007, fifteen statewide public defense systems "were overseen by an advisory board or commission." BJS REPORT, *supra* note 6, at 5.

³³ KY. REV. STAT. ANN. § 31.015(6)(a)-(b) (West 2011).

³⁴ KY. REV. STAT. ANN. § 31.015(3) (West 2011).

³⁵ KY. REV. STAT. ANN. § 31.015(1)(a) (West 2011), *amended* by H.B. 564, 2010 Gen. Assemb., Reg. Sess. (Ky. 2010).

³⁶ *Id.* The law schools are Salmon P. Chase College of Law of Northern Kentucky University, University of Kentucky College of Law, and Louis D. Brandeis School of Law at the University of Louisville.

³⁷ KY. REV. STAT. ANN. § 31.015(4) (West 2011); *Division Overview*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div> (last visited Nov. 17, 2011). The Public Advocate is designated as an "ex officio" member of the Commission. KY. REV. STAT. ANN. § 31.015(4) (West 2011).

³⁸ KY. REV. STAT. ANN. § 31.015(1)(a) (West 2011).

renewable term of four years.³⁹ The Chair of the Commission is elected by the other members to a renewable one-year term.⁴⁰ Members of the Commission are not paid salaries, but will receive \$100 per day for each meeting attended as well as reasonable and necessary compensation for expenses incurred during the performance of their duties.⁴¹

c. The Louisville Metro Public Defender's Office

Section 31.060 of the KRS requires any county in the Commonwealth with ten or more Circuit judges to have a local office of public advocacy and to submit a plan of operation to DPA.⁴² Since 1972, the Metro Defender has provided legal services to Louisville's "indigent adults and juveniles accused of crimes and status offenses, and to those who are subjected to involuntary hospitalization due to mental illness."⁴³

The Metro Defender is administered by a Chief Public Defender and Executive Director, as well as a Deputy Chief Public Defender.⁴⁴ It is organized into eight divisions, including five teams of attorneys within the Adult Trial Division, Juvenile Trial Division, Capital Trial Division, and Appellate Division.⁴⁵ The Capital Trial Division, with five attorneys, an investigator and a capital mitigation specialist, represents Jefferson County indigents in capital cases.⁴⁶ In the event of a case with multiple co-defendants or a conflict of interest, the Metro Defender will contract with outside conflict counsel under its "Assigned Counsel Panel Plan" to provide representation in such cases.⁴⁷ The Metro Defender's Appellate Division employs five attorneys who handle all of Louisville's capital direct appeals.⁴⁸

2. Funding

Kentucky's statewide indigent defense system is funded primarily through General Fund appropriations from the Kentucky General Assembly, the Restricted Fund,⁴⁹ and federal grants.⁵⁰

³⁹ *Id.*

⁴⁰ KY. REV. STAT. ANN. § 31.015(3) (West 2011).

⁴¹ KY. REV. STAT. ANN. § 31.015(5) (West 2011). Generally, commissioners waive receipt of the \$100 stipend. Statement of Michael Bowling and Allison Connelly, former and current Public Advocacy Commissioners, respectively, Nov. 5, 2010 (on file with author).

⁴² KY. REV. STAT. ANN. § 31.060(1) (West 2011) (effective 1972). Jefferson County has thirteen circuit judges. *Jefferson County Information*, KY. COURT OF JUSTICE, <http://courts.ky.gov/counties/jefferson> (last visited Nov. 17, 2011).

⁴³ KY. REV. STAT. ANN. § 31.060 (West 2011); Interview by Sarah Turberville and Paula Shapiro with Louisville Metro Pub. Defender's Office (Metro Defender), June 14, 2010 (on file with author). The Metro Defender was organized and incorporated under Commonwealth law in 1971. *History*, LOUISVILLE METRO PUB. DEFENDER'S OFFICE, <http://www.louisvillemetropublicdefender.com/history.html> (last visited Nov. 17, 2011).

⁴⁴ *Organizational Chart*, LOUISVILLE METRO PUB. DEFENDER'S OFFICE, http://www.louisvillemetropublicdefender.com/org_chart.pdf (last visited Aug. 13 2010); Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Cir. Court Division II, No. 08-CI-1094, at *6 (filed June 30, 2008).

⁴⁵ *Organizational Chart*, LOUISVILLE METRO PUB. DEFENDER'S OFFICE, http://www.louisvillemetropublicdefender.com/org_chart.pdf (last visited Nov. 17, 2011).

⁴⁶ Interview with Metro Defender, *supra* note 43.

⁴⁷ *Id.*; KY. R. CRIM. P. 8.30.

⁴⁸ Interview with Metro Defender, *supra* note 43.

⁴⁹ *See infra* note 59 and accompanying text on the Restricted Fund.

⁵⁰ KY. REV. STAT. ANN. § 31.030(11) (West 2011).

Under KRS 31.185, the Commonwealth also provides supplemental funding to public defender and private defense counsel for the payment of “reasonably necessary” expert assistance at trial and during post-conviction proceedings.⁵¹

a. The Department of Public Advocacy

The Kentucky General Assembly must “appropriate sufficient funds for DPA to carry out its constitutional and statutory duties and responsibilities.”⁵² Generally, the Public Advocate prepares a biennial operating budget request that covers all Commonwealth counties, including Jefferson, which is submitted through the Justice and Public Safety Cabinet’s overall budget proposal to the Governor.⁵³ The Governor then submits a biennial budget proposal to the General Assembly in January of every other year.⁵⁴ The Kentucky General Assembly must approve the Commonwealth’s budget and then appropriate funds for Commonwealth agencies, including DPA.⁵⁵ Funds appropriated to DPA support operational costs for the entire statewide defender system, including partial operation of the Metro Defender and the funds to compensate private counsel contracted by DPA and the Metro Defender to handle conflict cases.⁵⁶

The General Assembly’s biennial appropriation includes allocations from the General Fund and the Restricted Fund, which, along with any federal grants, comprise DPA’s total operating budget.⁵⁷ The General Fund “consist[s] of all moneys, not otherwise restricted, available for the general operations of state government.”⁵⁸ The Restricted Fund consists of “budget unit receipts restricted as to purpose by statute.”⁵⁹ For example, under KRS 31.211, upon a determination of indigence by the court, a criminal defendant may be required to pay a nominal fee assessed by the court that is then included in the Restricted Fund for use by DPA.⁶⁰ The Restricted Fund also includes revenue assessed through KRS 189A.050, which provides for the collection of a service

⁵¹ KY. REV. STAT. ANN. § 31.185 (West 2011); *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008), *overruling in part* *Stopher v. Conliffe*, 170 S.W.3d 307 (2005).

⁵² Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *10 (filed Jun. 30, 2008); KY. REV. STAT. ANN. §§ 31.010–31.241 (West 2011).

⁵³ KY. REV. STAT. ANN. §§ 48.030, 48.040 (West 2011). *See also* 2008–2010 BUDGET, *supra* note 19, at 345–46; KY. DEP’T OF PUB. ADVOCACY, OPERATING BUDGET REQUEST: PRIORITY RANKING SUMMARY RECORD, 2010–2012 KY. BRANCH BUDGET 20 (on file with author) [hereinafter DPA OPERATING BUDGET].

⁵⁴ KY. REV. STAT. ANN. §§ 48.050, 48.100 (West 2011).

⁵⁵ KY. REV. STAT. ANN. §§ 48.210, 48.300 (West 2011).

⁵⁶ KY. REV. STAT. ANN. § 31.050(2) (West 2011) (“the public advocate may allot a sufficient sum, subject to the approval of the secretary of the Finance and Administration Cabinet to the county or counties” who have submitted a plan for the defense of its indigents); Interview with Metro Defender, *supra* note 43.

⁵⁷ DPA 2011 ANNUAL REPORT, *supra* note 4, at 2; KY. REV. STAT. ANN. § 48.010(15)(a), (f) (West 2011). *See, e.g.*, 2008–2010 BUDGET, *supra* note 19, at 345.

⁵⁸ KY. REV. STAT. ANN. § 48.010(15)(a) (West 2011).

⁵⁹ KY. REV. STAT. ANN. § 48.010(15)(f) (West 2011). The Restricted Fund is consists of revenue from three sources: (a) partial fees paid by indigent defendants represented by DPA, pursuant to KRS 31.211, (b) DUI service fees paid by defendants convicted of DUIs, pursuant to KRS 189A.050, and (c) court costs collected pursuant to KRS 42.320(2)(f), which is capped at \$1.75 million. DPA 2011 ANNUAL REPORT, *supra* note 4, at 2.

⁶⁰ KY. REV. STAT. ANN. § 31.211(1), (3), (8) (West 2011) (assessing a partial fee against an indigent defendant, capable of paying some amount, at each stage of the proceedings). Kentucky is one of nineteen state-based public defender programs with a system of cost recoupment for public defense services; only nine of these, including Kentucky, do so through a standard statutory fee. BJS REPORT, *supra* note 6, at 9.

fee from persons convicted of drunk driving.⁶¹ In addition, the KRS 42.320 “Court Cost Distribution Fund” requires that 3.5 percent of the revenue assessed through fees under the statute be allocated to the Restricted Fund for use by DPA.⁶²

In fiscal year 2009, the Kentucky General Assembly allocated \$37,826,300 to DPA, and in that year, DPA represented clients at trial and during post-trial proceedings in 147,245 cases.⁶³ According to DPA, in 2007 Kentucky spent \$3,798,387 on capital representation in death penalty trial, appellate, and state and federal post-conviction cases.⁶⁴ Table 1 below illustrates the state and federal funding allocations to DPA since 1998.⁶⁵

Table 1

KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY FUNDING, 1998–2012				
Fiscal Year⁶⁶	General Fund⁶⁷	Restricted Fund⁶⁸	Federal Funds⁶⁹	Total Budget
1998	13,643,200	5,362,700	1,106,700	20,112,600
1999	16,637,100	4,335,800	1,192,500	22,185,400
2000	17,949,200	4,126,900	901,700	22,977,800
2001	22,380,000	3,000,000	913,100	26,293,100

⁶¹ KY. REV. STAT. ANN. §§ 189A.050, 189A.010 (West 2011). Originally \$200, in 2008 the Kentucky General Assembly approved a fee increase to \$375. KY. REV. STAT. ANN. § 189A.050 (West 2011). In fiscal year 1999, the DUI service charge raised \$1,169,870 for DPA. SPANGENBERG GRP., PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 10 (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf> [hereinafter SPANGENBERG 2002].

⁶² KY. REV. STAT. ANN. § 42.320(1), (2)(f) (West 2011). In addition, from 1994 to 2002, DPA received funds collected under KRS 31.051, which required any indigent person assigned a public defender in a criminal case to pay an administrative fee. KY. REV. STAT. ANN. § 31.051 (West 2011) (repealed effective July 15, 2002).

⁶³ KY. DEP’T OF PUB. ADVOCACY, *Budget Request for 2010-2012: The 2020 Public Defense Service Plan* 4 (Oct. 9, 2009) (on file with author) (noting that 32,637 cases were in the Commonwealth’s circuit courts and 107,480 were in district court) [hereinafter DPA SERVICE PLAN]. We note that the number of cases listed was calculated using DPA’s previous case counting method. *See supra* note 10.

⁶⁴ Email from Ed Monahan, *supra* note 10.

⁶⁵ *See* 2008-2010 BUDGET, *supra* note 19, at 345; OFFICE OF KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2006-2008 (2006), available at http://www.osbd.ky.gov/NR/rdonlyres/5F7D7F51-5023-4679-9479-9DE6A916FA62/0/0608_BOC_Justice.pdf; KY. OFFICE OF STATE BUDGET DIR, BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2004-2006 (Jan. 30, 2005), available at http://www.osbd.ky.gov/NR/rdonlyres/D7FA7219-C1BE-49AC-B28B-17F4D93C1007/0/0506BOC_Vol11C.pdf; OFFICE OF KY. STATE BUDGET DIR, BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2002-2004 (Jan. 22, 2002), available at http://www.osbd.ky.gov/NR/rdonlyres/FFEA54DB-0257-46EC-9071-17D61933D6BD/0/0204BOC_Vol11B.pdf; OFFICE OF KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2000-2002 (Jan. 25, 2000), available at http://www.osbd.ky.gov/NR/rdonlyres/E53AB2E5-16E3-4CDD-A57F-D6047A055B42/0/0002BOC_Vol11C.PDF; OFFICE OF KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 1998-2000, PPR-15 (May 18, 1998), available at http://www.osbd.ky.gov/NR/rdonlyres/2EB86E89-46BB-42C1-AFB6-4A104E47598A/0/9800BOC_Vol11d.pdf. This chart does not include funding provided under KRS 31.185.

⁶⁶ OFFICE OF KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2010-2012 265 (Jan. 19, 2010), available at http://www.osbd.ky.gov/NR/rdonlyres/8C66C5F2-7DC7-4BCF-A63D-65127936E565/0/1012ExecBud_VolumeI_C.pdf (explaining that 2011 and 2012 figures are “Enacted” amounts).

⁶⁷ KY. REV. STAT. ANN. § 48.010(15)(a) (West 2011).

⁶⁸ KY. REV. STAT. ANN. § 48.010(15)(f) (West 2011).

⁶⁹ KY. REV. STAT. ANN. § 48.010(15)(d) (West 2011) (defining “Federal Funds” as “all receipts from the federal government for any purpose”).

2002	24,821,100	3,015,900	958,500	28,795,500
2003	23,925,300	4,454,100	1,886,600	30,266,000
2004	25,389,800	4,400,800	1,605,100	31,395,700
2005	25,264,400	9,362,100	2,131,200	36,757,700
2006	25,923,800	8,723,100	1,771,500	36,418,400
2007	29,770,700	6,817,300	1,618,300	38,206,300
2008	33,967,200	4,492,900	1,713,100	40,173,200
2009	31,741,100	4,301,900	1,783,300	37,826,300
2010	38,049,500	4,003,800	2,662,110	44,714,400
2011*	38,143,000	4,020,000	2,196,000	44,359,400
2012*	38,143,400	4,044,000	1,798,500	43,985,900

* Denotes projected fiscal year budget

b. The Louisville Metro Public Defender’s Office

Pursuant to KRS 31.050 and 31.060, two-thirds of the funding for the Metro Defender’s annual operating budget comes from the General Assembly’s allocation to DPA to “defray[] the expenses” of Louisville’s public defender program.⁷⁰ The other third is funded by the Louisville-Jefferson County Metro Government.⁷¹ In recent years, DPA provided the Metro Defender with \$4 million, while the Louisville-Jefferson County Metro Government provided \$2 million.⁷² In fiscal year 2011, DPA will allocate \$4.2 million to Metro Defender and the county government will allocate \$2.1 million.⁷³

c. Funding for Contract Conflict Counsel

The annual operating budgets of DPA and the Metro Defender must also support one hundred percent of the costs associated with compensation of private counsel contracted to handle capital and non-capital conflict cases by each of these entities.⁷⁴

d. KRS 31.185 Funding

In addition to supporting DPA and the Metro Defender’s annual operating budgets, pursuant to KRS 31.185 the Commonwealth must maintain an account, available to all counsel representing indigent defendants, to pay for expert witness fees or any other “direct expense, including the cost of a transcript[,] . . . that is necessarily incurred in representing a needy person under this chapter.”⁷⁵ Under this statute, each county is required to appropriate twelve and a half cents, per

⁷⁰ See KY. REV. STAT. ANN. §§ 31.050, 31.060 (West 2011). See also Interview with Metro Defender, *supra* note 43.

⁷¹ KY. REV. STAT. ANN. §§ 31.050(2) (West 2011) (“If the plan for defense of indigent persons is approved, the public advocate may allot a sufficient sum, subject to the approval of the Finance and Administration Cabinet”), 31.060(2) (2011) (the county “shall contribute to the funding of the plan selected and approved in such amounts as the Department of Public Advocacy shall deem reasonable and necessary.”).

⁷² Interview with DPA, *supra* note 12.

⁷³ *Id.*

⁷⁴ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. For more information on the compensation of contract conflict counsel, see *infra* notes 120–127 and accompanying text.

⁷⁵ KY. REV. STAT. ANN. § 31.185(3) (West 2011) (the fund is administered by the Finance and Administration Cabinet); SPANGENBERG 2002, *supra* note 61, at 10 (noting that the KRS 31.185 fund was established “to cover

capita of the county population, to this account to pay court orders issued under the statute for payment of expenses.⁷⁶ Charges to this fund may not be greater than the rate charged by the Commonwealth and its agencies.⁷⁷ In the event that the county funds under KRS 31.185 are depleted, the Commonwealth is required to pay the additional costs out of the Treasury.⁷⁸

B. Appointment, Qualifications, and Compensation of and Resources Available to Defense Counsel at Trial, on Appeal, and in Post-Conviction Proceedings

1. Appointment of Counsel

Kentucky must provide counsel to an indigent person accused or convicted of a capital offense at trial and on direct appeal.⁷⁹ In certain circumstances, appointment of counsel is required during state post-conviction proceedings; however, in practice, the DPA will assign counsel to each death row inmate before his/her post-conviction proceedings commence.⁸⁰ DPA also may represent death row inmates in federal habeas corpus proceedings if the “matter arises out of or is related to an action pending or recently pending in a [Kentucky] court of criminal jurisdiction.”⁸¹

In all criminal cases, if a defendant raises the issue of indigence and requests counsel, the circuit court must hold a non-adversarial hearing to determine whether the defendant is indigent and must enter findings upon the conclusion of the hearing.⁸² The determination must be made no later than the defendant’s first appearance in court, usually at arraignment.⁸³ An indigent person is defined as a person who “at the time his or her need is determined, is unable to provide for the

expert witness fees and other comparable expenses associated with providing indigent defense services.”). In addition, “[e]xpenses incurred in the representation of needy persons confined in a state correctional institution” are paid from the KRS 31.185 fund. KY. REV. STAT. ANN. § 31.185(6) (West 2011).

⁷⁶ KY. REV. STAT. ANN. § 31.185(4) (West 2011). See also KY. REV. STAT. ANN. § 31.185(7) (West 2011) (restricting the orders payable under this statute to those entered after July 15, 1994).

⁷⁷ KY. REV. STAT. ANN. § 31.185(3) (West 2011).

⁷⁸ KY. REV. STAT. ANN. § 31.185(4) (adding that “[t]he funds in this account shall not lapse and shall remain in the special account.”), 31.185(5) (West 2011).

⁷⁹ KY. CONST. § 11; KY. REV. STAT. ANN. § 31.110(1)(a) (West 2011) (“A needy person . . . on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime . . . is entitled [t]o be represented by an attorney to the same extent as a person having his or her own counsel is so entitled”); KY. REV. STAT. ANN. § 31.110(2)(a)–(c) (West 2011) (“A needy person . . . is entitled . . . [t]o be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole . . . in any appeal . . . in any other post-conviction [proceeding] that the attorney and needy person considers appropriate”); KY. REV. STAT. ANN. § 31.219 (West 2011). In practice, DPA and the Metro Defender appoint attorneys from their appellate units to represent a death row inmate on direct appeal, rather than have the trial attorneys continue to provide representation. DPA 2011 ANNUAL REPORT, *supra* note 4, at 12; Interview with Metro Defender, *supra* note 43.

⁸⁰ KY. R. CRIM. P. 11.42(5); *Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001) (Rule “11.42(5) establishes when a judge *must* appoint counsel for an indigent movant”), *overruling, in part*, *Commonwealth v. Ivey*, 599 S.W.2d 456 (Ky. 1980) (to extent that it holds that the governing standard for appointment is KRS 31.110(2)(c)); Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

⁸¹ KY. REV. STAT. ANN. § 31.220 (West 2011).

⁸² KY. REV. STAT. ANN. § 31.120 (West 2011).

⁸³ KY. REV. STAT. ANN. § 31.120(1) (West 2011). However, this does not prevent the appointment of counsel at an earlier stage if the defendant so requests. *Id.*

payment of an attorney and all other necessary expenses of representation.”⁸⁴ In making an indigency determination, the court may consider a number of factors, including the defendant’s income, property ownership, number and age of the defendant’s dependants, and other circumstances relating to the defendant’s financial status and complexity of the case.⁸⁵ The court will determine whether the defendant qualifies as indigent at “each step of the proceedings.”⁸⁶

Additionally, the defendant must subscribe and swear to an Affidavit of Indigency.⁸⁷ If the circuit court finds the defendant indigent, it must appoint counsel unless the defendant waives his/her right to counsel.⁸⁸ In practice, Kentucky uses “pretrial services or probation officers to screen clients for indigency” in addition to the court’s role in determining indigency.⁸⁹

Furthermore, where DPA is unable or “fails to provide an attorney to a person eligible for representation” under Chapter 31, the court possesses the “inherent authority” to appoint an attorney to provide representation.⁹⁰

Courts in the Commonwealth generally appoint DPA to represent a capital defendant at trial, on direct appeal, and in post-conviction proceedings, although Metro Defender will be appointed to trial and appellate cases arising out of Jefferson County.⁹¹ However, DPA handles most capital post-conviction proceedings, regardless of where the case arises.⁹² In any case, DPA or Metro Defender may assign a substitute attorney for good cause, at any stage of the proceeding.⁹³

At the post-conviction level, an indigent death row inmate is entitled to counsel only if a court determines, based on the inmate’s Criminal Procedure Rule (RCr) 11.42 motion for post-conviction relief and the Commonwealth’s answer to that motion, that “there is a material issue of fact that cannot be determined on the face of the record.”⁹⁴ If a hearing is granted, and the defendant makes a specific request for counsel in writing, the court will make a determination of the defendant’s indigency.⁹⁵ If the defendant is indigent, then counsel *must* be appointed for the remainder of the proceeding, including appeal of the post-conviction decision.⁹⁶ However, DPA policy requires that two public defenders represent a Commonwealth death row inmate during all state post-conviction proceedings, including the filing of the initial RCr 11.42 petition.⁹⁷

⁸⁴ KY. REV. STAT. ANN. § 31.100(3)(a) (West 2011).

⁸⁵ KY. REV. STAT. ANN. § 31.120(2) (West 2011).

⁸⁶ KY. REV. STAT. ANN. § 31.120(1) (West 2011).

⁸⁷ KY. REV. STAT. ANN. § 31.120(3) (West 2011).

⁸⁸ KY. REV. STAT. ANN. § 31.140 (West 2011).

⁸⁹ BJS REPORT, *supra* note 6, at 6.

⁹⁰ KY. REV. STAT. ANN. § 31.235 (West 2011).

⁹¹ KY. REV. STAT. ANN. §§ 31.010, 31.030(1) (West 2011); Interview with DPA, *supra* note 12.

⁹² See DPA 2010 ANNUAL REPORT, *supra* note 25, at 10 (noting that DPA’s Post-Conviction Branch represented thirty-two of the Commonwealth’s thirty-five inmates on death row at the close of 2010).

⁹³ KY. REV. STAT. ANN. § 31.030(12) (West 2011).

⁹⁴ KY. R. CRIM. P. 11.42(5).

⁹⁵ *Id.*

⁹⁶ *Id.*; Fraser v. Commonwealth, 59 S.W.3d 448, 456 (Ky. 2001).

⁹⁷ KY. DEP’T OF PUB. ADVOCACY, POLICIES AND PROCEDURES, *Qualification and Compensation of Counsel in Contract Capital Cases* § 17.20(I)(C) (revised Jan. 1, 2008) (“Two Attorneys shall be assigned to all Death Penalty Cases.”) [hereinafter DPA POLICIES].

2. Qualifications and Training of Capital Counsel

All counsel in criminal cases in the Commonwealth must be attorneys admitted to practice pursuant to the Kentucky Supreme Court Rules.⁹⁸ In addition, the Kentucky Supreme Court requires all licensed attorneys to participate in a minimum of twelve and a half hours of approved continuing legal education (CLE) every year, at least two of which must include instruction on ethics and professional responsibility.⁹⁹

While Kentucky has not promulgated or adopted any rules, procedures, or guidelines on the qualification standards for defense attorneys appointed to capital cases in the Commonwealth, DPA has adopted, by reference, and has promulgated its own qualification standards based upon the *ABA Standards for Criminal Justice* and the *ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.¹⁰⁰ The Metro Defender also seeks to ensure that its attorneys have extensive capital litigation experience prior to appointment in a capital case.¹⁰¹ DPA policies and the qualifications of Metro Defender attorneys are discussed in further detail in the Analysis Section.¹⁰²

Apart from the CLE requirements for all attorneys in the Commonwealth, Kentucky has not promulgated rules, regulations, or requirements relating to the training of defense attorneys who represent capital defendants and death row inmates.¹⁰³ However, DPA and the Metro Defender require extensive training for all staff attorneys who handle capital cases, and provide in-house courses, seminars, and training programs to its attorneys, investigators, paralegals, mitigation specialists, and other members of the defense team, as well as contract conflict counsel representing a capital defendant or death row inmate.¹⁰⁴ Furthermore, DPA requires its contract conflict counsel to attend and fully participate in capital defense trainings as approved by the Director or Manager of the appropriate DPA Division.¹⁰⁵ DPA also cosponsors criminal defense and capital litigation CLE courses, litigation institutes, seminars, and conferences that are available to all criminal defense attorneys, including DPA's contract conflict counsel.¹⁰⁶

⁹⁸ SCR 2.022 (Admission by Bar Examination), 2.110 (Reciprocity Admission), 2.112 (Participants in Defender or Legal Services); DPA POLICIES, *supra* note 97, at §§ 17.22(I), 4.22, 8.04(I)(C)(1).

⁹⁹ SCR 3.661. Within twelve months of being sworn into the Kentucky Bar, attorneys are required to participate in the New Lawyer Skills Program, which provides twelve and a half hours of CLE credit. SCR 3.652 (exempting attorneys who have been admitted to practice in another jurisdiction for at least five years).

¹⁰⁰ See DPA POLICIES, *supra* note 97, at § 8.04(A); DPA POLICIES, *supra* note 97, at § 17.21(I) (noting that DPA is “committed to providing the highest quality representation” to every Commonwealth indigent client); ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984–85 (2003) [hereinafter *ABA Guidelines*].

¹⁰¹ Interview by Sarah Turberville and Paula Shapiro with Daniel T. Goyette, Chief Public Defender, Louisville Metro Public Defender's Office, Oct. 12, 2010 (on file with author).

¹⁰² See *supra* notes 211–231 and accompanying text.

¹⁰³ See *supra* notes 98–99 and accompanying text.

¹⁰⁴ DPA POLICIES, *supra* note 97, at § 4.22(III)(A)(2)(h); DPA POLICIES, *supra* note 97, at § 4.22(III)(B)(2)(h); DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(c); DPA POLICIES, *supra* note 97, at § 12.21; DPA POLICIES, *supra* note 97, at § 12.22; DPA POLICIES, *supra* note 97, at § 12.04; DPA POLICIES, *supra* note 97, at § 12.19(VII).

¹⁰⁵ DPA POLICIES, *supra* note 97, at § 8.04(I)(D)(3); BJS REPORT, *supra* note 6, at 17.

¹⁰⁶ *Education Calendar 2010*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed/ecal.htm> (last visited Oct. 27, 2010).

The Metro Defender has not adopted any formal written policies requiring its staff attorneys or contract conflict counsel to undergo any training prior to taking a capital case.¹⁰⁷ In practice, the however, the Metro Defender’s capital defense attorneys are not assigned to the capital trial division or assigned capital cases until they have received death penalty training.¹⁰⁸ In addition to undergoing in-house training, Metro Defender attorneys also may participate in DPA-sponsored trainings, and may attend national capital defense workshops.¹⁰⁹ Training on capital cases is discussed in further detail in the Analysis Section.

3. Compensation of Counsel

a. DPA and the Metro Defender

Compensation of the Commonwealth’s Public Advocate is governed by KRS 64.640 relating to the compensation of state officers and employees appointed by the Governor.¹¹⁰ The over 300 assistant public advocates are paid in accordance with the merit system.¹¹¹ Private conflict counsel contracted by DPA or the Metro Defender to provide capital representation are compensated at an hourly rate, up to a maximum cap, which is paid out of the contracting agency’s operating budget.¹¹²

As of June 2010, an entry-level assistant public advocate at DPA, known as a Staff Attorney I, receives a starting salary of \$38,800, with a five percent increase after six months and a ten percent increase after a year of employment.¹¹³ After one year of employment, assistant public advocates must apply for an increase in salary, which is awarded based on merit.¹¹⁴ The annual salary of an assistant public advocate with five or less years of experience ranges from \$46,900 to \$60,000; an assistant public advocate with six or more years of experience receives an annual salary between \$51,600 and \$60,000.¹¹⁵

A capital defense attorney at DPA typically falls under the category of Staff Attorney III, which is “an in-grade promotion [that] can only occur when a Staff Attorney II assumes the representation of capital clients as a material and permanent change in their duties” and meets

¹⁰⁷ Interview with Daniel T. Goyette, *supra* note 101 and accompanying text.

¹⁰⁸ Interview with Daniel T. Goyette, *supra* note 101 and accompanying text.

¹⁰⁹ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43; Interview with Daniel T. Goyette, *supra* note 101; *see also supra* notes 408–412, 414, 424–432 and accompanying text. In addition to its policies requiring continuing legal education and annual attorney performance reviews, DPA provides professional development training in the following areas, among others: death penalty trial defense, juvenile delinquency, trial skills, appellate cases, mental illness cases. BJS REPORT, *supra* note 6, at 17; Interview with DPA, *supra* note 12.

¹¹⁰ KY. REV. STAT. ANN. § 31.020 (West 2011) (“The compensation of the Public Advocate shall be set by the provisions of KRS 64.640.”); KY. REV. STAT. ANN. § 64.640 (West 2011).

¹¹¹ KY. REV. STAT. ANN. § 31.020(4) (West 2011); Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *6 (filed June 30, 2008).

¹¹² Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

¹¹³ BJS REPORT, *supra* note 6, at 18; Interview with DPA, *supra* note 12. Kentucky reported an entry-level maximum salary of \$51,400. BJS REPORT, *supra* note 6, at 18.

¹¹⁴ Interview with DPA, *supra* note 12.

¹¹⁵ BJS REPORT, *supra* note 6, at 19.

specific minimum performance requirements.¹¹⁶ Compensation rates for DPA capital defenders range from \$51,600 for an attorney with eight years experience and less than one year experience in capital trial work to \$82,680 for the Staff Attorney Supervisor with over thirty-five years experience as an attorney and over twelve years experience in the Capital Trial Branch.¹¹⁷

The Metro Defender's starting salary for entry-level public defenders is \$38,770.¹¹⁸ Compensation in the Metro Defender's Capital Trial Division ranges from \$56,000 to \$90,000, depending upon the experience of counsel.¹¹⁹

b. Contract Conflict Counsel

As of November 2011, conflict counsel contracting with DPA to provide capital representation at trial, on direct appeal, or during post-conviction proceedings are compensated at a rate of \$75 per hour for in-court and out-of-court work, with a maximum fee of \$30,000 per attorney, plus reasonable expenses.¹²⁰ Contract conflict trial counsel seeking a waiver of the \$30,000 maximum fee must submit a written request, including a justification of the waiver, prior to reaching \$25,000 expended.¹²¹ Contracts negotiated for post-conviction counsel after July 1, 2005 are permitted a maximum fee of \$50,000 per case with the same hourly rate, plus reasonable expenses.¹²²

The DPA Post Trial Division Director and prospective conflict counsel will negotiate and agree on reasonable contract terms for any successive post-conviction action.¹²³ Additionally, if DPA contracts with outside counsel to file a writ of certiorari to the U.S. Supreme Court, each counsel is compensated at a rate of \$75 per hour, with a maximum fee of \$1,250.¹²⁴ In the event that the writ is granted, contract counsel and DPA "will renegotiate the terms of the contract and come to a mutual agreement on payment."¹²⁵

At the same time, conflict counsel contracting with the Metro Defender to provide capital representation are compensated at a rate of \$50 per hour, with a maximum fee of \$15,000 per attorney for each stage of the capital proceedings.¹²⁶

¹¹⁶ See DPA POLICIES, *supra* note 12, at § 4.22(III)(C). Qualifications of capital defense attorneys will be discussed in further detail in the Analysis section. See *supra* notes 211–231 and accompanying text.

¹¹⁷ KY. DEP'T OF PUB. ADVOCACY, *Compensation of Capital Trial Branch*, June 30, 2010 (on file with author). For more discussion on compensation of capital public defenders, see Analysis Section, Recommendation #4, *supra* notes 311–402 and accompanying text.

¹¹⁸ Interview with Daniel T. Goyette, *supra* note 101.

¹¹⁹ *Id.*

¹²⁰ DPA POLICIES, *supra* note 97, at §§ 8.04(II)(A)(1), 8.04(II)(B)(2)(a), 8.04(II)(B)(1)(a)–(b). All motions, pleadings, writs or other post-conviction or new trial motions filed at the state circuit court level designed to bring relief to the capital post-conviction client in that forum, shall be deemed to be one action for purposes of this \$30,000 limit. DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(2)(b).

¹²¹ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(4).

¹²² DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(1)(b).

¹²³ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(2)(b).

¹²⁴ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(1)(c).

¹²⁵ *Id.*

¹²⁶ Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *11 (filed Jun. 30, 2008); Interview with Metro Defender, *supra* note 43 (in 2005, the Metro Defender raised the fee paid to conflict counsel to \$15,000 to bring it on par with the amount DPA paid its conflict

In the event that DPA or the Metro Defender fail to appoint contract conflict counsel, pursuant to KRS 31.235 the circuit court may appoint a private counsel to undertake representation and DPA must pay the appointed attorney a fee that is not “in excess of the prevailing maximum fee per attorney paid by the Department of Public Advocacy for the type of representation provided, and no hourly rate shall be paid in excess of” DPA’s prevailing hourly rate.¹²⁷ The attorney is entitled to be “compensated for his[/her] services with regard to the complexity of the issues, the time involved, and other relevant considerations.”¹²⁸

4. Resources

DPA and the Metro Defender general revenue budgets must support employment of staff investigators, mitigation specialists, and social workers.¹²⁹ In 2010, DPA hired a second investigator for the CTB, which historically employed a single investigator to assist the CTB’s approximately twelve to sixteen capital cases each year.¹³⁰ Capital cases handled by DPA’s regional trial branches are supported by staff investigators from those branches.¹³¹ As of 2010, DPA employed two mitigation specialists designated to assist all of DPA’s CTB and one mitigation specialist designated to assist DPA’s Post Trial Division in the representation of the Commonwealth’s death row inmates.¹³²

The Metro Defender employs one investigator and one mitigation specialist for its entire Capital Trial Division, which handles approximately twenty-five capital cases each year.¹³³

Capital defense attorneys within the Commonwealth may be provided with additional funding and resources for the presentation of a defense.¹³⁴ The KRS provides that an indigent capital defendant in Kentucky is entitled “to be provided with the necessary services and facilities of representation including investigation and other preparation”¹³⁵ and “to use the same state

attorneys at that time). DPA has since increased its compensation rate for contract conflict counsel; the Metro Defender has not. Interview with Metro Defender, *supra* note 43; Interview with Daniel T. Goyette, *supra* note 101.

¹²⁷ KY. REV. STAT. ANN. § 31.235(1) (West 2011).

¹²⁸ KY. REV. STAT. ANN. § 31.071(4) (West 2011).

¹²⁹ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. In 2007, Kentucky’s public defender agencies reported total full-time support staff of 172, including forty-six investigators, ten social workers, six paralegals, forty-six administrative staff members, fifty clerical staff, twelve interns, and two others. BJS REPORT, *supra* note 6, at 15 (noting that the other category “[i]ncludes human resources staff, forensic specialists, clinical psychologists, information technology specialists, interpreters, and investigators hired on a contractual basis”). For an in depth discussion of the use of KRS 31.185 and DPA’s use of expert services, see Analysis Section, Recommendation 1.

¹³⁰ Interview with DPA, *supra* note 12.

¹³¹ *Id.*

¹³² *Id.*; Interview with Tom Griffiths, *supra* note 24.

¹³³ Interview with Metro Defender, *supra* note 43. Both Metro Defender and DPA have stated that when necessary, investigators and/or social workers are borrowed from their other divisions in order to keep up with increasing caseloads. *Id.*; Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

¹³⁴ KY. REV. STAT. ANN. §§ 31.110; 31.130, 31.185(1) (West 2011); *Binion v. Commonwealth*, 891 S.W.2d 383, 385 (Ky. 1995); Interview with DPA, *supra* note 12. “Expenses” under Chapter 31 “includes the expenses of investigation, other preparation, and trial, together with the expenses of any appeal.” *Id.* at § 31.100(2).

¹³⁵ KY. REV. STAT. ANN. § 31.110(1)(b) (West 2011). *See also id.* § 31.110(2)(a)–(c) (“a needy person is entitled to . . . be counseled and defended at all stages of the matter . . . and [] to be represented in any appeal . . . to be

facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth.”¹³⁶ During post-conviction proceedings, an indigent death row petitioner “may be entitled to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner’s case.”¹³⁷

However, a defendant has no “right” to hire an expert of his/her own choosing at state expense.¹³⁸ Instead, s/he first must demonstrate that use of state facilities is impractical,¹³⁹ demonstrate that private expert assistance is “reasonably necessary,”¹⁴⁰ and describe the specific information the expert would provide.¹⁴¹ Defense counsel is permitted to make an ex parte request to the trial or post-conviction court for public funds for resources and experts.¹⁴² There is no statutory maximum on the funding defense counsel can request under KRS 31.185, although the amount authorized for an expert is not to “exceed the established rate charged by the Commonwealth and its agencies.”¹⁴³

C. Appointment, Qualifications, and Compensation of and Resources Available to Defense Counsel Handling Capital Federal Habeas Corpus Petitions

Generally, staff attorneys from DPA or the Metro Defender represent the Commonwealth’s death row inmates in federal habeas corpus proceedings.¹⁴⁴ This representation is authorized by the KRS, which permits DPA to represent an indigent capital defendant in federal habeas corpus proceedings, if “(1): [t]he matter arises out of or is related to an action pending or recently

represented in any other post-conviction” proceeding); *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979); *Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984).

¹³⁶ KY. REV. STAT. ANN. § 31.185(1) (West 2011).

¹³⁷ *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008) (noting that the “trial court still maintains the discretion to deny such funds if it determines that the expert testimony is not reasonably necessary”); *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008) (*overruling* *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)) (entitling indigent post-conviction petitioners to receive funds under KRS 31.185).

¹³⁸ *Crawford v. Commonwealth*, 824 S.W.2d 847, 850 (Ky. 1992) (noting that *Ake* did not support the proposition that an indigent defendant had the right to choose a psychiatrist or receive funds to hire one of his choosing); *Commonwealth v. Paisley*, 201 S.W.3d 34, 35, 56 (2006) (holding that “it was an abuse of discretion for the trial court to order the Finance and Administration Cabinet to pay up to \$5,000 for a private psychologist without the requisite showing that the use of state facilities was somehow impractical.”).

¹³⁹ KY. REV. STAT. ANN. § 31.185(1) (West 2011).

¹⁴⁰ *Young*, 585 S.W.2d at 379; *Hicks*, 670 S.W.2d at 838.

¹⁴¹ *Benjamin v. Commonwealth*, 266 S.W.3d 775, 789 (Ky. 2008). A court need not authorize funding for expert assistance if the defendant “offers little more than an undeveloped assertion that the requested assistance would be beneficial.” *Young*, 585 S.W.2d at 379; *see also Hicks*, 670 S.W.2d at 838 (“[T]rial courts are not required to provide funds to defense experts for fishing expeditions.”).

¹⁴² KY. REV. STAT. ANN. § 31.185(2) (West 2011).

¹⁴³ KY. REV. STAT. ANN. § 31.185(3) (West 2011) (providing funding for “any direct expense, including the cost of a transcript or bystander’s bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person.”).

¹⁴⁴ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. The Western Kentucky Federal Community Defender, located in Louisville, provides representation in the U.S. District Court for the Western District of Kentucky, but is not appointed to capital habeas cases resulting from a state court death sentence. Telephone Interview by Paula Shapiro with Kate Micou, Western Ky. Federal Community Defender, July 27, 2010 (on file with author). There is no federal defender in the Eastern District of Kentucky. OFFICE OF DEFENDER SERVS., FED. PUB. & CMTY. DEFENDER DIRECTORY 7 (Sept. 13, 2010), *available at* <http://infoweb.ao.dcn/defenderdir.pdf>.

pending in a court of criminal jurisdiction of the state; or (2) [r]epresentation is under a plan of the [U.S.] District Court as required by the Criminal Justice Act of 1964 (18 USC 3006A).”¹⁴⁵

Pursuant to 18 U.S.C. § 3599, an inmate under a death sentence imposed by a state court petitioning for federal habeas corpus in one of Kentucky’s two federal judicial districts—Eastern and Western—is entitled to appointed counsel and other resources, if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”¹⁴⁶

An inmate entitled to appointed counsel under section 3599 must be appointed “one or more” qualified attorneys prior to the filing of a formal, legally sufficient federal habeas petition.¹⁴⁷ To qualify for appointment, at least one attorney must have been admitted to practice in the U.S. Court of Appeals for the Sixth Circuit for at least five years, and have had at least three years of experience in handling felony appeals in the Sixth Circuit.¹⁴⁸ For good cause, the court may appoint another attorney “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”¹⁴⁹

Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than \$178 per hour for both in-court and out-of-court work.¹⁵⁰ There is no compensation maximum for appointed counsel for federal habeas corpus proceedings in capital cases.¹⁵¹ In addition to counsel, the court also may authorize a death row inmate’s attorney to obtain investigative, expert, or other services as are reasonably necessary for representation.¹⁵² The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.¹⁵³ If DPA undertakes representation of a death row inmate in a federal habeas corpus proceeding, the Department will be compensated in accordance with the fee structure set out in section 3599.¹⁵⁴

D. Appointment and Qualifications of Attorneys Representing Death Row Clemency Petitioners

In 2009, the U.S. Supreme Court clarified that 18 U.S.C. § 3599 permits, but does not require, “federally appointed counsel to represent their clients in state clemency proceedings and entitles

¹⁴⁵ KY. REV. STAT. ANN. § 31.220 (West 2011).

¹⁴⁶ 18 U.S.C. § 3599(a)(2) (2010).

¹⁴⁷ *Id.*; see also *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994).

¹⁴⁸ 18 U.S.C. § 3599(c) (2010).

¹⁴⁹ 18 U.S.C. § 3599(d) (2010).

¹⁵⁰ 18 U.S.C. § 3599(g)(1) (2010); see also 7 U.S. GUIDELINES FOR ADMINISTERING THE CJA AND RELATED STATUTES 6A, § 610.10.10 *Federal Death Penalty and Capital Habeas Corpus Representations, Hourly Rates* (2010), available at <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch06.pdf> [hereinafter U.S. GUIDELINES FOR ADMINISTERING THE CJA].

¹⁵¹ U.S. GUIDELINES FOR ADMINISTERING THE CJA, *supra* note 150, at § 610.10.20.

¹⁵² 18 U.S.C. § 3599(g)(2) (2010).

¹⁵³ *Id.*

¹⁵⁴ Interview by Paula Shapiro with Tim Arnold, Post Trial Division Director, Ky. Dep’t of Pub. Advocacy, Nov. 5, 2010 (on file with author).

them to compensation for that representation.”¹⁵⁵ The federal Code also provides a death row inmate the right to funds for “investigative, expert, or other services upon a showing they are reasonably necessary for the representation of the defendant.”¹⁵⁶

While Kentucky has not promulgated any rules, regulations, laws, or procedures that require courts to appoint counsel to death row inmates petitioning for clemency, both DPA and the Metro Defender provide representation to their clients through clemency and execution.¹⁵⁷ DPA’s *Post Trial Division Minimum Performance Standards* includes specific requirements relating to the performance of DPA attorneys providing representation during clemency, and is discussed in greater detail in the Analysis Section.¹⁵⁸

¹⁵⁵ 18 U.S.C. § 3599(e); *Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009) (stating that the petitioner’s “case underscores why it is ‘entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells’”) (citing *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc)).

¹⁵⁶ 18 U.S.C. § 3599(f); *see also* *Baze v. Parker*, 711 F.Supp.2d 744, 778–79 (E.D. Ky. 2011).

¹⁵⁷ DPA POLICIES, *supra* note 97, at §§ 18.01(E)(5)–(7), 18.09 (Execution Protocol).

¹⁵⁸ Interview with DPA, *supra* note 12 and accompanying text. If such counsel is unable to represent the inmate at clemency proceedings, another attorney from DPA will “take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.” DPA POLICIES, *supra* note 97, at § 18.01(E)(7).

II. ANALYSIS

A. Recommendation #1

In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings— pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- a. **At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

While the Commonwealth of Kentucky and federal law guarantees capital defendants counsel during pre-trial, trial, direct appeal, and, if certain conditions are met, post-conviction proceedings,¹⁵⁹ the Commonwealth has not adopted any standards governing the qualifications or compensation required of counsel in capital cases, nor does it guarantee that two attorneys, an investigator, and a mitigation specialist be assigned to the defense.

However, when an indigent defendant charged with a capital-eligible offense is represented by the Kentucky Department of Advocacy (DPA) or the Louisville Metro Public Defender's Office (Metro Defender), each agency strives to assign two attorneys who are qualified to undertake death penalty representation.¹⁶⁰ If no attorney within DPA or the Metro Defender is available to provide representation, it is each agency's policy to contract with two private conflict counsel to ensure representation for every indigent capital defendant within the Commonwealth.¹⁶¹ On the rare occasion when DPA or the Metro Defender are unable or fail "to provide an attorney to a

¹⁵⁹ KY. REV. STAT. ANN. §§ 31.110(2) (indigents are "entitled to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney . . . to be represented in any appeal; and to be represented in any other post-conviction . . . proceeding that the attorney and the needy person considers appropriate"), 31.219(1) ("It shall be the duty of the attorney representing a client under any public advocacy plan to perfect an appeal if his[her] client requests an appeal."), 31.220 (West 2011) (permitting a public advocacy attorney to provide representation to his/her client in federal court if the case "arises out of or is related to an action pending or recently pending in a [Kentucky] court of criminal jurisdiction"); *see generally* KY. R. CRIM. P. 11.42 on post-conviction procedures. This Recommendation does not call for physical presence of the entire defense team at every stage of the proceedings.

¹⁶⁰ DPA POLICIES, *supra* note 97, at § 17.20(I)(C) ("Two Attorneys shall be assigned to all Death Penalty Cases."); KY. REV. STAT. ANN. § 31.110(2)(a) (West 2011); Interview with Metro Defender, *supra* note 43. DPA will assign either two attorneys from its CTB, two regional trial branch attorneys who are capital-qualified, or, in rare cases, one attorney from each branch. Interview with DPA, *supra* note 12. The Metro Defender will assign two capital-qualified attorneys from its Capital Trial Division. Interview with Metro Defender, *supra* note 43.

¹⁶¹ DPA POLICIES, *supra* note 97, at §§ 8.04 (Qualification and Compensation of Counsel in Contract Capital Cases), 17.20(I)(C). DPA and Metro Defender staff attorneys provide the majority of the representation of indigent defendants in Kentucky; approximately 2,800 out of more than 148,000 capital and non-capital cases utilized private lawyers, mostly in conflict of interest situations. DPA SERVICE PLAN, *supra* note 63, at 12.

person eligible for representation,” the court possesses the “inherent authority” to appoint an attorney to provide representation.¹⁶²

While death row inmates are entitled to counsel during post-conviction proceedings only after an evidentiary hearing is ordered,¹⁶³ DPA or the Metro Defender regularly assign two attorneys to each of the Commonwealth’s death row inmates prior to the commencement of post-conviction proceedings, and the attorneys continue to provide representation through any petitions for certiorari.¹⁶⁴ Under federal law, an indigent death row inmate in Kentucky is entitled to one attorney through federal habeas corpus proceedings, and that attorney is authorized to continue his/her representation through clemency proceedings.¹⁶⁵ DPA and the Metro Defender also provide representation during clemency proceedings; however, assignment of counsel at this stage of the proceedings is not required by the Commonwealth.¹⁶⁶

Indigent defendants and death row inmates receiving representation through DPA or the Metro Defender have access to the representing agency’s staff investigators and mitigation specialists.¹⁶⁷ However, DPA has limited the number of hours for which non-attorney members of the defense team may be paid, thereby restricting access to investigative and mitigation assistance.¹⁶⁸ DPA and Metro Defender staff attorneys also may request funding under KRS 31.185 to obtain independent investigative or mitigation assistance; although, DPA has had some difficulty obtaining funding from the courts for mitigation assistance at the capital trial level.¹⁶⁹

Court-appointed attorneys and attorneys contracted by DPA or the Metro Defender to undertake representation in a capital case do not have access to DPA or Metro Defender staff investigators or mitigation specialists; instead, they must request funding for expert and investigative assistance from the courts under KRS 31.185.¹⁷⁰ The Commonwealth does not require the assignment of two attorneys, an investigator, and a mitigation specialist for all capital defendants and death row inmates.

¹⁶² KY. REV. STAT. ANN. § 31.235(1) (West 2011).

¹⁶³ An indigent death row inmate is entitled to appointed counsel only if a court determines, based on the inmate’s Rule 11.42 motion for post-conviction relief and the Commonwealth’s answer to that motion, that “there is a material issue of fact that cannot be determined on the face of the record.” KY. R. CRIM. P. 11.42(5). If a hearing is granted, and the defendant makes a specific request for counsel in writing, the court will make a determination of the defendant’s indigency. *Id.* If the defendant is indigent, then counsel *must* be appointed for the remainder of the proceeding, including appeal of the post-conviction decision. *Id.*

¹⁶⁴ DPA POLICIES, *supra* note 97, at § 17.20(I)(C). In most instances, DPA will provide representation during post-conviction proceedings to death row inmates represented by the Metro Defender at trial. Interview with Metro Defender, *supra* note 43 (currently representing two death row inmates); Interview with DPA, *supra* note 12.

¹⁶⁵ See 18 U.S.C. § 3599(a)(2) (2010); *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994); *Harbison v. Bell*, 129 S.Ct. 1481, 1486 (2009).

¹⁶⁶ DPA POLICIES, *supra* note 97, at § 17.20(I)(C); Interview with DPA, *supra* note 12; Interview with Daniel T. Goyette, *supra* note 101.

¹⁶⁷ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

¹⁶⁸ Email to Sarah Turberville & Paula Shapiro from Tom Griffiths, Capital Trial Branch Manager, Ky. Dep’t of Pub. Advocacy, Sept. 10, 2011 (on file with author) (stating work hours over 37.5 per week will not be compensated).

¹⁶⁹ *Id.*; see also *supra* notes 134–143 and accompanying text.

¹⁷⁰ KY. REV. STAT. ANN. § 31.185 (West 2011); Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

The Commonwealth does not require that counsel or other members of the capital defense team be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

Nonetheless, pursuant to DPA policy, all DPA staff attorneys, capital contract conflict counsel, and other staff members of the capital defense team are required to undergo training that includes education on the Commonwealth and federal laws regarding mental and psychological disorders in capital cases and impairments in capital clients.¹⁷¹ The Metro Defender also strives to ensure that its staff public defenders are trained on mental health-related legal issues in capital representation.¹⁷² However, neither DPA nor the Metro Defender training includes educating staff attorneys and contract counsel on *screening* for the presence of mental or psychological disorders or impairments.¹⁷³ Despite this failure to ensure such training, indigent capital defendants and death row inmates represented by DPA and Metro Defender attorneys are routinely screened for mental or psychological disorders and impairments at the outset of representation by outside mental health experts.¹⁷⁴

DPA and Metro Defender mitigation specialists, investigators, and experts are selected based upon their qualifications, rather than on the basis of cost of services, prior work for the prosecution, or professional status with the state.¹⁷⁵ However, budget constraints have affected the use of mitigation specialists and investigators during preparation for capital cases.¹⁷⁶

The Assessment Team was unable to determine whether capital defendants represented by privately-retained or court-appointed counsel are screened by qualified individuals for the presence of such disorders. Additionally, we were also unable to determine the basis for which privately-retained counsel or court-appointed counsel employ investigators and other experts.

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary**

¹⁷¹ DPA POLICIES, *supra* note 97, at §§ 8.04(I)(C)(3)(j)–(l), 12.04.

¹⁷² Interview with Daniel T. Goyette, *supra* note 101.

¹⁷³ Interview with Tom Griffiths, *supra* note 24; Telephone Interview by Paula Shapiro with Glenn McClister, Education and Strategic Planning Branch, Ky. Dep’t of Pub. Advocacy, Oct. 18, 2010 (on file with author); Interview with Daniel T. Goyette, *supra* note 101. However, it is the Metro Defender’s “standard practice to get a mental health professional involved in death penalty cases immediately for purposes of evaluation of the client’s competency to stand trial, assessment of criminal responsibility, and development of potential mitigation evidence.” Interview with Daniel T. Goyette, *supra* note 101. The Metro Defender routinely uses KRS 31.185 to accomplish this evaluation. *Id.*

¹⁷⁴ Interview with Daniel T. Goyette, *supra* note 101; Interview with Glenn McClister, *supra* note 173. For more information on mental health related issues in capital defense, please see Chapter Thirteen.

¹⁷⁵ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43; *infra* Chapter Thirteen on Mental Illness and Mental Retardation.

¹⁷⁶ Email from Tom Griffiths, *supra* note 168.

or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

- i. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.**
- ii. Counsel should have the right to have such services provided by persons independent of the government.**
- iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

Counsel for indigent defendants and death row inmates may seek the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings through ex parte proceedings.¹⁷⁷ Counsel also may hire experts and investigators who are independent of the Commonwealth.¹⁷⁸

Investigators and Mitigation Specialists

DPA employs staff investigators, mitigation specialists, paralegals, and social workers to assist in indigent representation.¹⁷⁹ Until 2010, DPA's Capital Trial Branch (CTB) had only one investigator with a caseload of approximately fifteen active cases, many of which required statewide travel.¹⁸⁰ With the recent addition of a second CTB investigator, each investigator now maintains projected caseloads of approximately eight to twelve active investigations, although recently DPA has sought to cap the number of cases for non-attorneys at ten cases maximum per person.¹⁸¹ Capital cases handled by DPA's regional trial branches are supported by staff investigators from the thirty regional trial offices, most of which employ only one investigator to assist regional trial branch attorneys who represent 400 to 600 cases each year.¹⁸² DPA also employs two mitigation specialists to assist all of CTB, and who have, on average, eight to twelve active capital cases at any given time.¹⁸³ DPA also employs one mitigation

¹⁷⁷ KY. REV. STAT. ANN. § 31.185(2) (West 2011).

¹⁷⁸ KY. REV. STAT. ANN. § 31.185 (West 2011).

¹⁷⁹ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. According to the U.S. Department of Justice's Bureau of Justice Statistics, in 2007, Kentucky's public defender agencies reported total full-time support staff of 172, including forty-six investigators, ten social workers, six paralegals, forty-six administrative staff members, fifty clerical staff, twelve interns, and two others. BJS REPORT, *supra* note 6, at 15 (noting that the "other" category denotes "human resources staff, forensic specialists, clinical psychologists, information technology (IT) specialists, interpreters, and investigators hired on a contractual basis.>").

¹⁸⁰ Interview with DPA, *supra* note 12. In September 2008, DPA's Capital Trial Branch was comprised of twelve staff members: seven attorneys (all housed within one work unit and a branch manager), two mitigation specialist, one investigator and two secretaries. As of July 2010, the CTB had seventeen staff members; eleven attorneys (restructured in August 2009 to create two sections with two supervising attorneys and a branch manager), two mitigation specialists, two investigators, and two secretaries. Interview with Tom Griffiths, *supra* note 24.

¹⁸¹ *Supra* note 130 and accompanying text.

¹⁸² Interview with DPA, *supra* note 12. As of October 2010, only six regional trial offices have more than one investigator: Louisville (Metro Defender), Covington, Paducah, Hopkinsville, Lexington, and Elizabethtown. DPA SERVICE PLAN, *supra* note 63, at 10.

¹⁸³ Interview with DPA, *supra* note 12; Email from Tom Griffiths, *supra* note 168.

specialist to assist the Post Trial Division in the representation of the Commonwealth's death row inmates.¹⁸⁴ DPA's 2010 budget request to the Kentucky General Assembly requested funding to hire an additional twenty-one investigators and forty support staff in order to "increase the effectiveness and efficiency of DPA's service to the courts, clients and public."¹⁸⁵

It appears DPA also has restricted the number of hours for which non-attorney employees, including investigators and mitigation specialists, may be compensated. DPA supervisors are not permitted to authorize use of overtime funds for compensation, despite the maintenance of a caseload (including in death penalty cases) in which overtime compensation was previously available.¹⁸⁶ These financial limitations reduce the ability of capital counsel to receive the assistance of investigative and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.

The Metro Defender employs one investigator and one mitigation specialist for its entire Capital Trial Division, which handles approximately twenty-five capital cases each year.¹⁸⁷ The Metro Defender also employs investigators, paralegals, and support staff who are responsible for assisting Metro Defender attorneys.¹⁸⁸ If caseloads for the Capital Trial Division staff investigator, paralegals, or mitigation specialist are excessive, the Metro Defender relies on investigators and paralegals from the Adult or Juvenile Trial Divisions to assist the Capital Trial Division attorneys.¹⁸⁹ Due to the already excessive caseload assigned to the single mitigation specialist employed by the Metro Defender, and the lack of funding to hire additional mitigation specialists, as caseloads increase the Metro Defender is likely to have to apply for funding for such services through KRS Chapter 31.¹⁹⁰ See below for a discussion of KRS Chapter 31.¹⁹¹

According to DPA, throughout the public defender system, there "are insufficient numbers of support staff resulting in the inefficiency and compounding the problem of overworked attorneys performing support staff functions."¹⁹² Because of this, staff investigators mainly work on the "worst cases," typically capital felony and murder cases, and public defenders are often left to investigate their other cases.¹⁹³ Approximately forty-four DPA regional trial branch attorneys provide capital representation in addition to carrying caseloads of 300 to 600 non-capital cases;

¹⁸⁴ Interview with DPA, *supra* note 12; Interview with Tom Griffiths, *supra* note 24.

¹⁸⁵ DPA SERVICE PLAN, *supra* note 63, at 10.

¹⁸⁶ Email from Tom Griffiths, *supra* note 168.

¹⁸⁷ Interview with Metro Defender, *supra* note 43.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *supra* notes 195–208 and accompanying text.

¹⁹² DPA SERVICE PLAN, *supra* 63, at 10; see also BJS REPORT, *supra* note 6, at 15; KY. PUB. ADVOCACY COMM'N, JUSTICE JEOPARDIZED: FINAL REPORT, 19–20 (Sept. 2005), available at <http://apps.dpa.ky.gov/news/JusticeJeopardizedFINALREPORT.pdf> [hereinafter JUSTICE JEOPARDIZED] (where the Commonwealth's Public Advocacy Commission recommended to the Kentucky General Assembly that additional funding be given to DPA because "[t]here is insufficient support for Kentucky's public defenders. As a result, public defenders are doing their own typing, filing, and handling of other clerical tasks. This is inefficient, and is inconsistent with how private lawyers handle their practices").

¹⁹³ DPA SERVICE PLAN, *supra* note 63, at 10.

such caseloads plus investigatory responsibilities puts unacceptable strains on already overburdened defense attorneys.¹⁹⁴

Expert Services under KRS 31.185

Under KRS 31.185, Kentucky’s public defenders, contract counsel, and court-appointed counsel representing an indigent capital defendant or death row inmate may request funding for expert, investigative, and other ancillary professional services from the courts.¹⁹⁵ Commonwealth courts may, in their discretion, authorize funds for expert and investigative services for trial, appellate, and/or post-conviction proceedings if such services are “reasonably necessary” and the use of state facilities is “impractical.”¹⁹⁶

Generally, counsel will request preauthorization for expenses from the circuit court which may place an initial “cap” on funding for expert services, however, the court may grant additional funding when defense counsel demonstrates its necessity.¹⁹⁷ In lieu of placing a cap on funding, some Jefferson County trial courts have entered “good faith” orders allowing defense counsel to use their discretion to spend “reasonable” funds for the provision of expert services, such as mental health professionals.¹⁹⁸

At the trial level, contract conflict counsel have successfully petitioned the Commonwealth’s courts to obtain KRS 31.185 funds for expert and investigative services.¹⁹⁹ DPA also has sought KRS 31.185 funding for ancillary services with varying degrees of success. As of September

¹⁹⁴ *Id.*

¹⁹⁵ KY. REV. STAT. ANN. §§ 31.185, 31.185(5) (West 2011).

¹⁹⁶ KY. REV. STAT. ANN. § 31.185 (West 2011); *see also infra* Chapter Thirteen on Mental Illness and Mental Retardation. Under KRS 31.185(5), each county within the Commonwealth provides a per capita amount of money into a special fund for indigent defense expert and investigative resources; however, when this fund is depleted, the Commonwealth of Kentucky must pay any additional funding requirements granted by the court. KY. REV. STAT. ANN. § 31.185(5) (West 2011).

¹⁹⁷ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

¹⁹⁸ Interview with Metro Defender, *supra* note 43. During federal habeas corpus and clemency proceedings, the federal courts may authorize and provide funding to contract conflict counsel, as well as public defense attorneys, to obtain investigative, expert, or other services as are reasonably necessary for representation. 18 U.S.C. § 3599(f) (2010).

KRS 31.185 Funding Approvals Per Fiscal Year—Capital and Non-Capital Cases		
<i>Fiscal Year</i>	<i>Number of payments authorized by the Commonwealth’s circuit courts within a fiscal year</i>	<i>Total amount authorized to defense counsel by the Commonwealth’s circuit courts under KRS 31.185 in a fiscal year</i>
2000–2001	756	\$942,074.20
2001–2002	729	\$977,924.19
2002–2003	803	\$1,225,013.64
2003–2004	830	\$1,303,968.40
2004–2005	753	\$1,198,132.76
2005–2006	768	\$1,184,648.50

Telephone Interview by Paula Shapiro with Justin Perry, Administrative Specialist II, County Fees Systems Branch, Div. of Local Gov’t Services, Office of the Comptroller, Finance & Admin. Cabinet, Oct. 27, 2010 (on file with author); *see also* KY. REV. STAT. ANN. § 23A.010 (West 2011). Kentucky’s Division of Local Government Services does not keep track of the funding provided under KRS 31.185 specifically in capital cases. *Id.*

¹⁹⁹ Email from Ed Monahan, *supra* note 10.

2011, DPA's staff mitigation specialists were providing assistance in eight capital-eligible trials, while, due to budget constraints, an additional twelve capital-eligible cases were required to be contracted to private mitigation specialists under KRS 31.185.²⁰⁰ During capital post-conviction proceedings, however, DPA has not been successful in using KRS 31.185 as a vehicle to support additional investigative or mitigation assistance.²⁰¹ The Metro Defender has not utilized KRS 31.185 funding to obtain investigators or mitigation specialists, and instead, as of June 2010, was continuing to rely on staff resources.²⁰² However, due to the Metro Defender's budget constraints and increasing caseloads, the Metro Defender asserts that it will eventually need to utilize KRS 31.185 to support investigative and mitigation assistance in capital cases.²⁰³

Because KRS 31.185 funding is for expenses "necessarily incurred in representing a needy person under this chapter," it is unclear whether a capital defendant or death row inmate who has retained private counsel and who is unable to afford expert services is permitted to utilize KRS 31.185 to procure expert and ancillary defense services.²⁰⁴

The availability of KRS 31.185 funding is limited during post-conviction proceedings. A post-conviction petitioner only is entitled "to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner's case,"²⁰⁵ permitting use of KRS 31.185 funding when "the post-conviction petition sets forth sufficient allegations to necessitate an evidentiary hearing."²⁰⁶ However, even if a post-conviction petition has met the threshold requirement for an evidentiary hearing, the petitioner is not automatically entitled to funding; instead, trial courts "have the inherent authority to control the proceedings before them to eliminate unjustifiable expense and delay."²⁰⁷ It appears death row inmates have significantly greater difficulty obtaining expert resources during post-conviction than at trial.²⁰⁸

²⁰⁰ Email from Ed Monahan, *supra* note 10; DPA states that there have been instances where Kentucky trial courts have initially refused to provide KRS 31.185 funds or required counsel to justify why staff mitigation specialists are unable to provide the necessary investigation. Email from Tom Griffiths, *supra* note 168 (noting that in one case, a trial judge "rejected a portion of the mitigation expert's bill and this is currently being litigated since the expert may refuse to work for [DPA] in the future" and in another case, a mitigation expert hired with KRS 31.185 funds refused to turn over work product prior to trial without additional funding).

²⁰¹ Email from Ed Monahan, *supra* note 10.

²⁰² Interview with Metro Defender, *supra* note 43. However, the Metro Defender frequently uses KRS 31.185 for expert services, particularly for independent mental health evaluations. *Id.*

²⁰³ *Id.*

²⁰⁴ KY. REV. STAT. ANN. § 31.185(3) (West 2011).

²⁰⁵ *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008); *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008).

²⁰⁶ *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008), *overruling in part* *Stopher v. Conliffe*, 170 S.W.3d 307 (2005) ("it is clear we went too far in *Stopher* when we said that KRS 31.185 has no application post-conviction proceedings."); *Mills*, 268 S.W.3d at 367.

²⁰⁷ *Mills*, 268 S.W.3d at 367 ("The trial court still maintains the discretion to deny such funds if it determines that the expert testimony is not reasonably necessary.")

²⁰⁸ *See, e.g., Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008); *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008); *Johnson v. Commonwealth*, No. 2006-SC-000548-MR, 2008 WL 4270731, at *7 (Ky. Sept. 18, 2008); *Foley v. Commonwealth*, No. 2008-SC-000909-TG, 2010 WL 1005873, at *3 (Ky. Mar. 18, 2010); Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. For more information on access to experts, see Chapter Thirteen on Mental Retardation and Mental Illness. During federal habeas corpus and clemency proceedings, the federal courts may authorize and provide funding to contract conflict counsel, as well as public defense attorneys, to obtain investigative, expert, or other services as are reasonably necessary for representation. 18 U.S.C. § 3599(f) (2010).

Further, it appears that Kentucky death row inmates have a limited right to have such services provided by persons independent of the government. The Kentucky Supreme Court recently required a death row inmate to undergo a mental evaluation by the Commonwealth's psychiatric institute, holding that because the inmate had been previously convicted, any inquiry by mental health professionals about the underlying offense does not implicate, or only minimally implicates, the inmate's rights to remain silent and "to confidential defense communications."²⁰⁹

Conclusion

The Kentucky Death Penalty Assessment Team applauds the Department of Public Advocacy and the Louisville Metro Public Defender's Office for efforts to staff each capital case with two attorneys, a mitigation specialist, and an investigator. However, because the Commonwealth does not require adherence to each of the provisions within this recommendation, the Commonwealth is not in compliance with Recommendation #1.

To ensure high quality legal representation for every capital defendant and death row inmate in the Commonwealth, Kentucky must

- Guarantee that every capital defendant will be represented by two attorneys and have access to an investigator and a mitigation specialist at every stage of the legal proceedings;
- Ensure adequate funding of investigative and other ancillary professional services reasonably necessary to provide high quality legal representation at every stage of the proceedings, including compensation of work hours necessary to fully prepare for each capital case;
- Ensure at least one member of the defense team is trained to screen capital clients for mental and psychological disorders; and
- Ensure KRS 31.185 funding is available to all capital defendants or death row inmates unable to afford expert and ancillary services, irrespective of whether s/he is determined indigent and represented by a public defender or privately-retained counsel.

The Kentucky Supreme Court should also adopt a rule to authorize access to reasonable, ancillary, and expert services during the claim development stage of a capital post-conviction case.

B. Recommendation #2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and**

²⁰⁹ White v. Payne, 332 S.W.3d 45, 50 (Ky. 2011). For a detailed discussion of death row inmates' rights during post-conviction and during post-conviction evaluations, see Chapters Eight and Thirteen.

applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

- b. In formulating qualification standards, the jurisdiction should ensure:
 - i. That every attorney representing a capital defendant has:
 - (a) Obtained a license or permission to practice in the jurisdiction;
 - (b) Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - (c) Satisfied the training requirements set forth in Guideline 8.1.²¹⁰
 - ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation.

Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

- (a) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- (b) Skill in the management and conduct of complex negotiations and litigation;
- (c) Skill in legal research, analysis, and the drafting of litigation documents;
- (d) Skill in oral advocacy;
- (e) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (f) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (g) Skill in the investigation, preparation, and presentation of mitigating evidence; and
- (h) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Any attorney who undertakes representation of a client, including a capital defendant or death row inmate, in Kentucky courts must be licensed by the Commonwealth of Kentucky to practice law.²¹¹ Out-of-state attorneys must file an application with the Kentucky Bar Association to receive a limited certificate of admission to practice law in the Commonwealth.²¹² Although the requirement to be a member of the Kentucky Bar or admitted *pro hac vice* is in accordance with this Recommendation, the Commonwealth has not established minimum qualifications standards applicable to all attorneys that represent all capital defendants or death row inmates at trial, direct appeal, post-conviction, or clemency proceedings in Kentucky.

However, DPA has promulgated policies, applicable to DPA employees and private attorneys who contract with DPA to provide indigent representation, that include qualification standards

²¹⁰ Training requirements are discussed in Recommendation #5. See *infra* notes 403–432 and accompanying text.

²¹¹ KY. REV. STAT. ANN. § 524.130 (West 2011) (classifying the unauthorized practice of law as a misdemeanor); SCR 2.010 (requirements for admission to the Kentucky Bar).

²¹² SCR 3.030.

for attorneys at each stage of capital proceedings.²¹³ These policies, discussed below, require that staff attorneys and contract counsel meet the requirements set forth in this Recommendation. We note that we are unable to determine the extent to which DPA voluntarily adheres to these policies.

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DPA has adopted, by reference, the *ABA Revised Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines)* and the *NLADA Performance Guidelines for Criminal Defense Representation*.²¹⁴

Staff Attorneys

In order to represent a client in a capital case, DPA policy stipulates that the attorney must be designated as a “Staff Attorney III,” which is the classification level representing the most-experienced and highly-qualified attorneys on DPA’s staff.²¹⁵ The Staff Attorney III classification requires that the attorney meet the qualification standards called for in this Recommendation, including zealous advocacy, training,²¹⁶ and possession of the requisite skill set.²¹⁷ While all attorneys qualified at Staff Attorney III may represent capital defendants and death row inmates, DPA policy stipulates that trial attorneys in its CTB must also possess significant previous trial experience, including “a minimum of four (4) years experience as a litigator, [] good courtroom skills[,] and [] knowledge of Death Penalty jurisprudence in addition to meeting the qualifications [of a] Staff Attorney III.”²¹⁸

In addition to attaining a Staff Attorney III designation, DPA attorneys providing representation at the appellate and post-conviction level must also be able to provide competent and diligent representation to death row inmates.²¹⁹ A Staff Attorney III in the Appellate Branch “must identify appellate issues irrespective of the complexity of the case, must research those issues thoroughly, must write a persuasive brief, and must argue the case skillfully to any appellate

²¹³ KY. REV. STAT. ANN. § 31.030(4) (West 2011) (it is DPA’s authority and duty to develop and promulgate “standards and regulations, rules, and procedures for administration of the defense of indigent defendants in criminal cases which the public advocate, statutes, or the courts determine are subject to public assistance.”); DPA POLICIES, *supra* note 97, at § 4.22(III).

²¹⁴ DPA POLICIES, *supra* note 97, at § 17.21(I) (*Trial Division Guidelines: Case Reviews and Voir Dire Workshops in Capital Cases*). DPA policies have been adopted to ensure that the Department can “provide each client with high quality services through an effective delivery system which ensures a defender staff dedicated to the interests of their clients. . . .” DPA 2010 ANNUAL REPORT, *supra* note 25, at 2.

²¹⁵ DPA POLICIES, *supra* note 97, at §§ 4.22(III)(C)(1), 17.20.

²¹⁶ DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(c).

²¹⁷ DPA POLICIES, *supra* note 97, at §§ 17.22(I) (initially issued June 9, 1998) (last revised 2006), 4.22(III). A Staff Attorney III must also have shown initiative by participating in special projects or assignments; assuming additional responsibilities; acting as a legal resource for other staff; developing an expertise; “[e]xcelling in handling a variety of complex legal services, trial research, and administrative [duties], characterized by issues which are complex, unique or technical in nature”; or interacting professionally with various members of the criminal justice arena. DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(d).

²¹⁸ DPA POLICIES, *supra* note 97, at § 17.22(I). DPA revised its policies reclassifying its staff attorneys into three levels: Staff Attorney I, Staff Attorney II, and Staff Attorney III. DPA POLICIES, *supra* note 97, at § 4.22.

²¹⁹ DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(b)(ii)–(iii); *see supra* notes 215–218 and accompanying text.

court and take any further steps necessary to finalize the appeal.”²²⁰ Similar criteria exist for a Staff Attorney III in the Post-Conviction Branch, where attorneys must “conduct interviews of clients, witnesses, including trial and appellate counsel, must competently identify potential post-conviction issues, must research and investigate those issues thoroughly, must write appropriate pleadings, and must present skillfully post-conviction hearings (and appeals therefrom) in state and federal court, all irrespective of the cases’ complexity.”²²¹

DPA Contract Conflict Counsel

DPA contracts with private counsel to provide representation in the event of a conflict of interest or excessive caseloads within the Department.²²² In order to be included in DPA’s list of prospective contract counsel, DPA policy requires that the attorney must (1) be licensed to practice law in the Commonwealth or be qualified to practice before the Sixth Circuit, (2) have demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases,²²³ and (3) have completed a comprehensive training program, approved by DPA, on several topics relating to capital defense.²²⁴ DPA policy also requires private counsel to have demonstrated skills in accordance with this Recommendation.²²⁵ In addition, if contracting for representation in a post trial action, DPA requires the attorney to have demonstrated skill in the elements of appellate advocacy.²²⁶

As a condition of the contract with DPA, counsel must agree to participate in a case review at least 120 days prior to trial, or ninety days before filing a post-conviction motion on behalf of a death row inmate, and in workshops or practice arguments depending on the type of proceeding in which counsel enters his/her appearance.²²⁷

We note, however, that because the Commonwealth does not require that capital counsel meet the qualification standards described in this Recommendation, we are unable to determine the extent to which DPA’s qualification standards are enforced. Furthermore, DPA consistently contracts with approximately ten capital-qualified attorneys across the Commonwealth that meet DPA’s qualification requirements for contract counsel in death penalty trials.²²⁸ The small pool of private attorneys with whom DPA contracts for death penalty trial work may be limited due to an insufficient pool of attorneys who meet the qualification standards for appointment and due to the maximum caps on compensation and low hourly rates available to contract counsel.²²⁹

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²²⁰ DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(b)(ii).

²²¹ DPA POLICIES, *supra* note 97, at § 4.22(III)(C)(3)(b)(iii).

²²² *See supra* notes 161–162 and accompanying text.

²²³ DPA POLICIES, *supra* note 97, at § 8.04(I)(C).

²²⁴ DPA POLICIES, *supra* note 97, at § 8.04(I)(C)(3). For more information on training, see Recommendation #5.

²²⁵ DPA POLICIES, *supra* note 97, at § 8.04(I)(C).

²²⁶ DPA POLICIES, *supra* note 97, at § 8.04(I)(C)(4)(i).

²²⁷ DPA POLICIES, *supra* note 97, at § 8.04(I)(D)(1), (2)(a)–(b). Attorneys may request additional case reviews, which will be provided at least thirty days prior to a significant advocacy event such as an evidentiary hearing. DPA POLICIES, *supra* note 97, at § 8.04(I)(D)(4).

²²⁸ Interview with Tom Griffiths, *supra* note 24.

²²⁹ *See supra* notes 120–126 and accompanying text on compensation rates for contract counsel in death penalty cases.

The Metro Defender requires its staff attorneys providing capital representation to successfully complete extensive capital case training and attempts to ensure that each attorney assigned to a capital case has capital litigation experience.²³⁰

However, the Metro Defender has not formally adopted any written rules, policies, or guidelines governing the requisite qualifications of staff attorneys or contract counsel in capital cases.²³¹ We also were unable to determine whether the pool of staff and contract attorneys available for representation in capital cases arising in Jefferson County is sufficient to ensure that each capital defendant in the county receives high quality legal representation.

Conclusion

Although current internal DPA policies comport with this Recommendation, the Commonwealth of Kentucky has not established any minimum qualification standards that apply to *all* counsel providing capital representation at trial, on direct appeal, and during post-conviction and clemency proceedings. Furthermore, public defender agencies self-enforce any internal agency guidelines on capital representation, which provides no guarantee that capital defendants and death row inmates will be represented by attorneys who possess demonstrated skills in the areas outlined in Recommendation #2. Therefore, Kentucky partially complies with this Recommendation.

C. Recommendation #3

The selection and evaluation process should include:

- a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:**
 - i. A defender organization that is either:**
 - (a) A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - (b) A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - ii. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.**

²³⁰ Interview with Metro Defender, *supra* note 43. The Metro Defender has stated that there may be three attorneys assigned to a capital case in order to provide training for its staff attorneys. *Id.*

²³¹ *Id.*; Interview with Daniel T. Goyette, *supra* note 101.

In the Commonwealth of Kentucky, DPA and the Metro Defender are the statewide independent appointing authorities responsible for training, selecting, appointing, and monitoring attorneys who represent indigent capital defendants and death row inmates.²³² DPA division directors and branch managers are responsible for the assignment of DPA attorneys, as well as counsel contracted by DPA, to capital cases in 119 of the Commonwealth's 120 counties.²³³ The Metro Defender's Chief Public Defender, Deputy Chief Public Defender, and Division Directors are responsible for selecting counsel for indigent capital defendants whose cases arise out of Jefferson County.²³⁴

Because the Commonwealth has vested DPA and Metro Defender staff counsel with the responsibility to assign representation in capital trials and appeals, Kentucky is in compliance with this portion of Recommendation #3.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

DPA and the Metro Defender maintain capital trial and post trial branches, composed of attorneys specially qualified to provide representation to indigent defendants at trial and through each of the remaining phases of capital proceedings.²³⁵ DPA policy also requires the maintenance of a written "list of private attorneys who are willing and qualified to enter into trial and post trial level capital conflicts with the Department."²³⁶ The list, which is categorized by attorneys qualified to provide representation at capital trials, on direct appeal, and during post-conviction proceedings, is maintained and periodically updated by DPA's Capital Trial Branch (CTB) Manager and the Post Trial Division Director.²³⁷

Similarly, the Metro Defender has implemented an "Assigned Counsel Panel Plan" through which the Metro Defender compiles the names of private local attorneys who may be qualified and available to handle a capital case in the event of a conflict of interest barring a Metro

²³² KY. REV. STAT. ANN. §§ 31.010 (establishing DPA as "an independent agency of state government"), 31.030, 31.050, 31.060 (West 2011).

²³³ KY. REV. STAT. ANN. §§ 31.030, 31.050, 31.060 (West 2011) (requiring a county with ten or more circuit court judges, such as Jefferson County, to maintain an office of public defense).

²³⁴ Interview with Metro Defender, *supra* note 43. While DPA is overseen by the Public Advocacy Commission (Commission), an entity composed of members appointed by the Governor and the Kentucky Supreme Court, the Commission is prohibited by law from interfering "with the discretion, judgment, or advocacy of employees of [DPA] in their handling of individual cases." KY. REV. STAT. ANN. § 31.015(7) (West 2011). See Factual Discussion, *supra* notes 32–41 and accompanying text, for additional information on the Commission. The Public Advocate, who serves as chief administrator of DPA and who is responsible for appointing and hiring a Deputy Public Advocate, assistant public defenders, and other DPA personnel, is selected by the Kentucky Governor from a list of three candidates recommended by the DPA Commission. KY. REV. STAT. ANN. § 31.020(2) (West 2011).

²³⁵ *Trial Division*, KY. DEP'T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/div/trial.htm> (last visited Oct. 14, 2010); *About*, LOUISVILLE METRO PUB. DEFENDER'S OFFICE, <http://www.louisvillemetropublicdefender.com/about.html> (last visited Oct. 14, 2010); Interview with Metro Defender, *supra* note 43. KY. REV. STAT. ANN. § 31.010 (West 2011) (the system was established to represent all "indigent persons accused of crimes or mental states which may result in their incarceration or confinement"). For more information on DPA's requisite qualifications to become capital-qualified, see Recommendation #2, *supra* notes 214–221 and accompanying text.

²³⁶ DPA POLICIES, *supra* note 97, at § 8.04(I)(C)(1).

²³⁷ *Id.* Qualifications established by DPA for representation in capital cases are discussed at length in Recommendation #2.

Defender attorney from providing representation.²³⁸ Attorneys seeking appointment to a capital case by the Metro Defender must fill out an application describing the attorney's education and trial litigation experience, including experience providing capital representation at every stage of capital proceedings.²³⁹ In practice, the Metro Defender's Chief Public Defender, Deputy Chief Public Defender, and Division Directors make an "ad hoc" decision on which two attorneys to appoint from the Metro Defender's roster depending upon the circumstances of each case.²⁴⁰ The Metro Defender's Office Manager maintains and periodically updates the file of attorneys qualified to represent capital (and non-capital) defendants at each stage of the proceedings.²⁴¹

Although both DPA and the Metro Defender have developed and currently maintain a roster of eligible lawyers for each phase of capital representation, the Commonwealth has not vested in these agencies the authority to maintain a roster of all private counsel that is qualified to represent capital defendants and death row inmates. Thus, the Commonwealth is in partial compliance with this portion of Recommendation #3.

c. The statewide independent appointing authority should perform the following duties:

This portion of the recommendation will address the extent to which DPA and/or the Metro Defender are performing the duties listed below. However, we note at the outset that because neither DPA nor the Metro Defender, nor any other entity in the Commonwealth, is vested with the authority to certify the qualifications or monitor the performance of all attorneys, including privately-retained counsel and court-appointed counsel, who provide representation in capital cases, the Commonwealth is not fully compliant with this Recommendation. Furthermore, no entity is responsible for enforcing or monitoring DPA's or the Metro Defender's performance of the duties listed below.²⁴²

- i. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;**
- ii. Establish minimum standards for performance of all counsel in death penalty cases;**
- iii. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**
- iv. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**
- v. Draft and periodically publish rosters of certified attorneys;**

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²³⁸ Interview with Daniel T. Goyette, *supra* note 101; KY. R. CRIM. P. 8.30 (requiring separate counsel for cases with multiple defendants).

²³⁹ Interview with Daniel T. Goyette, *supra* note 101.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² While the Public Advocacy Commission and the Metro Defender Board oversee DPA and the Metro Defender respectively, these entities do not monitor the public defenders' performance of the duties listed in this Recommendation; in fact, the Commission is statutorily prohibited from interfering with DPA's handling of cases. KY. REV. STAT. ANN. § 31.015(7) (West 2011).

DPA is responsible for assigning two attorneys to represent an indigent capital defendant at each stage of the proceeding for every case arising within 119 counties of the Commonwealth.²⁴³ DPA Policy stipulates that it is the responsibility of DPA’s Directing Attorneys, along with the CTB Manager and the Regional Manager, to appoint two attorneys to each death penalty case at trial.²⁴⁴ In practice, the CTB Manager strives to assign two capital-qualified attorneys, from CTB or a regional trial office, to every murder case in which the death penalty could be sought.²⁴⁵ Appointment determinations are based on several factors, including the “relative experience of the available field office staff, current caseload in CTB, complexity of the case, retrials, special expertise of CTB, geographical concerns, and the special circumstances in the given case.”²⁴⁶ In cases where the CTB Manager determines that CTB representation is not appropriate, DPA strives to contract with private counsel to ensure two attorneys provide representation to the indigent capital defendant.²⁴⁷ Capital direct appeals and post-conviction proceedings are assigned to capital-eligible attorneys within DPA’s Post Trial Branch, unless a conflict of interest requires DPA to contract with capital-qualified private counsel to represent its death row inmates.²⁴⁸

DPA has promulgated minimum performance standards governing its staff attorneys and contract counsel in death penalty cases at the trial, appellate, and post-conviction level, to comport with the *ABA Guidelines*.²⁴⁹ DPA also recruits private attorneys within the Commonwealth for inclusion in its roster of capital-qualified private attorneys that may contract with DPA to provide representation in a death penalty case.²⁵⁰ However, DPA has not promulgated any specific procedures to certify attorneys as qualified to represent capital defendants. In addition, although DPA policies on the qualifications required of capital counsel are written and published, we are unaware of their availability to the public; nor does it appear that DPA’s roster of capital-qualified attorneys is periodically published or made available to the public.

Louisville Metro Public Defender’s Office

The Director of the Metro Defender’s Adult Trial Division determines which attorneys within the Capital Division are appointed to a capital-eligible case arising within Jefferson County.²⁵¹

²⁴³ DPA POLICIES, *supra* note 97, at §§ 17.20(A) (DPA supervisors and managers are responsible for the appointment of two qualified counsel even “in the event that the Directing Attorney or other Staff Attorneys are disqualified from providing direct representation by order of the Court or DPA action.”), 17.20(I)(C).

²⁴⁴ DPA POLICIES, *supra* note 97, at § 17.20(A) (noting that any disagreement regarding who to appoint will be resolved by the Trial Division Director).

²⁴⁵ Interview with Tom Griffiths, *supra* note 24; *see also supra* notes 214–221 and accompanying text (defining capital-qualified attorneys).

²⁴⁶ DPA POLICIES, *supra* note 97, at § 17.20(I)(D).

²⁴⁷ DPA 2010 ANNUAL REPORT, *supra* note 25, at 21.

²⁴⁸ DPA POLICIES, *supra* note 97, at §§ 18.01, 18.03, 8.04(I)(C), 8.04(II)(B).

²⁴⁹ DPA POLICIES, *supra* note 97, at §§ 17.21 (Trial Division performance guidelines for capital cases), 18.01 (Post Trial Division minimum performance standards), 8.04 (noting the adoption of the *ABA Guidelines* as part of DPA contract counsel qualifications).

²⁵⁰ DPA POLICIES, *supra* note 97, at § 8.04(I)(C); *supra* notes 222–228 and accompanying text.

²⁵¹ Interview with Metro Defender, *supra* note 43. Although it lacks written policies or guidelines mandating the assignment of counsel, the Metro Defender determines who will be assigned to each individual case. *Id.* The Metro Defender estimates that ninety percent of its capital-eligible homicides do not result in a capital charge, thereby creating difficulty in determining whether to assign a homicide case to capital counsel. *Id.*

While the Metro Defender attempts to ensure that the two attorneys who are appointed to death penalty cases have extensive trial experience and/or capital litigation experience; to the best of our knowledge, the Metro Defender has not established minimum performance standards for counsel representing a capital defendant or death row inmate.²⁵²

When attorneys from the Metro Defender's Capital Division cannot provide representation, the Metro Defender contracts with independent conflict counsel to ensure two attorneys are assigned to a capital defendant's case.²⁵³ Under its "Assigned Counsel Panel Plan," the Metro Defender recruits private attorneys for inclusion on a roster which is consulted in the event of a conflict of interest barring the Metro Defender's representation at trial.²⁵⁴ The Metro Defender's roster of attorneys eligible for appointment in death penalty cases is unpublished and it is unclear whether it is written. The Metro Defender has not established certification procedures for its private counsel wishing to represent capital defendants on a contractual basis.

vi. Implement mechanisms to ensure that the workload of defense attorneys in death penalty cases enables counsel to provide each client with high quality legal representation consistent with the ABA Guidelines;

Funding shortages represent the single greatest impediment to ensuring proper workloads for all public defenders, including those representing capital defendants and death row inmates. A detailed discussion of funding is found below in Recommendation #4. Absent an increase in funding, DPA and the Metro Defender have sought to limit the workload of public defenders to enable counsel to provide high quality legal representation in death penalty cases consistent with the *ABA Guidelines*.

The U.S. Department of Justice's Bureau of Justice Statistics (BJS) reported that Kentucky public defender agencies receive, by far, the greatest number of capital-eligible felony cases out of eleven statewide public defender programs in capital jurisdictions that were examined in its study.²⁵⁵ According to the BJS Report, in 2007, Kentucky's public defender agencies undertook representation in ninety-seven death penalty cases.²⁵⁶ The state with the second highest number of capital cases at trial was Maryland, in which the public defender undertook representation in thirty capital trials.²⁵⁷

²⁵² Interview with Metro Defender, *supra* note 43.

²⁵³ Interview with Metro Defender, *supra* note 43; Interview with Daniel T. Goyette, *supra* note 101.

²⁵⁴ See *supra* notes 238–241 and accompanying text. DPA capital-eligible attorneys also may provide representation in the Metro Defender's conflict cases at direct appeal or during post-conviction proceedings. Interview with Metro Defender, *supra* note 43; Interview with DPA, *supra* note 12.

²⁵⁵ BJS REPORT, *supra* note 6, at 11 (including caseload data from all of Kentucky's public defender agencies in 2007); Email from Ed Monahan, *supra* note 10. Note that case numbers submitted to BJS were counted pursuant to DPA's previous case counting method. See *supra* note 10.

²⁵⁶ BJS REPORT, *supra* note 6, at 11 ("The number of cases in which the prosecutor filed for the death penalty ranged from 97 cases in Kentucky to 1 case each in Arkansas and New Hampshire."). DPA states that it did not distinguish in its responses to the BJS inquiry between capital-eligible cases and cases where a notice of aggravators were filed. Email from Ed Monahan, *supra* note 10.

²⁵⁷ BJS REPORT, *supra* note 6, at 11.

In fiscal year 2011, Kentucky's public defenders represented 101 capital clients in forty-two counties.²⁵⁸ DPA estimates that it represents capital defendants in approximately thirty-two capital trials each year.²⁵⁹ Of those, approximately sixteen are handled by DPA's capital trial branch attorneys; the other half of the capital cases are handled by independent conflict counsel, DPA's regional trial attorneys, or privately-retained counsel.²⁶⁰ Pursuant to its policy, DPA attempts to limit capital caseloads by assigning each capital case to a CTB attorney who is best equipped, due to current caseload and experience, to undertake representation at that time.²⁶¹ DPA attempts to limit the CTB caseloads to five or six cases per attorney and assigns the remainder of the capital cases to DPA regional offices.²⁶² In 2010, forty-four regional trial branch attorneys were providing representation in capital trials, in addition to representing clients in over 400 non-capital cases each year, far exceeding national averages and recommended maximum caseloads.²⁶³ Regional trial branch managers are responsible for monitoring the workloads of their defense attorneys providing representation in capital cases.²⁶⁴

In Jefferson County, the Metro Defender typically represents between twenty-five and twenty-seven clients under capital indictment at any given time, resulting in a caseload of approximately thirteen to fourteen cases per attorney in the Capital Trial Division.²⁶⁵ Unlike DPA, the chief administrators of the Metro Defender carry capital caseloads in addition to their administrative

²⁵⁸ DPA 2011 ANNUAL REPORT, *supra* note 4, at i.

²⁵⁹ Interview with DPA, *supra* note 12. This excludes Jefferson County, discussed below in the Metro Defender section. In fiscal year 2010, DPA's CTB defended thirty-five capital cases. DPA 2010 ANNUAL REPORT, *supra* note 25, at 19.

²⁶⁰ Interview with DPA, *supra* note 12. Out of the sixteen cases not handled by DPA's CTB, about two cases per year are handled by private attorneys, and two more are handled by contract conflict counsel. The remainder are handled by DPA field office staff attorneys. *Id.*; DPA POLICIES, *supra* note 97, at §§ 17.20(A) (stating that it will be the DPA supervisors and managers obligation to appoint two qualified counsel even "in the event that the Directing Attorney or other Staff Attorneys are disqualified from providing direct representation by order of the Court or DPA action"), 17.20(I)(C).

²⁶¹ See DPA POLICIES, *supra* note 97, at § 17.20.

²⁶² Interview with DPA, *supra* note 12.

²⁶³ *Id.* DPA strives to assign each capital trial at least two attorneys, although this is not always possible. DPA POLICIES, *supra* note 97, at § 17.20(A); Interview with Tom Griffiths, *supra* note 24. With respect to appellate caseloads during fiscal year 2010, 288 cases, including eight death penalty cases, were assigned to DPA's Appellate Branch, resulting in an average caseload per attorney of 17.45. DPA 2010 ANNUAL REPORT, *supra* note 4, at 10. At the end of fiscal year 2010, DPA's Post-Conviction Branch represented thirty-two clients on death row and had forty court actions pending in capital cases, or a caseload of approximately nine cases per attorney, not including non-capital cases. *Id.* In fiscal year 2011, DPA's Appellate Branch received 280 new cases, including two death penalty cases pending direct appeal, and DPA's Post-Conviction Branch represented twenty-four clients on death row and had forty-seven court actions pending in capital cases. DPA 2011 ANNUAL REPORT, *supra* note 4, at 12. In addition to their capital caseload, most Post-Conviction Branch capital attorneys also provide representation in one or two non-capital cases. Interview with DPA, *supra* note 12. Average caseloads include actions pursuing a number of different avenues of relief, such as civil actions or expert assistance in clemency applications, for a single death row inmate. Telephone Interview by Paula Shapiro with Tim Arnold, Director of the Post Trial Division, Ky. Dep't of Pub. Advocacy, Oct. 29, 2010 (on file with author). No DPA attorney exclusively represents clients at clemency, although DPA provides representation during clemency proceedings to all of its clients. *Id.*

²⁶⁴ DPA POLICIES, *supra* note 97, at § 17.21(II).

²⁶⁵ Interview with Metro Defender, *supra* note 43. As of July 9, 2010, the Metro Defender represented twenty-four capital clients. *Id.* Five or six years ago, there were, on average, thirteen to fifteen active death penalty cases within the entire jurisdiction. *Id.* The number of capital defendants represented by private counsel in Jefferson County is approximately twenty-five, which is the same as the number of the Metro Defender's capital clients. *Id.*

duties.²⁶⁶ The Metro Defender attempts to limit the number of capital cases handled by its Capital Trial Division by seeking to contract with independent counsel to provide representation when faced with extraordinary caseloads.²⁶⁷

Despite efforts to combat excessive caseloads, Commonwealth caseloads continue to rise. The Metro Defender handles approximately double the capital caseload of its counterparts at DPA.²⁶⁸ Meanwhile, DPA's overall caseloads have risen from 97,818 in 2000 to 147,245 in 2009, with a 4.7 percent average increase over the last ten years.²⁶⁹ In 2011, DPA and the Metro Defender received a combined total of 152,727 new cases.²⁷⁰ While ad hoc measures employed by DPA and the Metro Defender attempt to limit capital caseloads, we are unable to determine if these mechanisms sufficiently limit the impact of increasing caseloads on public defenders, including those handling death penalty cases, throughout Kentucky.

vii. Monitor the performance of all attorneys providing representation in capital proceedings;

DPA is responsible for monitoring the performance of its staff attorneys and contract conflict counsel who provide representation in capital proceedings.²⁷¹ DPA's policies require all capital counsel to participate in a case review at least four months prior to the scheduled trial date.²⁷² Such counsel must also participate in "a voir dire work shop at least thirty (30) days" prior to trial.²⁷³ Attorneys in DPA's Post Trial Division must participate in at least two case reviews per year.²⁷⁴ Post Trial Division Branch Managers responsible for the appointment of capital representation must ensure case reviews occur "at meaningful and critical junctures" in each

²⁶⁶ *Organizational Chart*, LOUISVILLE METRO PUBLIC DEFENDER'S OFFICE, http://www.louisvillemetropublicdefender.com/org_chart.pdf (last visited Aug. 13 2010); *Petition for Declaratory Judgment*, Lewis v. Hollenbach, Franklin Cir. Ct. Division II, Civil Action No. 08-CI-1094, at *6 (filed Jun. 30, 2008). The Metro Defender's Appellate Division indicate an average of about twenty-four direct appeal cases per attorney; however, Metro Defender appellate attorneys are responsible for assisting trial attorneys with district court appeals and writs, serving as "of counsel" to each of the three trial divisions with pretrial matters, trial issues, and post-conviction actions. Interview with Metro Defender, *supra* note 43.

²⁶⁷ Interview with Metro Defender, *supra* note 43.

²⁶⁸ As stated, DPA capital counsel have, on average, a caseload of five or six capital cases at any given time. *See supra* note 262 and accompanying text. However, Metro Defender capital attorneys handle an average of twelve to fourteen capital cases each year. DPA 2010 ANNUAL REPORT, *supra* note 25, at 17 (noting that one Metro Defender attorney has handled "an average of twelve to fourteen capital defendants each year for the past decade").

²⁶⁹ DPA SERVICE PLAN, *supra* note 63, at 13. These figures were counted using DPA's previous case-counting method. *See supra* note 7.

²⁷⁰ DPA 2011 ANNUAL REPORT, *supra* note 4, at 3.

²⁷¹ DPA POLICIES, *supra* note 97, at § 17.21(II) (noting that within DPA's Trial Branch, the "Regional Manager in each of the five regions and the Capital Trial Branch Manager shall be responsible for monitoring all attorneys representing capital clients in their region and/or branch in order to ensure compliance with the requirements set forth in this policy"); Interview with Metro Defender, *supra* note 43. DPA is statutorily mandated to "[d]evelop[] and promulgat[e] standards and regulations, rules, and procedures for the administration of the defense of indigent defendants in criminal cases which the public advocate, statutes, or courts determine are subject to public assistance." KY. REV. STAT. ANN. § 31.030(4) (West 2011).

²⁷² DPA POLICIES, *supra* note 97, at § 17.21(II). While the Metro Defender is organized under Chapter 31 of the KRS, it does not appear DPA policies are applicable to Metro Defender activities.

²⁷³ *Id.*

²⁷⁴ DPA POLICIES, *supra* note 97, at § 18.03(I)(A) (first issued May 27, 1999) (last revised Jan. 27, 2007).

capital case.²⁷⁵ Branch managers report to the relevant division director all case reviews conducted each month.²⁷⁶ However, we were unable to confirm whether DPA currently conducts these reviews and workshops in every capital case.

Counsel under contract with DPA also are required, as a condition of the contract, to attend and fully participate in selected DPA training events such as the Death Penalty Trial Practice Institute, or other non-DPA training events as determined by DPA.²⁷⁷ In addition, these attorneys must participate in a “case review at least 120 days prior to trial, or 90 days prior to the filing of the appellant’s opening brief, or the filing of an RCr 11.42 motion.”²⁷⁸ Similarly, DPA policy requires all direct appeal and post-conviction contract counsel to undergo case review, mock oral argument, and other selected DPA trainings, as determined by the Post Trial Division Director.²⁷⁹ However, in practice, it appears DPA’s oversight of its contract conflict counsel may be more limited than is stipulated in the Department’s policies.²⁸⁰

The Metro Defender conducts capital case reviews and utilizes other performance monitoring mechanisms for its capital attorneys on staff and under contract; however, it does not possess written policies governing the monitoring of the performance of its capital defense attorneys and contract conflict counsel providing capital representation analogous to DPA provisions described above.²⁸¹ DPA and Metro Defender capital counsel may also be held accountable for their performance in yearly performance evaluations.²⁸²

Because the Commonwealth’s public defender agencies provide some internal oversight of capital attorneys on staff and at least limited oversight of contract counsel, Kentucky is in partial compliance with this aspect of the Recommendation.

viii. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

Both DPA and the Metro Defender state that each agency periodically reviews and updates its respective lists of capital-qualified attorneys available for appointment on a contractual basis by removing attorneys from the list who are no longer willing or able to accept appointment or who are deemed no longer qualified to provide high quality legal representation consistent with the *ABA Guidelines*.²⁸³ However, because the Commonwealth does not require formal certification of all attorneys providing representation in death penalty cases (public defenders, contract

²⁷⁵ DPA POLICIES, *supra* note 97, at § 18.03(I)(A), (C). Prior to the case review, the capital attorneys must inform their branch manager of “any special issues that exist in the case (i.e. other DPA attorneys with conflicts of interest, special expertise desired in a reviewer)” so the manager and supervisors are able to select a qualified case review team. DPA POLICIES, *supra* note 97, at § 18.03(I)(B).

²⁷⁶ DPA POLICIES, *supra* note 97, at § 18.03(I)(E).

²⁷⁷ DPA POLICIES, *supra* note 97, at § 8.04(I)(D)(3).

²⁷⁸ DPA POLICIES, *supra* note 97, at § 8.04(I)(D)(1).

²⁷⁹ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(5).

²⁸⁰ Interview with Glenn McClister, *supra* note 173; Interview with Tom Griffiths, *supra* note 24.

²⁸¹ Interview with Metro Defender, *supra* note 43.

²⁸² Interview with Glenn McClister, *supra* note 173; Interview with Daniel T. Goyette, *supra* note 101.

²⁸³ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43.

conflict counsel, court-appointed attorneys, or privately-retained counsel), the Commonwealth is only in partial compliance with this Recommendation.

The importance of certification is illustrated by the case of Gregory Wilson, who was charged and later convicted and sentenced to death for murder, rape, and kidnapping in Kenton County.²⁸⁴ The court sought representation for Wilson by hanging a sign on the courtroom door that read “PLEASE HELP. DESPERATE. THIS CASE CANNOT BE CONTINUED AGAIN.”²⁸⁵ One of the two attorneys who agreed to take the case had never tried a felony case 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 . . . [and] practiced out of his home, where he displayed a flashing ‘Budweiser’ sign.”²⁸⁶ 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.

ix. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases;

DPA’s Education and Strategic Planning Branch conducts, sponsors, and provides specialized training for DPA and Metro Defender staff attorneys providing capital representation, as well as contract conflict counsel who are actively representing a capital defendant or death row inmate.²⁸⁷ DPA also sponsors CLE courses and local and national seminars and conferences available to staff public defenders, contract conflict counsel, court-appointed counsel, and privately-retained defense counsel in death penalty cases.²⁸⁸ The Metro Defender also provides capital and non-capital in-house training, and sends its capital defense attorneys to participate in DPA trainings, free of charge, as well as national capital defense workshops, to the extent resources are available.²⁸⁹ For more on the training of capital counsel in the Commonwealth, see Recommendation #5.

x. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

No single entity is responsible for investigating and maintaining records concerning complaints about the performance of attorneys providing representation in Kentucky death penalty cases.

²⁸⁴ See *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992).

²⁸⁵ *Wilson v. Rees*, 624 F.3d 737, 739 (6th Cir. 2010), Martin, J. dissenting; Andrew Wolfson, *Problems littered Ky. death-row inmate’s trial, Sept. 16 execution*, COURIER-J. (Louisville, Ky.), Sept. 8, 2010, at A1.

²⁸⁶ *Rees*, 624 F.3d at 739.

²⁸⁷ See Recommendation #5 on training, *infra* notes 403–432 and accompanying text.

²⁸⁸ *Education Overview*, KY. DEP’T OF PUB. ADVOCACY, <http://www.dpa.ky.gov/ed> (last visited Oct. 14, 2010) (listing CLE events open to all criminal defense attorneys, as well as annual conferences and in-house trainings for DPA staff attorneys); DPA POLICIES, *supra* note 97, at § 12.04; Email from Tom Griffiths, *supra* note 168 (noting that DPA’s Education Department “works with national organizations to secure scholarships to various [training] events”). DPA is statutorily authorized to “[d]o such things and institute such programs as are reasonably necessary to carry out the provisions of” Chapter 13 of the KRS, which creates the statewide public defender system. KY. REV. STAT. ANN. § 31.030(13) (West 2011).

²⁸⁹ Interview with Daniel T. Goyette, *supra* note 101.

DPA has promulgated procedures for internally reviewing and handling complaints about staff attorney and contract conflict counsel performance,²⁹⁰ which includes “a structure and a process for quickly and fairly responding to and resolving complaints about client representation at the lowest level possible, and that provides DPA’s management with information to insure quality service to clients.”²⁹¹ Upon an allegation or complaint, a DPA “supervisor shall promptly respond to the complainant and inform the DPA employee or contractor of the response,” and determine, where warranted, the “immediate appropriate corrective action” to be taken.²⁹² DPA maintains records on each complaint, including copies of the complaint, response, findings, and corrective action taken.²⁹³

In the event of a complaint about a Metro Defender attorney performance, the Metro Defender will internally review and take appropriate corrective action.²⁹⁴ However, the Metro Defender does not have written policies or procedures governing its review process upon receipt of a complaint on counsel’s performance. We were unable to determine how often complaints are reviewed and whether records of each complaint are maintained.

Pursuant to the Rules of the Kentucky Supreme Court, the Kentucky Bar Association (KBA) is the entity responsible for investigating and maintaining records concerning complaints about violations of the Rules of Professional Conduct (Rules) of any licensed attorney in the Commonwealth, including those providing representation in death penalty cases.²⁹⁵ However, poor performance by defense counsel in a capital case cannot be remedied through bar disciplinary proceedings, even if such performance rises to the level of ethical misconduct.²⁹⁶

The Kentucky Code of Judicial Conduct also advises that a “judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Kentucky Rules

²⁹⁰ DPA POLICIES, *supra* note 97, at §14.09(III)(E) (“A complaint is defined as the raising of a significant issue affecting either the quality of representation or the attorney-client relationship that in the discretion of the supervisor appears to warrant further examination.”).

²⁹¹ DPA POLICIES, *supra* note 97, at §14.09(I)–(II) (“This policy and procedure applies to all DPA employees and contractors in the Trial, Post-Trial and Law Operations Divisions.”).

²⁹² DPA POLICIES, *supra* note 97, at §14.09(V)–(VI)

²⁹³ DPA POLICIES, *supra* note 97, at §14.09(IV)–(VI).

²⁹⁴ Interview with Daniel T. Goyette, *supra* note 101.

²⁹⁵ See generally SCR 3.130–3.530; *Office of Bar Counsel Overview*, KY. BAR ASS’N, <http://www.kybar.org/234> (last visited Oct. 19, 2010).

²⁹⁶ SCR 3.380 (degrees of discipline). Attorneys licensed to practice in the Commonwealth may be disciplined, resulting in sanctions ranging from reprimand to permanent disbarment, for violations of the Rules, including

- i. Misappropriation of client funds;
- ii. If probable cause exists to believe that “an attorney’s conduct poses a substantial threat of harm to his[her] clients or to the public;”
- iii. If “[a]n attorney has been convicted of a crime...and it appears from the record of such conviction that the attorney has so acted as to put in grave issue whether he/she has the moral fitness to continue to practice law;”
- iv. If probable cause exists to believe that “attorney is mentally disabled or is addicted to intoxicants or drugs and probable cause exists to believe he/she does not have the physical or mental fitness to continue to practice law.” SCR 3.165(1)–(4).

Bar disciplinary proceedings relating to ethical misconduct do not bear upon whether an attorney’s client has received “ineffective assistance counsel.” See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

of Professional Conduct should take appropriate action.”²⁹⁷ When a judge has “knowledge that a lawyer has committed a violation of the [Rules] that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” the judge should “inform the appropriate authority.”²⁹⁸

The KBA’s Office of Bar Counsel investigates allegations of attorney misconduct.²⁹⁹ However, as the entity that licenses attorneys, only the Kentucky Supreme Court can reprimand an attorney, suspend an attorney’s license, or order permanent disbarment from the practice of law.³⁰⁰ The Office of Bar Counsel is also responsible for maintaining records of any complaints filed, which remain confidential, while the Disciplinary Clerk is responsible for maintaining records of subsequent disciplinary proceedings and determinations, which are available to the public upon request.³⁰¹ Findings of misconduct and sanctions are available publicly in the Southwest Reporter; if no misconduct is found, information on the disciplinary proceedings will not be published.³⁰²

However, it appears disciplinary proceedings are insufficient to guard against deficient performance of counsel providing representation in a serious and complex case such as a capital trial, direct appeal, or post-conviction proceeding. A 2001 article on capital punishment in Kentucky noted that at that time “one-third of the twenty-six men on Kentucky’s death row had lawyers who were eventually disbarred or had their licenses suspended.”³⁰³ Specifically, of the seventy-eight individuals sentenced to death in Kentucky since 1976, at least ten have been represented by attorneys who were later disbarred (twelve percent).³⁰⁴ For example, Jeffrey

²⁹⁷ KY. CODE OF JUD. CONDUCT CANON 3D(2). For a discussion of the professional conduct rules incumbent on lawyers and prosecutors in the Commonwealth of Kentucky, see Chapter Five.

²⁹⁸ KY. CODE OF JUD. CONDUCT CANON 3D(2).

²⁹⁹ The Office of Bar Counsel presents its findings to a three-person panel of the “Inquiry Commission,” which is “an independent body appointed by the [Kentucky Supreme] Court to receive and process complaints from any source which allege professional misconduct by lawyers.” SCR 3.140. If the panel finds, after review, that there is probable cause to find that a violation was committed, then a hearing is held by the Inquiry Commission to determine if a violation of the Rules has occurred. SCR 3.380. The KBA has the burden of proof in a disciplinary proceeding, and must prove the facts of the case by a preponderance of the evidence. SCR 3.330. If the Commission makes a determination of guilt, the decision may be appealed to the KBA Board of Governors, which will then be reviewed by the Kentucky Supreme Court; however, if neither party appeals, the decision will automatically be reviewed by the Kentucky Supreme Court. SCR 3.370.

³⁰⁰ SCR 3.380.

³⁰¹ Telephone Interview by Paula Shapiro with Jay Jarrett, Chief Deputy Bar Counsel, Office of Bar Counsel, Ky. Bar Ass’n, Oct. 19, 2010 (on file with author).

³⁰² SCR 3.150, 3.440 (final orders in disciplinary cases are published as are other opinions of the Kentucky Supreme Court). Furthermore, every opinion or order imposing disbarment or a suspension for more than sixty days must include a direction to the sanctioned attorney to notify all courts in which s/he has matters pending and all clients for whom s/he is actively involved in legal matters that s/he is unable to continue representation. SCR 3.390. “[N]otice of all public discipline imposed against a lawyer and reinstatements” is transmitted to the American Bar Association’s National Discipline Data Bank. SCR 3.440.

³⁰³ *Death Trip: The American Way of Execution*, NATION, Jan. 8, 2001, at 13.

³⁰⁴ Christopher Walls, sentenced to death in 1986, was represented by Joseph Martin, Jr., who was later charged with unethical conduct and had his bar license suspended. *Record of Death Row Attorneys Questioned*, LEXINGTON HERALD-LEADER, Nov. 19, 1990, at B1. At his first trial, Samuel Fields was represented by David L. Curtis, who was disbarred, and Robert L. Templeton, who was later suspended from the Bar for disciplinary reasons. KY. BAR ASS’N, DATABASE, <http://www.kybar.org/26> (search by last name) (last visited Feb. 16, 2011). Jeffrey Leonard was represented at trial by Fred Radolovich, who was later charged with perjury due to his testimony during Leonard’s

Leonard, sentenced to death in 1983,³⁰⁵ was represented by an attorney who later agreed to resign from the practice of law as part of a plea agreement to have criminal perjury charges dismissed.³⁰⁶ The perjury charges were directly related to the attorney's false testimony at Leonard's hearing for post-conviction relief on a claim of ineffective assistance of counsel.³⁰⁷ In another case, Roger Epperson, currently on death row, was represented at trial by an attorney who was later disbarred for a mail fraud conviction, which stemmed from the attorney "knowingly accept[ing] money stolen in an armed robbery and murder as a fee for representing

post-conviction hearing, and agreed to resign from the practice of law as a condition of his plea agreement. *Former Louisville Lawyer Has More Problems*, POPPE LAW FIRM (June 21, 2009), <http://www.poppelawfirm.com/blog/211.cfm> (last visited Nov. 5, 2010). Teddy Cosby was represented at trial first by Louis McHenry, Jr., who was disbarred, and then by Chris Seaman, who was also disbarred. KY. BAR ASS'N, DATABASE, <http://www.kybar.org/26> (search by last name) (last visited Feb. 16, 2011). Death row inmates William Bevins and Roger Dale Epperson were both represented by Lester Burns, Jr., whose conviction of mail fraud and receiving money stolen by his clients as payment for his legal services, lead to his disbarment. Bill Estep, *Death Row Inmates allege Jury Tampering Epperson, Hodge Accuse Prosecutor of Wrongdoing*, LEXINGTON HERALD-LEADER, Jan. 13, 2000; *News Briefs From Around Kentucky*, AP Alert, Jan. 17, 2010; KY. BAR ASS'N, DATABASE, <http://www.kybar.org/26> (search by last name) (last visited Feb. 16, 2011). Benny Lee Hodge, sentenced to death in 1986, 1987, and 1996, was represented in his 1986 trial by Dale Mitchell, an out-of-state attorney from Texas, currently suspended from the practice of law in his home state of Texas, whose performance during Hodge's penalty phase was found deficient due to his failure to conduct a reasonable investigation into mitigating evidence. *Find a Lawyer*, STATE BAR OF TEXAS, http://www.texasbar.com/am/template.cfm?section=simple_search (search by last name) (last visited Aug. 16, 2011); *Judge rejects motion from 1 of 2 Acker killers who are on Death Row*, MOUNTAIN EAGLE, Nov. 11, 2009, http://mountaineagle.our-hometown.com/news/2009-11-11/front_page/003.html (last visited Aug. 16, 2011). David Sanders, sentenced to death in 1987, and Karu Gene White, sentenced to death in 1980, were represented by J. Kevin Charters, who is now disbarred. KY. BAR ASS'N, DATABASE, <http://www.kybar.org/26> (last visited Feb. 16, 2011); *Record of Death Row Attorneys Questioned*, LEXINGTON HERALD-LEADER, Nov. 19, 1990, at B1. Robert Allen Smith was represented by L.M. Tipton Reed, Jr., who was suspended four times from the practice of law and finally disbarred, and who admitted in court to not preparing for Smith's case because he forgot that the prosecutor filed a notice to seek the death penalty. *Search Will Go on for Four in Laurel County, Sheriff Says*, LEXINGTON HERALD-LEADER, Aug. 31, 1991; KY. BAR ASS'N, DATABASE, <http://www.kybar.org/26> (search by last name) (last visited Feb. 16, 2011). Charles Bussell and Ernest Rogers were both represented by Joel R. Embry, III, who was disbarred after conviction of drug possession and second-degree manslaughter in connection with the death of his mother from starvation and neglect. *See generally* KBA v. Embry, 152 S.W.3d 869 (Ky. 2005). Embry stated that that "a heavy workload precluded him from spending as much time on Bussell's case as he would have liked and that he had a "feeling of hopelessness" as Bussell's case unfolded. R.G. Dunlop, *Ex-Death Row Inmate Awaits a New Trial*, COURIER-J. (Louisville, Ky.), June 1, 2008, at A1. In addition, Eddie Lee Harper, a death row inmate who voluntarily waived his appeals and was executed in 1999, was represented at trial by Lewis G. Benham, who was suspended from the bar for failure to pay dues. KY. BAR ASS'N, DATABASE, <http://www.kybar.org/26> (search by last name) (last visited Feb. 16, 2011).

³⁰⁵ Leonard received such ineffective assistance counsel that his attorney "did not even know his client's real name," leading to a gubernatorial commutation of Leonard's death sentence to life without parole. *Fletcher Pardons 83 People*, WKYT.COM, <http://www.wkyt.com/home/headlines/12340711.html> (last visited August 24, 2010). Court opinions related to Leonard's case are filed under the name "James Slaughter." *See, e.g.*, Parker v. Slaughter, 187 F.Supp.2d 755, 774 (W.D. Ky. 2001).

³⁰⁶ *Former Louisville Lawyer Has More Problems*, POPPE LAW FIRM (June 21, 2009), <http://www.poppelawfirm.com/blog/211.cfm> (last visited Nov. 5, 2010).

³⁰⁷ The lawyer testified that prior to representing Leonard, "he had worked as a state prosecutor in New York, during which time he had handled four capital cases []. He also supposedly had handled two capital cases as a defense attorney in Kentucky []. This testimony proved to be materially incorrect, however. An affidavit from the Executive Assistant District Attorney in New York County revealed that [he] had worked for the office only for less than a year beginning in 1977. During that time, he did not try *any* capital cases []. In fact, "[g]iven [his] time with the office, it was unlikely that he tried any homicide cases." Parker v. Slaughter, 187 F.Supp.2d 755, 774 (W.D.Ky. 2001).

one of the defendants prosecuted for those crimes . . . [his] client, Epperson, was [later] sentenced to death.”³⁰⁸ Epperson’s attorney was also found to have accepted a \$75,000 kickback from Dale Mitchell for “cajoling” the wife of one of Epperson’s co-defendants’ into hiring the lawyer as defense counsel for the co-defendant.³⁰⁹ The co-defendant, Benny Hodge, was also sentenced to death.³¹⁰

Conclusion

The Kentucky Assessment Team on the Death Penalty applauds the Commonwealth of Kentucky for creating a statewide independent appointing authority tasked with representing indigent defendants charged with or convicted of a capital offense and for successfully removing the judiciary and legislative branches from the attorney appointment process. Furthermore, the Assessment Team applauds DPA for promulgating written policies, including those requiring compliance with the *ABA Guidelines*. Specialized capital units within DPA and the Metro Defender, coupled with these agencies’ monitoring of the qualifications and performance of capital counsel under their supervision, significantly improve the quality of representation available to Kentucky’s indigents in death penalty cases.

However, Kentucky has failed to require any Commonwealth entity to promulgate certification procedures, applicable to all attorneys providing representation at all phases of capital proceedings, including performance and training requirements and mechanisms to monitor counsel performance in death penalty cases. Furthermore, it is unclear the extent to which DPA and Metro Defender are able to adhere to internally-promulgated policies and guidelines. This subjects capital defendants and death row inmates to a real risk that financial constraints of the various agencies will affect the quality of representation afforded to them. The public defenders must provide defense services in a growing number of cases with fewer resources.

Therefore, the Commonwealth is in partial compliance with Recommendation #3.

D. Recommendation #4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by ABA Guideline 9.1, by the defense team and outside experts selected by counsel.³¹¹**

³⁰⁸ Burns v. Ky. Bar Ass’n, 318 S.W.3d 591, 592–93 (Ky. 2010).

³⁰⁹ *Id.* See *supra* text accompanying note 304 on Dale Mitchell.

³¹⁰ Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1991) (Hodge and Epperson were tried as co-defendants at the same trial).

³¹¹ In order for a state to ensure funding for the “full cost of high quality legal representation,” it must be responsible for “paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g., Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5]).” See *ABA Guidelines, supra* note 100, 984–85.

DPA is primarily funded through appropriations from the Kentucky General Assembly.³¹² In addition to funding the annual operational costs of DPA, the funds allocated to DPA also finance two-thirds of the operating budget for the Metro Defender.³¹³

Department of Public Advocacy

DPA is one of nine entities that comprise Kentucky’s criminal justice system.³¹⁴ Table 2, below, breaks down the expenditures for Kentucky’s criminal justice system for fiscal year 2009.³¹⁵

Table 2

Kentucky Criminal Justice System Actual Expenditures—Fiscal Year 2009³¹⁶		
Criminal Justice System Entity	FY 2009 Actual Expenditures	Percent of Total Expenditures
Judiciary	\$312,750,700	25.58%
State Police	\$166,044,300	13.58%
Juvenile Justice	\$107,540,200	8.79%
Criminal Justice Training	\$48,333,900	3.95%
Justice Administration	\$27,546,300	2.25%
Public Advocacy	\$36,635,100	3%
Corrections	\$451,222,000	36.90%
Prosecution	\$72,766,800	5.95%
TOTAL EXPENDITURES	\$1,222,839,300	100%

In fiscal year 2009, a year in which DPA represented clients at trial and during post-trial proceedings in 147,245 cases, the Kentucky General Assembly allocated \$37,826,300 to DPA.³¹⁷ DPA was allocated the second smallest amount of funds within the criminal justice system, totaling only three percent of the amount of money provided to these entities by the Kentucky General Assembly.³¹⁸ A recent report by the U.S. Department of Justice’s Bureau of Justice Statistics (BJS) found that in 2007, DPA had actual expenditures of \$32,513,000, which was

³¹² OFFICE OF THE KY. STATE BUDGET DIR., BUDGET OF THE COMMONWEALTH OF KENTUCKY, FISCAL YEARS 2010-2012 264, available at <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf> [hereinafter 2010-2012 KY. BUDGET]; see also notes 49–69 and accompanying text.

³¹³ KY. REV. STAT. ANN. §§ 31.050, 31.060 (West 2011). The operating budgets also include costs for both capital and non-capital contract conflict counsel; DPA, in partnership with the Kentucky Bar Association, is able to “contract with outside ‘conflict’ attorneys at hourly rates well below standard hourly rates,” paying an average of \$550 per non-capital criminal case. DPA 2010 ANNUAL REPORT, *supra* note 25, at 21.

³¹⁴ DPA SERVICE PLAN, *supra* note 63, at 4.

³¹⁵ DPA SERVICE PLAN, *supra* note 63, at 16.

³¹⁶ *Id.*

³¹⁷ DPA SERVICE PLAN, *supra* note 63, at 4 (noting that 32,637 cases were in the Commonwealth’s circuit courts and 107,480 were in district court); *but see* KY. DEP’T OF PUB. ADVOCACY, FISCAL YEAR 2009 DPA ANNUAL CASELOAD REPORT 6, available at http://www.dpa.ky.gov/NR/rdonlyres/E58861E2-6EAC-4B16-BF58-4EEB4B529ACA/0/DPA_2009_CaseloadReportFINAL.pdf (noting that there were 144,878 cases opened by trial attorneys in fiscal year 2009) [hereinafter 2009 DPA CASELOAD REPORT]. Note that this represents the General Assembly’s allocations to DPA while the figures in Table 1 are DPA’s actual expenditures.

³¹⁸ DPA SERVICE PLAN, *supra* note 63, at 16. See also KY. DEP’T OF PUB. ADVOCACY, 4 LEGISLATIVE UPDATE 1999, FY 2000 CRIMINAL JUSTICE BUDGETS, TOTAL FUNDS, available at http://apps.dpa.ky.gov/library/legupd/May99_LegUpdate.pdf (providing figures for fiscal year 2000, when DPA received 2.7% of the total state funds from the criminal justice budget, when prosecutors received 7.23%).

only 8.9% of Kentucky’s total judicial and legal expenditures for that fiscal year.³¹⁹ This represented the second lowest percentage of judicial and legal expenditures spent on public defense, after Connecticut, out of states with capital punishment and a statewide public defender program.³²⁰

In fiscal year 2010, DPA’s operating budget for providing indigent defense services was \$42,053,300.³²¹ Comparatively, in fiscal year 2010, the Commonwealth’s budget for prosecution services, including funding for the Attorney General, Commonwealth’s Attorneys, and County Attorneys was \$93,502,000.³²² The Attorney General’s Office received \$23,832,600; the Commonwealth’s Attorneys received a total of \$38,069,100; and County Attorneys received \$31,600,300.³²³ DPA represents the Commonwealth’s indigent defendants in cases prosecuted by the Attorney General, Commonwealth Attorneys, and County Attorneys, and receives less than half of the combined budgets of these three entities within the Commonwealth’s prosecutorial system. However, the Kentucky Death Penalty Assessment Team notes that it was unable to determine parity of resources among prosecutors and indigent defenders in Kentucky because it was unable to determine precise funding allocations to capital cases for each entity.

Table 3, below, illustrates the variance in the amount of funding DPA has requested each fiscal year, from 1999–2012, and the amount appropriated by the Kentucky General Assembly in the corresponding year.

Table 3

DPA Requested versus Received from the Kentucky General Assembly			
Fiscal Year	Requested (in \$)³²⁴	Enacted³²⁵ (in \$)	Difference (in \$)

³¹⁹ BJS REPORT, *supra* note 6, at 4–5 (noting that a “median of 15% of states’ legal and judicial direct expenditures went to public defender programs”). Only four states with statewide public defender programs—Connecticut, Hawaii, North Dakota and Rhode Island—spent a smaller percentage of their total judicial and legal expenses on public defense. Connecticut is the only one of these four states that has a death penalty. *Id.* at 4. Moreover, seventeen out of twenty-two states with statewide public defender programs spent *more* than Kentucky. *Id.*

³²⁰ See BJS REPORT, *supra* note 6, at 4.

³²¹ 2010-2012 KY. BUDGET, *supra* note 312, at 265. This amount does not include receipts from federal grant funds. This figure funds all of DPA’s responsibilities, including, but not limited to, administration of the statewide defense system; providing technical aid to local counsel representing indigents at trial, on direct appeal, or during post-conviction proceedings; developing standards, regulations, rules and procedures for the administration of indigent defense throughout the Commonwealth; pursuing remedies to insure protection of the rights of persons with disabilities; and purchasing liability insurance for all public advocates and contract counsel providing representation. KY. REV. STAT. ANN. § 31.030 (West 2011).

³²² 2010-2012 KY. BUDGET, *supra* note 312, at 35–38. Only a portion of the Attorney General’s budget was spent on criminal prosecutions since the Attorney General, “as the Commonwealth’s constitutional chief law enforcement officer, performs a range of legal, investigative, and administrative duties.” *Id.* County attorneys prosecute criminal cases in District Court while the Commonwealth’s Attorneys “are responsible for all felony prosecutions, including those circuit court prosecutions in which the penalty of death may be imposed” *Id.* at 37; KY. REV. STAT. ANN. §§ 15.725, 15.715 (West 2011).

³²³ 2010-2012 KY. BUDGET, *supra* note 311, at 35–38.

³²⁴ This figure includes the amount of funding provided by the Commonwealth of Kentucky, including from the General Fund (allocated by the Kentucky General Assembly) and the Restricted Fund (pursuant to statutory authorities).

³²⁵ For fiscal years 2010, 2008, 2006, and 2000, the amount of funding appropriated to DPA during this year was revised to include additional appropriations to DPA; for fiscal years 2011 and 2012, the enacted figure is the amount recommended by the Kentucky General Assembly. See, e.g., 2010-2012 KY. BUDGET, *supra* note 311, at 264.

2012	57,518,900	42,187,400	(15,331,500)
2011	51,121,900	42,163,400	(8,958,500)
2010	64,831,000	42,053,300	(22,777,700)
2009	61,714,823	36,043,000	(25,671,823)
2008	51,171,000	38,460,100	(12,710,900)
2007	47,573,600	36,588,000	(10,985,600)
2006	43,516,600	34,646,900	(8,869,700)
2005	38,844,200	34,626,500	(4,217,700)
2004	37,281,000	29,790,600	(7,490,400)
2003	32,605,300	28,379,400	(4,225,900)
2002	37,536,700	27,837,000	(9,699,700)
2001	33,817,500	25,380,000	(8,437,500)
2000	20,475,000	22,076,100	1,601,100
1999	20,698,500	20,992,900	294,400

Year after year, DPA is allocated significantly less funding than it requests.³²⁶ The Public Advocacy Commission’s 2005 report, *Justice Jeopardized*, found that “Kentucky continues to fund its system of indigent defense at a level that is at the bottom of the nation based upon the cost-per-case benchmark.”³²⁷ *Justice Jeopardized* found that in 2005, Kentucky spent \$233 per case, which is less than the amount spent by other states on indigent defense, such as Colorado, which spent \$889, Ohio \$719; Alabama \$603; North Carolina \$435; Missouri \$384; Georgia \$310; Maryland \$306; and Virginia at \$250.³²⁸ *Justice Jeopardized* recommended that “[a]t a minimum, an additional \$10 million per year is necessary to bring Kentucky into the mid-level area in comparison with other programs in important benchmark areas such as cost-per-case.”³²⁹

Funding deficits also have prohibited DPA and the Metro Defender from hiring the number of attorneys needed to provide effective representation, creating significant and excessive caseloads for full-time public defenders. The recent BJS Report stated that in 2007, DPA employed 327 full-time litigating attorneys but needed 636 to meet the U.S. Department of Justice’s National Advisory Council caseload guidelines.³³⁰ However, in 2009, the Kentucky General Assembly eliminated \$2.3 million dollars from the budget allocated to DPA for that fiscal year, leaving vacancies in sixty public defender positions across the Commonwealth.³³¹ Without this funding,

³²⁶ SPANGENBERG GRP., ASSESSMENT OF INDIGENT DEFENSE COST RECOVERY IN FAYETTE AND JEFFERSON COUNTY 2 (Oct. 30, 2001), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ky-costrecovery.pdf> (“Despite the combination of state/county funding and the alternative revenue sources, DPA has suffered from chronic under-funding.”) [hereinafter KY. SPANGENBERG]. The Spangenberg Group is a national research and consulting group that specializes in examination of indigent defense systems. See generally SPANGENBERG GRP., <http://www.spangenberggroup.com> (last visited Jan. 31, 2011). See also *supra* Table 3. The Kentucky Governor’s budget for fiscal year 2010-2011 kept funding level to that of the previous fiscal year for DPA and prosecutorial services in the Commonwealth, while most other state agencies were to receive less funding than in previous fiscal years. Jason Riley, *Prosecutors, public defenders spared more budget cuts*, COURIER-J. (Louisville, Ky.), Jan. 20, 2010.

³²⁷ JUSTICE JEOPARDIZED, *supra* note 192, at 1–2. *Justice Jeopardized* was created after the Commission received testimony from Supreme Court Justices, Court of Appeals judges, public defenders, private bar counsel, judges, prosecutors, and others. *Id.*

³²⁸ *Id.* at 14.

³²⁹ *Id.* at 1–2.

³³⁰ BJS REPORT, *supra* note 6, at 13. For more on caseloads, see Recommendation #3.

³³¹ Lewis v. Hollenbach, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *11 (filed Jun. 30, 2008). According to the Commonwealth’s then Public Advocate, Ernie Lewis, DPA’s budget problems began when

DPA planned “to stop taking cases involving multiple defendants charged with the same crime, involuntary commitment cases, and family court cases—between 10,000 and 20,000 a year.”³³² In June 2008, DPA, the Metro Defender, and private counsel who provide representation in contract cases, jointly sued the Commonwealth, arguing that the Kentucky General Assembly “failed to provide sufficient funding to an already overburdened, underfunded public defender system.”³³³ After the Kentucky Governor provided DPA with an additional \$2 million in May of 2009 and the Kentucky General Assembly provided an additional \$1.7 million in a special session, the Kentucky Supreme Court dismissed the lawsuit as moot.³³⁴

Capital Representation Costs

The Commonwealth spent an estimated \$3,798,387 on indigent capital representation at trial, on direct appeal, and during post-conviction proceedings in 2007.³³⁵ However, this amount does not include all costs associated with representation of Kentucky’s capital indigents in 2007, nor does it include funding procured through KRS 31.185 for indigent defense services.³³⁶ The 2009 BJS Report found that in 2007 Kentucky was one of three capital jurisdictions with a statewide public defender that spent more than \$2 million on capital defense that year.³³⁷ The Report also noted that Kentucky public defender agencies received, by far, the highest number of felony capital cases out of any state with a centralized public defender system.³³⁸

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the Commonwealth’s budget director “took \$1.3 million of indebtedness from [fiscal year 2006] and moved it to [fiscal year 2007]. As a result, DPA began [fiscal year 2007] in such a deficit that it was forced to implement a hiring freeze and stopped paying bills altogether before [fiscal year 2008] began.” Exhibit 1, Affidavit of Ernie W. Lewis, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *2 (2008).

³³² Scott Michels, *Facing Budget “Crisis,” Public Defenders May Refuse Cases*, ABC NEWS, June 13, 2008, <http://abcnews.go.com/TheLaw/story?id=5049461&page=2> (last visited Nov. 2, 2010).

³³³ *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094. at *3 (filed Jun. 30, 2008).

³³⁴ *Ethical Funding Litigation*, KY. DEP’T OF PUB. ADVOCACY, <http://dpa.ky.gov/ci/efl.htm> (last visited Nov. 2, 2010); DPA SERVICE PLAN, *supra* note 63, at 2. For more information on the underlying problems that caused DPA, the Metro Defender and contract counsel to file for a declaratory judgment, see Recommendation #3.

³³⁵ Interview with DPA, *supra* note 12; Email from Ed Monahan, *supra* note 10. DPA asserts that “[e]stimating death penalty costs to Kentucky since 1976 is difficult. A proper calculation of costs associated with the death penalty statewide would require a formal study The majority of death penalty costs do not appear as line items in any budget.” Letter to Norman W. Lawson, Jr., Committee Staff Admin’r of the Judiciary Comm., Legislative Research Comm’n from Edward C. Monahan, Public Advocate, Ky. Dep’t of Pub. Advocacy (Feb. 25, 2009) (on file with author).

³³⁶ Interview with DPA, *supra* note 12.

³³⁷ BJS REPORT, *supra* note 6, at 11. Connecticut and Virginia also spent over \$2 million on capital defense. *Id.*

³³⁸ BJS REPORT, *supra* note 6, at 10. In 2007, capital jurisdictions with a statewide public defender included Arkansas, Colorado, Connecticut, Delaware, Kentucky, Maryland, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Virginia, and Wyoming. *Id.* New Jersey repealed its death penalty statute in late 2007. Keith Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html>. New Mexico abolished the death penalty in 2009. Trip Jennings, *Richardson abolished N.M. death penalty*, NEW MEXICO INDEP., Mar. 18, 2009, available at <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>.

Unlike the other 119 counties in the Commonwealth, Jefferson County provides substantial funds to supplement DPA’s contribution to the Metro Defender’s operational budget.³³⁹ In 2010, DPA provided the Metro Defender with approximately \$4 million, and the Louisville-Jefferson County Metro Government allocated \$2 million.³⁴⁰ DPA estimates that in 2007 the Metro Defender spent approximately \$540,000 on capital case representation.³⁴¹ Table 4, below, includes the total funding received by the Metro Defender from DPA and the Louisville-Jefferson County Metro Government from fiscal years 2004 to 2011.³⁴²

Table 4

Funding Received by the Louisville Metro Public Defender’s Office	
Fiscal Year	Amount Received (in \$)
2004	4,606,100
2005	4,725,000
2006	5,143,000
2007	5,771,550
2008	6,071,100
2009	5,875,700
2010	6,035,700
2011	6,303,800

Unfortunately, we were unable to determine the specific amounts requested by the Metro Defender. However, the Metro Defender’s Chief Public Defender maintains that “without exception, in each and every fiscal year, the Metro Defender requested more than the Metro Defender has received, despite providing detailed justification and documentation of [the Metro Defender’s] needs.”³⁴³ According to a 2001 report by the Spangenberg Group, the Metro Defender has been underfunded since its inception in 1972.³⁴⁴ The report identified a number of causes for this, including a significant difference between the Metro Defender’s cost recovery efforts to fund its public defender program compared to other organizations, such as the former Fayette County Legal Aid, including (a) variations in indigency screening methodology, (b) assessment of recoupment by judges, (c) availability of public defender services to indigent-but-able-to-contribute clients, and (d) the collection practices of court clerks.³⁴⁵ Underfunding the Metro Defender affects all aspects of its operations, including decreasing the number of staff and amount of resources that are available for the provision of capital representation.

b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and

³³⁹ KY. REV. STAT. ANN. § 31.060 (West 2011); KY. SPANGENBERG, *supra* note 326, at 1.

³⁴⁰ KY. REV. STAT. ANN. §§ 31.050, 31.060 (West 2011); Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Cir. Ct. Div. II, Civil Action No. 08-CI-1094, at *11 (filed Jun. 30, 2008) (noting that the agreement providing two-thirds from DPA and one-third from Louisville dates back to 1972). In fiscal year 2011, DPA appropriated \$4.2 million, and the Louisville-Jefferson County Metro Government provided \$2.1 million. Interview with DPA, *supra* note 12.

³⁴¹ Email from Ed Monahan, *supra* note 10 (including capital contract conflict case expenditures).

³⁴² Data provided by the Metro Defender. Interview with Daniel T. Goyette, *supra* note 101.

³⁴³ Interview with Daniel T. Goyette, *supra* note 101.

³⁴⁴ KY. SPANGENBERG, *supra* note 326, at 3.

³⁴⁵ KY. SPANGENBERG, *supra* note 326, at 5. Notably, Fayette County Legal Aid provided indigent representation in every capital and non-capital case arising in Fayette County until it closed in 2007. *Musgrave*, *supra* note 9.

reflects the extraordinary responsibilities inherent in death penalty representation.

- i. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.

DPA and the Metro Defender provide annual salaries to staff attorneys who represent capital defendants and death row inmates based on a merit system.³⁴⁶ Table 5, below, describes the annual salaries of DPA’s CTB as of June 30, 2010.³⁴⁷ Currently, attorneys within the Metro Defender’s Capital Trial Division receive salaries ranging between \$56,000 and \$90,000.³⁴⁸

Table 5

Compensation of DPA Capital Trial Branch (CTB) (As of 1/31/11) ³⁴⁹			
Title	Annual Salary	Years Attorney	Years CTB
Staff Attorney Manager	\$76,568	15	17 months
Staff Attorney Supervisor	\$58,596	vacant	Vacant
Staff Attorney	\$54,041	8	18 months
Staff Attorney	\$51,600	9	14.5 months
Staff Attorney	\$80,654	27	17.5 months
Staff Attorney	\$52,538	7	8 months
Staff Attorney Supervisor	\$82,680	36	12 years 11 months
Staff Attorney	\$58,500	14	17 months
Staff Attorney	\$54,041	12	2 years 6 months
Staff Attorney	\$53,558	17	18 months
Staff Attorney	\$77,575	27	17.5 months

Kentucky assistant public defenders with five or less years of experience earn a starting salary between \$46,900 and \$60,000, and assistant public defenders with six or more years of experience earn salaries that range from \$51,600 to \$60,000.³⁵⁰ DPA attorneys and contract

³⁴⁶ *Compensation (Pay) Plan*, KY. PERS. CABINET, <http://personnel.ky.gov/stemp/emphb/compen.htm> (last visited Oct. 7, 2010). In 1972, the year that Kentucky’s statewide public defender service was established, public defense attorneys at DPA were paid \$20 per hour for out-of-court work and \$30 per hour for in-court work, with a \$500 maximum for a misdemeanor case and \$1,000 maximum for a felony. DPA, *The KRS 31.185 Statewide Indigent Defense Funds: Amount & Expenditures; Inflation*, DPA FUNDING MANUAL 12, available at <http://dpa.state.ky.us/library/manuals/funds/ch12.html>. At the time of DPA’s creation, the Kentucky Supreme Court had recently held that Kentucky could not require an attorney to represent an indigent defendant absent compensation. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972). In 1998, the Kentucky General Assembly authorized DPA to set hourly rates and per case maximums, resulting in a compensation rate for capital defense attorneys of \$50 per hour with a maximum fee of \$12,500; statutory maximums of \$500 for a misdemeanor and \$1,250 for a felony were eliminated. H.B. 337, 1998 Gen. Assemb., Reg. Sess. (Ky. 1998).

³⁴⁷ KY. DEP’T OF PUB. ADVOCACY, *Compensation of Capital Trial Branch*, June 30, 2010 (on file with author). According to the 2010 BJS Report, as of 2007, entry-level assistant public defenders in Kentucky earn salaries ranging from \$38,800 to \$51,400. BJS REPORT, *supra* note 6, at 18. An entry-level assistant public defender at the Metro Defender receives a salary of \$38,770, an amount which has remained unchanged since 2007. Interview with Daniel T. Goyette, *supra* note 101.

³⁴⁸ Interview with Daniel T. Goyette, *supra* note 101. Previously, attorneys within the Metro Defender’s Capital Trial Division were paid \$47,500 to \$88,000; however, the Metro Defender recently increased some salaries on July 1, 2008. *Id.*

³⁴⁹ The table does not include trial attorneys in the Jefferson Branch of the Metro Defender.

³⁵⁰ BJS REPORT, *supra* note 6, at 18; Interview with DPA, *supra* note 12.

conflict counsel who provide representation during federal habeas corpus proceedings are entitled to \$178 per hour pursuant to the Criminal Justice Act.³⁵¹ The BJS Report also noted that the maximum salary for an attorney with six or more years of experience from Kentucky was the lowest of all nineteen states with a statewide public defender system that reported such figures.³⁵² Given that in 2010 there were forty-four DPA regional trial branch staff attorneys representing capital clients while carrying over 400 non-capital cases per year, it is clear that the Commonwealth's public defenders providing indigent capital defense are woefully understaffed.

Moreover, DPA's October 2011 *Comparative Study of Kentucky Public Defender Salaries* revealed that Kentucky public defenders who handle death penalty cases make "31% less than similarly experienced attorneys in surrounding states."³⁵³ Average salaries for Kentucky's public defenders in death penalty cases are the lowest of six surrounding capital jurisdictions, including the Kentucky federal defender.³⁵⁴ Furthermore, the average salary for a supervisor of a regional public defender office in Kentucky is \$68,572, which is 34% less than their counterparts in the surrounding jurisdictions.³⁵⁵

The *ABA Guidelines* require that defense attorneys be compensated at a rate that is commensurate with prosecuting attorneys within the jurisdiction.³⁵⁶ Capital cases in Kentucky are prosecuted at trial by Commonwealth's Attorneys and on appeal and during post-conviction proceedings by the Kentucky Attorney General's Office of Criminal Appeals.³⁵⁷ The majority of salaries paid to Commonwealth's Attorneys are based on the merit system and "vary from county to county based on experience, background and other factors" as governed by the KRS.³⁵⁸

While we were unable to determine the salaries of most Assistant Commonwealth's Attorneys throughout Kentucky, we were able to determine that some of the salaries of some assistant Commonwealth's Attorneys in Jefferson County who prosecute death penalty cases range from \$56,832 to \$73,416.³⁵⁹ This indicates approximate parity between the capital prosecutors and

³⁵¹ Interview with Tim Arnold, *supra* note 263; U.S. GUIDELINES FOR ADMINISTERING THE CJA, *supra* note 151.

³⁵² BJS REPORT, *supra* note 6, at 19.

³⁵³ KY. DEP'T. OF PUB. ADVOCACY, COMPARATIVE STUDY OF KENTUCKY PUBLIC DEFENDER SALARIES WITH SURROUNDING STATES AND KENTUCKY FEDERAL DEFENDER 3 (Oct. 2011) [hereinafter DPA SALARY STUDY]. The study compares the compensation of Kentucky public defenders to their counterparts in Illinois, Indiana, Missouri, Ohio, Tennessee, Virginia, and the federal public defender. *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* (comparing supervisor salaries to the above-mentioned jurisdictions and West Virginia).

³⁵⁶ *ABA Guidelines*, *supra* note 100, at § 9.1(B)(2).

³⁵⁷ KY. REV. STAT. ANN. § 15.020 (West 2011); OFFICE OF THE KY. ATT'Y GEN., 2009 BIENNIAL REPORT 24 (2009).

³⁵⁸ See *FAQs*, OFFICE OF THE COMMONWEALTH'S ATT'Y, 30TH JUDICIAL DIST., <http://www.louisvilleprosecutor.com/faqs.htm> (last visited Oct. 5, 2010); *Compensation (Pay) Plan*, KY. PERS. CABINET, <http://personnel.ky.gov/stemp/emphb/compen.htm> (last visited Oct. 7, 2010).

³⁵⁹ *Kentucky Payroll Database*, LEXINGTON HERALD-LEADER.COM, <http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=661837411371008> (last visited Nov. 4, 2010) (indicating a monthly salary of \$4,736);

Kentucky Payroll Database, LEXINGTON HERALD-LEADER.COM, <http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=381837417851034> (last visited Nov. 4, 2010) (indicating a monthly salary of \$4,790);

Kentucky Payroll Database, LEXINGTON HERALD-LEADER.COM,

defenders in this jurisdiction.³⁶⁰ General parity also exists among the highest level of management within DPA, and the Commonwealth's top prosecutor. The annual salary of DPA's Public Advocate is \$104,178³⁶¹ which is only slightly less than the Commonwealth's Attorney General who receives an annual salary of \$105,840.³⁶² However, it appears that Commonwealth's Attorneys who prosecute capital cases earn substantially more than their public defender counterparts. The salaries of DPA's most experienced capital defense attorneys range from \$75,810³⁶³ to \$86,131.³⁶⁴ Comparatively, as of 2010, every full-time Commonwealth's Attorney in Kentucky earned an annual salary of \$110,346.³⁶⁵

- ii. **Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
- iii. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

Currently, counsel contracted by DPA and the Metro Defender to undertake capital representation are compensated at an hourly rate, with caps placed on the maximum amount of compensation permitted.³⁶⁶ Since February 1, 2004, conflict counsel contracted by DPA are compensated at a rate of \$75 per hour for in-court and out-of-court-work, up to \$30,000 per attorney plus reasonable expenses.³⁶⁷ Contracts for capital appellate cases and state post-conviction actions negotiated after July 1, 2005 are permitted a maximum fee of \$50,000 with the same hourly rate of \$75 per hour for in-court and out-of-court work.³⁶⁸ Additionally, for

<http://www.kentucky.com/2008/10/10/551569/search-the-kentucky-payroll-database.html?appSession=447183741450428> (last visited Nov. 4, 2010) (indicating a monthly salary of \$6,118).

³⁶⁰ The Chief Public Defender at the Metro Defender noted that it observes a disparity of resources available to defense counsel. For example, Jefferson County assistant Commonwealth Attorneys have a laptop computer for use in court proceedings; however, public defenders in Kentucky do not have the "benefit of a laptop, not to mention various technological tools available to prosecutors during trial for things such as PowerPoint presentations." Interview with Daniel T. Goyette, *supra* note 101.

³⁶¹ *Government Salary Database*, KY. COURIER-JOURNAL.COM, <http://datacenter.courier-journal.com/government/salaries/> (type Monahan into the last name box) (last visited Nov. 3, 2010).

³⁶² *Id.* (type Conway into last name box).

³⁶³ *Government Salary Database*, KY. COURIER-JOURNAL.COM, <http://datacenter.courier-journal.com/government/salaries> (type Griffiths into last name box) (last visited Nov. 3, 2010).

³⁶⁴ *Government Salary Database*, KY. COURIER-JOURNAL.COM, <http://datacenter.courier-journal.com/government/salaries> (type Damon into last name box) (last visited Nov. 3, 2010).

³⁶⁵ Interview by Sarah Turberville with Willie Morrison, Research Assistant, Justice Programs Office, American Univ., April 28, 2011 (on file with author). Kentucky's six part-time Commonwealth Attorneys earned an annual salary of \$66,207 in 2010. *Id.*

³⁶⁶ See generally DPA POLICIES, *supra* note 97; Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43; Lewis v. Hollenbach, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at *5 (filed Jun. 30, 2008).

³⁶⁷ DPA POLICIES, *supra* note 97, at §§ 8.04(II)(A)(1), 8.04(II)(B)(2)(a) (used in the "representation of capital clients on appeal from a final judgment at trial or from the appeal of a post-conviction case/s"). All motions, pleadings, writs or other post conviction or new trial motions filed at the state circuit court level designed to bring relief to the capital post conviction client in that forum, shall be deemed to be one action for purposes of this \$30,000 limit. DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(2)(b).

³⁶⁸ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(1)(b), (2)(a).

counsel filing a writ of certiorari to the U.S. Supreme Court, compensation cannot exceed \$1,250 at a rate of \$75 per hour.³⁶⁹ In the event that the writ is granted, “counsel and DPA will renegotiate the terms of the contract and come to a mutual agreement on payment.”³⁷⁰ The Metro Defender compensates contract counsel in Jefferson County at a rate of \$50 per hour, with a cap of \$15,000 per attorney at each stage of the capital proceedings.³⁷¹

DPA’s contract counsel must provide an itemized bill to the appropriate Branch Manager who approves and authorizes the payment of conflict fees.³⁷² Contract counsel are “eligible for reimbursement for meals, lodging and mileage, with the same restrictions as full-time employees of the Commonwealth” and may bill DPA quarterly for costs incurred.³⁷³ Attorneys who contract with the Metro Defender are not permitted periodic billing; instead, contract counsel are paid at the completion of each stage of the proceedings, except when counsel requests and receives funds from the Commonwealth pursuant to court orders under KRS Chapter 31.³⁷⁴

While DPA and the Metro Defender should be commended for not distinguishing payment based upon in or out-of-court work, any maximum caps on compensation in death penalty cases is inappropriate. The disparity between the compensation rates of capital counsel contracted by DPA and the Metro Defender also illustrates that counsel are not compensated at a rate commensurate with the provision of high quality legal representation. Similarly, the Commission noted the importance “in a full-time system [of indigent defense] to continue the involvement of the private criminal defense bar. That bar will not participate if funding is so low that it cannot even cover the cost of overhead.”³⁷⁵ Comparatively, the hourly compensation rates available for legal services contracted by other Kentucky state agencies is far greater than that available to attorneys contracted by the public defender to represent a capital defendant or death row inmate.³⁷⁶ Furthermore, contract counsel are not always fully compensated for their time and resources. The Commission also found that “[p]rivate attorneys working as conflict counsel for DPA trial offices are not being paid sufficiently. In many instances, private attorneys are not being reimbursed for their costs, and are thus working pro bono on indigent defense cases,” including capital cases.³⁷⁷

³⁶⁹ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(1)(c).

³⁷⁰ *Id.*

³⁷¹ Interview with Metro Defender, *supra* note 43. Shortly after the Metro Defender’s rate of compensation for their contract conflict counsel was increased to provide the same rate as DPA, DPA’s rate was increased once again, and the Metro Defender has not received an increase since. *Id.*

³⁷² DPA POLICIES, *supra* note 97, at §§ 8.04(II)(A)(6) (noting that the Division Director must maintain “an accounting of all outstanding post trial capital contracts, all claims paid, and the amount of money paid on all closed post-trial level capital contract”), 8.04(II)(B)(5) (same). Upon approval, claims for payment shall be submitted by this Director to the Law Operations Division, which will pay all claims as soon as practical following receipt of the Director’s authorization. DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(6), (B)(5).

³⁷³ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(5), (B)(3).

³⁷⁴ Interview with Daniel T. Goyette, *supra* note 101.

³⁷⁵ JUSTICE JEOPARDIZED, *supra* note 192, at 19.

³⁷⁶ See KY. LEGISLATIVE RESEARCH COMM’N, GOV’T CONTRACT REVIEW COMM., *Legal Services: Duties and Maximum Rate Schedule, Policy Statement 99-1* (amended Jan. 8, 2002), available at <http://www.lrc.ky.gov/Statcomm/Contracts/homepage.htm>. The rate available for “personal service contracts for legal services” is \$125 per hour. *Id.*

³⁷⁷ JUSTICE JEOPARDIZED, *supra* note 192, at 14; Interview with Tom Griffiths, *supra* note 24.

The Kentucky Assessment Team also notes that, historically, counsel who contracted with DPA prior to February 1, 2004 were compensated at a rate of \$50 per hour for work in-court and out-of-court, for up to 400 hours, with a maximum fee of \$20,000 per attorney.³⁷⁸ If the case went to trial, counsel was permitted to be compensated for up to 200 additional hours, although the compensation could not exceed a total of \$30,000.³⁷⁹ The Metro Defender set maximum compensation amounts for contract counsel in capital cases between \$5,000 and \$7,500 until the cap reached its current level of \$15,000.³⁸⁰ Notably, most death row inmates in Kentucky were sentenced to death when compensation rates for contract counsel were far below today's levels.³⁸¹ For example, in 1981, Harold McQueen, one of three Kentucky death row inmates to be executed, was represented at his capital murder trial by an attorney who was paid \$1,000.³⁸²

- c. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - i. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
 - ii. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - iii. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

DPA and Metro Defender budgets must include the cost of compensation for investigators and mitigation specialists. Prosecutors' budgets in the Commonwealth may include costs for employment of non-lawyer staff to assist in prosecution of capital cases, but need not include the cost of investigative services provided by law enforcement agencies, such as local and state police, sheriff's offices, the Kentucky State Police Crime Laboratory, the statewide medical examiner's office, or county coroners' offices.

DPA and the Metro Defender

³⁷⁸ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(2), (B)(3). This payment scheme applies to all cases in which representation was entered into before the rate increase was established and continued after the 2004 rate increase came into effect. DPA POLICIES, *supra* note 97, at § 8.04(II).

³⁷⁹ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(3).

³⁸⁰ Interview with Metro Defender, *supra* note 43.

³⁸¹ Two death sentences were imposed from 1976–1979; forty-five death sentences were imposed from 1980–1989; twenty-seven death sentences were imposed from 1990–1999; and nineteen death sentences were imposed from 2000–February 2010. See KY. DEP'T OF PUB. ADVOCACY, *Number of Death Sentences Imposed in Kentucky Per Year Since 1976*, Feb. 26, 2010 (on file with author).

³⁸² Jaime Lucke, *A path to healing, but not legislation*, LEXINGTON HERALD-LEADER (July 1, 2007); *McQueen Files Appeals Attempts to Avoid Chair Repeat Initial Arguments*, CINCINNATI-KY. POST (June 24, 1997).

DPA and the Metro Defender employ staff investigators and mitigation specialists and also may petition the court for funding to support payments for expert services.³⁸³ The Metro Defender's capital investigator receives a salary of \$40,500 per year and the mitigation specialist receives \$31,500 a year.³⁸⁴ DPA and the Metro Defender also employ paralegals to assist in the provision of indigent defense representation; the Metro Defender's paralegals, capital and non-capital, receive a salary ranging from \$34,250 to \$38,250.³⁸⁵ DPA investigators are compensated between approximately mid-twenty to low-thirty thousand dollars per year and all non-attorney defense team members are restricted from receiving compensation for more than 37.5 hours of work per week.³⁸⁶ Also due to limited resources, DPA has sought KRS 31.185 funds to obtain contract mitigation specialists to assist with an additional twelve capital cases at trial.³⁸⁷

However, because we were unable to determine the salaries of investigators, mitigation specialists and paralegals in the Commonwealth's Attorneys' or Attorney General's offices, we are unable to determine whether there is parity between public defense and public prosecution within the Commonwealth.

Defense Team in Cases Represented by Contract Counsel

Pursuant to KRS 31.185, private attorneys who contract with DPA and the Metro Defender to provide capital representation may have access to experts who are "reasonably necessary," if counsel first demonstrates that use of Commonwealth facilities is impractical.³⁸⁸ As discussed in Recommendation #1, there is no statutory cap on defense counsel's access to KRS 31.185 funding and it appears Kentucky courts do grant to defense counsel sufficient funds at the trial level.³⁸⁹ However, Kentucky courts permit only limited access to funding for experts during post-conviction proceedings.³⁹⁰

It is unclear to what extent a privately-retained investigator or mitigation specialist is compensated in the Commonwealth. We were unable to determine whether funds granted under KRS 31.185 are sufficient to compensate mitigation specialists, investigators, or other necessary expert defense witnesses according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector. Periodic billing is available for expert and other ancillary services.³⁹¹

³⁸³ Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43; KY. REV. STAT. ANN. § 31.185 (West 2011).

³⁸⁴ Interview with Daniel T. Goyette, *supra* note 101.

³⁸⁵ *Id.* Prior to July 1, 2008's salary increase, the Metro Defender's capital investigator received a salary of \$39,500, the mitigation specialists received \$30,000, and paralegals received \$33,000. *Id.*

³⁸⁶ *See supra* notes 130, 168, 176, 199 and accompanying text.

³⁸⁷ Email from Ed Monahan, *supra* note 10; *see supra* note 200 and accompanying text.

³⁸⁸ KY. REV. STAT. ANN. § 31.185 (West 2011); *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008); *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008) (overruling *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005) ("has determined that the [] petition sets forth allegations sufficient to necessitate an evidentiary hearing"))).

³⁸⁹ *See supra* notes 195–208 and accompanying text.

³⁹⁰ KY. REV. STAT. ANN. § 31.185(5) (West 2011); *supra* notes 205–208 and accompanying text.

³⁹¹ *See* Email from Ed Monahan, *supra* note 10; *McCracken Cnty. Fiscal Court v. Graves*, 885 S.W.2d 307 (Oct. 1994).

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

In cases in which private counsel is contracted by DPA to provide representation at trial, DPA policy permits waiver of the maximum fee of \$30,000 per attorney “[i]n limited circumstances.”³⁹² Circumstances where a waiver may be appropriate include “extraordinary complex or time-consuming pretrial investigation or motion practice or an unusually long jury trial.”³⁹³ Contract conflict counsel must submit to the Public Advocate a written request, including a justification of the waiver, prior to reaching \$25,000 expended.³⁹⁴ On appeal or during post-conviction proceedings, contract conflict counsel are compensated at a rate of \$75 an hour with a \$50,000 presumptive maximum fee per attorney per case.³⁹⁵ Although DPA policy states that there may be additional compensation available to trial contract counsel,³⁹⁶ there is no corresponding policy relating to contract conflict counsel providing representation on direct appeals or during post-conviction proceedings. DPA attorneys and contract counsel providing representation during federal habeas corpus proceedings are entitled to payment pursuant to the Criminal Justice Act, at \$178 per hour, and there is no statutory maximum on compensation.³⁹⁷

The Metro Defender does not permit additional compensation or reimbursement for an unusually protracted and extraordinary case in excess of its \$15,000 cap on attorneys’ fees and reasonable expenses for each stage of the proceeding.³⁹⁸ Furthermore, we are unaware of any instances in which DPA or the Metro Defender has permitted additional reimbursement in unusually protracted and extraordinary cases.

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

In most instances, DPA and Metro Defender attorneys who represent capital defendants and death row inmates, as salaried employees, are provided with the resources for funding the incidental costs associated with representation of capital defendants and death row inmates.³⁹⁹

DPA permits contract counsel providing capital representation to be compensated in addition to “reasonable expenses.”⁴⁰⁰ Reasonable expenses are “specific out-of-pocket costs related to representation of the client, and do not include any portion of the ordinary costs of operating

³⁹² DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(3). Additional compensation is not provided for handling capital felony trials, appeals or post-conviction proceedings in which DPA or the Metro Defender provided representation, as these attorneys are salaried employees.

³⁹³ *Id.*

³⁹⁴ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(4). The Public Advocate’s decision to grant or deny a waiver of the maximum fee is final. DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(3).

³⁹⁵ DPA POLICIES, *supra* note 97, at § 8.04(II)(B)(1)(b).

³⁹⁶ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(3).

³⁹⁷ U.S. GUIDELINES FOR ADMINISTERING THE CJA, *supra* note 151 and accompanying text.

³⁹⁸ Interview with Daniel T. Goyette, *supra* note 101.

³⁹⁹ KY. REV. STAT. ANN. §§ 31.185, 31.110 (West 2011). For example, because it is a state agency, DPA receives a state car and fuel paid for by the Commonwealth for travel required in indigent defense representation. Interview with Tom Griffiths, *supra* note 24.

⁴⁰⁰ DPA POLICIES, *supra* note 97, at § 8.04(II)(A)(1)–(2), (B)(1)(b), (B)(2)(a).

Counsel's law office, such as secretarial time, typing costs, or in-office copying costs."⁴⁰¹ The Metro Defender reimburses contract conflict counsel for reasonable incidental expenses, such as mileage and copy costs; the \$15,000 per attorney cap is strictly for the attorney's time spent on the case.⁴⁰²

Conclusion

Kentucky's funding of the costs associated with providing legal representation for capital defendants and death row inmates at trial, on direct appeal, and during capital post-conviction proceedings, as well as the approximate parity of salary between some defenders and prosecutors in the Commonwealth, bring Kentucky into partial compliance with Recommendation #4.

However, there are significant funding and compensation deficiencies that must be ameliorated in order to ensure capital defendants and death row inmates in the Commonwealth receive the quality of representation required in cases where a life is at stake, including

- An increase in funding to the Commonwealth's defender agencies which would permit the provision of high quality legal representation in the approximately 100 capital cases handled by the defender agencies each year;
- Ensuring that an equal salary scale exists among defense attorneys and prosecutors who handle capital cases;
- Ensuring that the Commonwealth's defender agencies receive funding sufficient to compensate non-attorney members of the defense team for necessary work performed to provide high quality representation consistent with the *ABA Guidelines* and sufficient to hire additional investigators and mitigation specialists as needed; and
- Removal of the cap placed on compensation to contract counsel in death penalty cases and provision of uniform compensation rates for conflict counsel who contract with the Metro Defender and DPA, commensurate with prevailing rates for retained counsel in Kentucky, and a guarantee of payment to private counsel contracted to handle death penalty cases.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

- a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

The Kentucky General Assembly's biennial budget appropriation to DPA, as well as a \$100,000 federal grant from the U.S. Department of Justice's Bureau of Justice Assistance (BJA), permits DPA to provide effective training, professional development, and continuing education for all

⁴⁰¹ KY. DEP'T OF PUB. ADVOCACY, *Conflict Contract for FY11* (2010) (on file with author) ("The cost of copying of court, medical, or other client records, whether video, audio, or paper, shall be borne by the Commonwealth, Finance and Administration Cabinet, upon an appropriate Court order, consistent with the provisions of KRS 31.185 and 31.200.").

⁴⁰² Interview with Daniel T. Goyette, *supra* note 101.

members of its capital defense teams.⁴⁰³ DPA policy requires that the Education and Strategic Planning Branch “provide employees responsible for the representation of death penalty clients with the education necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal, and post-conviction.”⁴⁰⁴

Funding from the General Assembly and federal grants support DPA-sponsored trainings and conferences, as well as DPA’s co-sponsorship of capital litigation trainings available to capital defense attorneys throughout the Commonwealth.⁴⁰⁵ For example, \$5,000 is allocated from DPA’s operating budget to support training on capital voir dire case law and workshops on conducting individual voir dire in capital cases.⁴⁰⁶ The BJA’s Capital Case Litigation Initiative grant supports DPA’s annual five-day capital practice institute for all members of the capital defense team, five regional one-day death penalty training events, the development of a new manual on capital defense, creation of a motion bank for capital litigation, and twenty case reviews annually.⁴⁰⁷

The Metro Defender also offers periodic trainings on a variety of capital and non-capital issues, including litigation skills; pleading and motion practice; applicable state, federal, and international law; and regular, ongoing multi-disciplinary case reviews.⁴⁰⁸ Metro Defender attorneys and contract counsel actively involved in a capital case are able to attend, free of charge, any DPA-sponsored training program or conference.⁴⁰⁹

In addition, DPA and the Metro Defender reserve a portion of their operating budgets to obtain grants and secure scholarships from national organizations to support staff member attendance at national capital defense training conferences,⁴¹⁰ including the NAACP Legal Defense and Education Fund’s Annual Capital Punishment Training Conference; the Darrow Defense College, a week-long annual seminar cosponsored by DePaul University’s Center for Justice in Capital Cases and the University of Michigan; the National Legal Aid and Defender Association’s annual Life in the Balance conference; and the Santa Clara Death Penalty College, among others.⁴¹¹ If financial resources are available, DPA and the Metro Defender may support

⁴⁰³ Interview with Glenn McClister, *supra* note 173.

⁴⁰⁴ DPA POLICIES, *supra* note 97, at § 12.19(VII)(A). In addition, DPA requires all new staff attorneys to successfully complete the Kentucky Public Defender College, a three-week training program that includes extensive instruction and interactive learning on relevant Kentucky law and procedure; trial skills; district, juvenile, and circuit court practice; and training on other subjects such as evidence, mental health, and preservation of evidence. Glenn S. McClister, *KPDC’s Recent Past and Hopeful Future*, <http://dpa.ky.gov/NR/rdonlyres/3B98E4C8-DFBA-4552-885A-40272FE5AECF/0/KPDC20Overview.pdf>. The trial skills training portion of KPDC is a nationally-known week-long trial skills institute, called Faubush, which uses actual on-going cases as practice. *Id.*

⁴⁰⁵ Interview with Glenn McClister, *supra* note 173; Email from Tom Griffiths, *supra* note 168.

⁴⁰⁶ Interview with Glenn McClister, *supra* note 173.

⁴⁰⁷ *Id.*; BJA Programs, BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/BJA/grant/CCLI.html> (last visited Oct. 29, 2010).

⁴⁰⁸ Interview with Metro Defender, *supra* note 43; Interview with Daniel T. Goyette, *supra* note 101.

⁴⁰⁹ Interview with Daniel T. Goyette, *supra* note 101.

⁴¹⁰ *Id.*; Interview with DPA, *supra* note 12; Interview with Glenn McClister, *supra* note 173; Email from Tom Griffiths, *supra* note 168; Interview with Metro Defender, *supra* note 43.

⁴¹¹ See *Annual Capital Defense Training College*, NAACP-LDF, <http://naacpldf.org/event/naacp-legal-defense-and-educational-fund-inc-31st-annual-capital-punishment-training-conferenc> (last visited Nov. 2, 2010); *Training and Conferences*, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/Training/Train_Defender/Train_Defender_Balance (last visited Oct. 12, 2010); *Darrow*

capital defense attorneys' attendance at non-capital national training sessions, such as the National Criminal Defense College's Trial Practice Institute and the Advanced Cross-Examination Theories and Themes Seminar.⁴¹²

The Commonwealth is in compliance with this portion of Recommendation #5.

- b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
 - i. Relevant state, federal, and international law;**
 - ii. Pleading and motion practice;**
 - iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
 - iv. Jury selection;**
 - v. Trial preparation and presentation, including the use of experts;**
 - vi. Ethical considerations particular to capital defense representation;**
 - vii. Preservation of the record and of issues for post-conviction review;**
 - viii. Counsel's relationship with the client and his/her family;**
 - ix. Post-conviction litigation in state and federal courts;**
 - x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.**

- c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

The Kentucky Supreme Court Rules require all attorneys admitted to the Kentucky Bar to complete a minimum of twelve and a half hours of continuing legal education every year, which must include at least two hours of training on legal ethics, professional responsibility, or professionalism.⁴¹³ Apart from these general CLE requirements, the Commonwealth does not require specialized training for attorneys seeking to qualify for appointment to a capital case at trial, on direct appeal, during post-conviction proceedings, or during clemency. However, DPA and the Metro Defender both require specialized training for staff attorneys, contract counsel in death penalty cases, and other members of the capital defense team.⁴¹⁴

Defense College, CTR. FOR JUSTICE IN CAPITAL CASES, DEPAUL UNIV., http://www.law.depaul.edu/centers_institutes/cjcc/darrow.asp (last visited Oct. 12, 2010); *The Bryan R. Shechmeister Death Penalty College*, SANTA CLARA UNIV. SCHOOL OF LAW, <http://law.scu.edu/dpc/index.cfm> (last visited Nov. 4, 2010).

⁴¹² Interview with DPA, *supra* note 12; Interview with Metro Defender, *supra* note 43. See *Trial Practice Institute*, NAT'L CRIMINAL DEF. COLL., <http://www.ncdc.net/tpi/index.html> (last visited Nov. 5, 2010); *Advanced Cross Examination*, NAT'L CRIMINAL DEF. COLL., <http://www.ncdc.net/adx/index.html> (last visited Nov. 5, 2010).

⁴¹³ SCR 3.661(1) (requiring completion of attendance by June 30th of each year).

⁴¹⁴ See generally, DPA POLICIES, *supra* note 97; Interview with Daniel T. Goyette, *supra* note 101.

DPA policy requires all public defenders that provide capital representation to satisfactorily complete a comprehensive training program on each of the areas listed in subsection b of this Recommendation, in conformance with the *ABA Guidelines*.⁴¹⁵ Additionally, DPA public defenders are required to attend training on the “unique issues relating to the Racial Justice Act and representation of mentally retarded capital defendants who are charged with committing capital offenses.”⁴¹⁶ DPA policy on death penalty cases states that “no attorney shall be assigned representation in a death penalty case unless that attorney has attended the Department’s periodic Death Penalty education,” absent approval of the Trial Division Director.⁴¹⁷

DPA policy also requires staff attorneys who represent capital clients to attend and successfully complete a specialized capital defense training program at least once every two years.⁴¹⁸ For example, DPA sponsors a Death Penalty Litigation Persuasion Institute every two years, where participants discuss their cases with experienced faculty.⁴¹⁹ DPA typically also offers a series of capital training sessions at its Annual Litigation Conference, which all DPA attorneys are required to attend.⁴²⁰ In addition, DPA attorneys representing death row inmates in post-conviction proceedings strive to attend federal habeas corpus litigation training every year.⁴²¹

We were, however, unable to determine the extent to which DPA enforces these training requirements on all members of the capital defense team.

Furthermore, DPA policy requires contract counsel in death penalty cases to complete a comprehensive training program, approved by DPA, on each of the subject areas called for by this Recommendation, in addition to specialized training on Kentucky’s Racial Justice Act and representation of mentally retarded capital offenders.⁴²² According to DPA, it has sought to ensure that private counsel have successfully completed such training before entering into contract for representation; however, enforcement of this requirement has been sporadic, particularly because it is difficult for DPA to locate private attorneys who meet the requisite criteria.⁴²³

The Metro Defender’s staff attorneys providing capital representation at trial, on direct appeal, and during post-conviction or clemency proceedings attend the Metro Defender’s capital training, DPA-sponsored trainings including its Capital Practice Institute, and may be provided

⁴¹⁵ DPA POLICIES, *supra* note 97, at §§ 17.21(I), 12.21, 12.04(I)(B), 17.20(I)(G), 4.22(III)(C).

⁴¹⁶ DPA POLICIES, *supra* note 97, at §§ 12.04(I)(B), 17.21(I), 17.20(I)(G), 4.22(III)(C). For more information on unique issues such as Kentucky’s Racial Justice Act and Kentucky law on capital punishment and mental retardation and mental illness, please see Chapters Twelve and Thirteen.

⁴¹⁷ DPA POLICIES, *supra* note 97, at § 17.20(I)(G).

⁴¹⁸ DPA POLICIES, *supra* note 97, at §§ 12.04(I)(B), 8.04(I)(C), 17.20(I)(G).

⁴¹⁹ Interview with Glenn McClister, *supra* note 173. Prior to 2007, the Death Penalty Litigation Persuasion Institute was held every three years. *Id.*

⁴²⁰ Interview with Glenn McClister, *supra* note 173.

⁴²¹ Interview with Tim Arnold, *supra* note 263.

⁴²² DPA POLICIES, *supra* note 97, at § 8.04(I)(C)(3) (listing all of the subdivisions of the ABA Guideline and Recommendation #5). DPA will offer incentives, including reduced rates or payment of hotel rooms, to promote contract conflict counsel attendance at DPA and other national capital defense trainings. *Id.*

⁴²³ Interview with Tim Arnold, *supra* note 263. However, DPA states that currently all of its contractors handling capital direct appeals and post-conviction proceedings meet the training criteria. *Id.*

the opportunity to attend other national training seminars, if financial resources are available.⁴²⁴ Prior to assignment to the capital division, Metro Defender attorneys are required to participate in an orientation and training program, which includes education on relevant law, mock exercises, and a review of capital trial videotapes.⁴²⁵ In addition, new Metro Defender attorneys attend a national training at the outset of their assignment to the Capital Trial Division, such as *Life in the Balance*.⁴²⁶ They are also required to participate in regular, on-going multi-disciplinary case reviews and in-house trainings on particular aspects of capital litigation and death penalty issues, including recent developments in the law and new litigation techniques.⁴²⁷ While a Metro Defender attorney will not be assigned a capital case until the attorney has received extensive capital case training,⁴²⁸ we were unable to determine whether the required training program covers the range of topics called for by this Recommendation.

Conflict counsel that contracts with the Metro Defender to provide capital representation will not be appointed to a capital case unless they have undergone capital training or have prior capital litigation experience.⁴²⁹ However, we were unable to determine whether they receive, at least every two years, the required training covering the range of topics called for by this Recommendation.

d. The jurisdiction should ensure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

The Commonwealth does not have any mechanisms in place that ensure all non-attorneys on capital defense teams receive continuing professional education appropriate to their areas of expertise. However, DPA and the Metro Defender require training for non-attorney members of the defense team, including investigators, mitigation specialists, paralegals, social workers, and sentencing specialists.⁴³⁰ DPA also publishes relevant educational materials and sponsors continuing professional education courses for non-attorney members of the defense team, available to DPA and non-DPA professionals, such as DPA's 2010 Litigation Persuasion Institute, which provided an "Investigator Case Preparation Track."⁴³¹ DPA also permits Metro Defender non-attorney members of defense teams to attend any DPA trainings.⁴³²

⁴²⁴ Interview with Metro Defender, *supra* note 43; Interview with Daniel T. Goyette, *supra* note 101.

⁴²⁵ Interview with Daniel T. Goyette, *supra* note 101.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ Interview with Metro Defender, *supra* note 43.

⁴²⁹ Interview with Daniel T. Goyette, *supra* note 101.

⁴³⁰ DPA POLICIES, *supra* note 97, at §§ 12.04(C)(1) (Required Defender Education), 12.03 (Required Sharing of Education By All Staff), 12.20 (Paralegal Training), 12.21 (DPA Capital Trial Practice Institute), 12.19 (Education Standards). In addition, DPA has staff criminal defense investigators certified by the Criminal Defense Investigation Training Council to serve as certified training instructors. *C.D.I.T.C. Accredited Seminars & Training Programs*, CRIMINAL DEF. INVESTIGATION TRAINING COUNCIL, <http://www.defenseinvestigator.com/seminars.html> (last visited Oct. 12, 2010).

⁴³¹ DPA POLICIES, *supra* note 97, at §12.19(IV)(E); *Education Overview*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed> (last visited Oct. 29, 2010); *Education Calendar 2010*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed/ecal.htm> (last visited Oct. 12, 2010); Interview with Glenn McClister, *supra* note 173.

⁴³² Interview with Metro Defender, *supra* note 43.

Conclusion

DPA and the Metro Defender provide extensive training to the Commonwealth's public defenders, including DPA and Metro Defender attorneys, private counsel contracted by these agencies to handle death penalty cases, and other members of the defense team. However, because the Commonwealth does not require all attorneys, including public defenders, court-appointed counsel, and privately-retained counsel seeking appointment to a death penalty case, to successfully complete a specialized training program that focuses on the defense of death penalty cases at least once every two years, the Commonwealth only partially complies with this portion of the Recommendation.

Accordingly, the Kentucky Death Penalty Assessment Team recommends that the Commonwealth adopt mandatory training requirements for *all* attorneys and members of the defense team seeking to handle a capital case during any stage of the proceedings. Such a program should include, at a minimum, presentations and trainings in the areas listed within Recommendation #5 so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

CHAPTER SEVEN

THE DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Every defendant who receives a death sentence is, by statute, entitled to one level of appellate review, known as the direct appeal. As the U.S. Supreme Court stated in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”¹ The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and conclusions of law and to determine whether the trial court’s actions during the guilt and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure a meaningful direct appeal process is comparative proportionality review. Comparative proportionality review is the process through which a death sentence is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational, non-arbitrary manner; provide a check on broad prosecutorial discretion; and prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they do not have the information necessary to evaluate the propriety of that sentence in the case before them in light of sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. More than merely citing previous decisions, a court conducting proportionality review ought to analyze the similarities and differences between those past decisions and the case before it. By weighing the appropriateness of a death sentence from a statewide perspective, a reviewing court achieves the important ends of proportionality review while properly leaving to local prosecutors and juries the decisions, in the first instance, of whether the death penalty ought to be sought and whether it ought to be imposed.

Finally, for proportionality review to be truly effective in ensuring the rational, non-arbitrary application of the death penalty, it must include not only cases in which a death sentence was imposed but also 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.

¹ *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. Direct Appeal Procedures

A defendant may challenge his/her conviction and death sentence by filing a direct appeal with the Kentucky Supreme Court.² In order to pursue an appeal, the defendant must file a notice of appeal in the trial court within thirty days of the entry of the judgment or within thirty days of the trial court's entry of an order denying a new trial.³ In practice, Kentucky's public defender agencies represent death-sentenced inmates on direct appeal.⁴

To ensure that the appropriate materials are provided to the Kentucky Supreme Court, an appellant must file, with the clerk of the trial court, a designation of un-transcribed material within ten days from the filing of the notice of appeal.⁵ The designation should list any un-transcribed portions of the proceedings that the defendant wishes to have included in the record on appeal.⁶ The appellant must also attach a certificate to the designation that states (1) the date on which the transcript was requested, (2) the estimated number of pages, (3) the estimated completion date, and (4) that defendant's counsel and the reporter have agreed on an acceptable payment schedule to the court for the preparation of the transcript.⁷ This certificate must be signed by both the court reporter and counsel for the appellant.⁸

² KY. CONST. § 110(2)(b); KY. REV. STAT. ANN. § 532.075 (West 2011); KY. R. CRIM. P. 12.02. Direct appeal in criminal cases to the Kentucky Supreme Court is available when a defendant has been sentenced to death. KY. REV. STAT. ANN. § 532.075(1) (West 2011); KY. R. CRIM. P. 12.02.

³ KY. R. CRIM. P. 12.04(1), (3); *see also* KY. R. CIV. P. 73.01(2) (“All appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken.”). If the motion for a new trial was filed more than five days after return of the verdict, the appeal shall be limited to the grounds “timely raised by the motion.” *Id.* *See also* KY. R. CRIM. P. 10.06 (discussing the time requirements for new-trial motions and the grounds upon which these motions may be based). This motion need not include “[a]llegations of error, properly preserved by objections . . . , in respect to rulings, orders or instructions of the [trial] court . . . in order to be preserved for appellate review.” KY. R. CRIM. P. 10.12.

⁴ Interview by Sarah Turberville and Paula Shapiro with the Ky. Dep't of Pub. Advocacy (DPA), June 14, 2010 (on file with author). *See also* Chapman v. Commonwealth, 265 S.W.3d 156, 162, n.2 (Ky. 2007) (although the defendant sentenced to death requested the death penalty and waived any appeals, “[t]he Department of Public Advocacy then filed this [direct] appeal on Chapman's behalf.”).

⁵ KY. R. CIV. P. 75.01(1). Three exceptions to this filing requirement apply: “[A]n agreed statement of the case is certified as provided in Rule 75.15, the proceedings were taken exclusively by video recording as governed by Rule 98, or there are no proceedings to transcribe.” *Id.* Also, in lieu of adhering to this rule, “the parties by stipulation filed with the clerk of the trial court may designate the parts of the proceedings and evidence to be included in the record on appeal.” KY. R. CIV. P. 75.06.

⁶ KY. R. CIV. P. 75.01(1). In Kentucky, the official trial record is in the form of a video recording of the proceeding. KY. R. CIV. P. 98(2)(a) (“Upon the filing of a notice of appeal, one of the two video recordings, or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal.”).

⁷ KY. R. CIV. P. 75.01(2).

⁸ *Id.* In cases in which the death penalty had been sought at trial, the court reporter must prepare the requested transcript within 170 days from the date on which the designation was filed; if the court reporter is unable to complete the transcript within the 170 days, s/he is required to make a written request to appellant's attorney “who shall [then] file in the Supreme Court of Kentucky for an extension of time.” KY. R. CIV. P. 75.01(4). Further delays necessitate additional written requests and filings. *Id.* Finally, the court reporter must make any such written request “at least ten [] days before the expiration of the period as originally prescribed or as extended by a previous order.” KY. R. CIV. P. 75.01(5).

The circuit court clerk must “transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge,” which is “in the form of a standard questionnaire prepared and supplied by the Supreme Court.”⁹ The clerk will include in the notice: “the title docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed.”¹⁰

In death penalty cases, “[b]oth the defendant and the Commonwealth shall have the right to submit briefs within the time provided by the court, and to present oral argument to the [Kentucky Supreme C]ourt.”¹¹ If the appellant is represented by the Public Advocate, s/he must file his/her brief “within [sixty] days after . . . the record on appeal was received by the clerk of the [Kentucky Supreme Court]” notice of which is required under the rule.¹² In this instance, the Commonwealth, as the appellee, then has sixty days “after . . . the appellant’s brief was filed” to file its brief.¹³

In cases where the death penalty has been imposed, the appellant and Commonwealth may increase the page limits of initial briefs to 150 pages each and of any reply brief to twenty-five pages.¹⁴ Absent this motion, initial briefs and any reply brief may not exceed fifty pages and ten pages, respectively.¹⁵

B. Standard of Review

Allegations of error properly preserved at trial, as well as errors not preserved at trial but possibly constituting palpable error, will be reviewed by the Kentucky Supreme Court on direct

⁹ KY. REV. STAT. ANN. § 532.075(1) (West 2011).

¹⁰ *Id.*

¹¹ KY. REV. STAT. ANN. § 532.075(4) (West 2011). In other criminal cases, if the appellant wishes to present an oral argument, s/he must include in his/her initial brief a “statement concerning oral argument” that explains “why appellant believes that oral argument would . . . be helpful to the [appellate] court in deciding the issues presented.” KY. R. CIV. P. 76.12(4)(c)(ii). If the appellant does not wish to present an oral argument, s/he instead may assert that oral argument would not be helpful to the appellate court in deciding the issues presented. *Id.* The decision to allow or to refuse oral argument remains in the discretion of the appellate court. KY. R. CIV. P. 76.16(1) (Any party may, within ten days from “the date of the [appellate court’s] order [dispensing with oral argument],” file a motion asking the court to reconsider its decision.). Since the constitutionality of the death penalty was reestablished in 1976, we have not uncovered a capital case in which the Kentucky Supreme Court denied a request for oral argument. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

¹² KY. R. CIV. P. 76.12(2)(b)(i).

¹³ KY. R. CIV. P. 76.12(2)(a)–(b). If the appellant is represented by counsel other than the Public Advocate, the appellant must file his/her brief within sixty days after the clerk of the trial court “notif[ies] the clerk of the appellate court when the record has been completed and certified,” and notice of certification of the record must be provided to the parties. KY. R. CIV. P. 76.12(2)(a)–(b), 75.07(6). In this instance, the Commonwealth, as appellee, then has sixty days “after . . . the appellant’s brief was filed or . . . the record on appeal was received by the clerk of the appellate court, whichever is [] later,” to file its brief. KY. R. CIV. P. 76.12(2)(b)(ii). Finally, both the Commonwealth and the appellant must file their reply briefs within fifteen days “after . . . the [] appellee’s brief was filed or due to be filed.” KY. R. CIV. P. 76.12(2)(a).

¹⁴ KY. R. CIV. P. 76.12(4)(b)(iii).

¹⁵ KY. R. CIV. P. 76.12(4)(b)(ii).

appeal.¹⁶ To properly preserve an allegation of error, counsel must object “as provided in [the Kentucky Rules of Criminal Procedure].”¹⁷

If an issue has been preserved for review, then it is “reviewed under normal standards.”¹⁸ For example, a trial court’s evidentiary rulings generally are reviewed under an abuse-of-discretion standard, requiring the appellate court to determine “whether the trial [court’s] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”¹⁹ Likewise, an abuse-of-discretion standard also applies to certain trial court rulings respecting jury selection, e.g., “limit[ing] the scope of voir dire.”²⁰ Matters of law, by contrast, are reviewed de novo without deference to the trial court ruling.²¹

If an issue has been “insufficiently raised or preserved for review,” then an appellate court will grant relief only if the error is “[a] palpable error [that] affects the substantial rights of a party.”²² Palpable error “requires a showing of ‘manifest injustice,’” meaning that “the error must have prejudiced the substantial rights of the defendant,” or that, absent the error, “a substantial possibility exists that the result of the trial would have been different.”²³ The Kentucky Supreme Court has elaborated that this standard means “probability of a different result *or* error so fundamental as to threaten a defendant’s entitlement to due process of law.”²⁴ To uncover palpable error, “a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.”²⁵ The Court also requires, in order for relief to be granted for an unpreserved issue, that there be no reasonable justification or explanation for defense counsel’s failure to object in the first instance.²⁶

¹⁶ KY. REV. STAT. ANN. § 532.075(2) (West 2011) (“The Supreme Court [in its review of a death sentence] shall consider the punishment as well as any errors enumerated by way of appeal.”).

¹⁷ KY. R. CRIM. P. 10.12. Formal exceptions to rulings or orders of the court are unnecessary, and “it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or any objection to the action of the court.” See KY. R. CRIM. P. 9.22.

¹⁸ Meece v. Commonwealth, 2006-SC-000881-MR, 2011 WL 2433733, at *2 (Ky. June 16, 2011).

¹⁹ *Id.* (quoting Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)).

²⁰ *Id.* at *55 (citing Fields v. Commonwealth, 274 S.W.3d 375, 393 (Ky. 2008)).

²¹ See Winstead v. Commonwealth, 327 S.W.3d 386, 405 (Ky. 2010) (“Since interpreting an extradition agreement is a matter of law, our review is de novo.”).

²² KY. R. CRIM. P. 10.26.

²³ Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997).

²⁴ Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006) (emphasis added).

²⁵ *Id.* at 3–4.

²⁶ Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1990). *Sanders*, which preceded *Martin*, summarized the unpreserved-issues inquiry as follows:

[W]e begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel’s failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

Id. (internal citations omitted). See also Strickland v. Washington, 466 U.S. 668 (1984) (holding that in order to prevail on a claim of ineffective assistance of counsel, the petitioner must prove both poor performance and prejudice affecting the outcome of the case due to the inadequate performance of counsel).

C. Mandatory Review of the Death Sentence

Independent of whether a defendant files a direct appeal, the Kentucky Supreme Court is required by statute to conduct a mandatory review of all death sentences.²⁷ If a defendant files a direct appeal, mandatory review of the death sentence will be consolidated with the appeal.²⁸ Upon mandatory review of the death sentence, the Court must “consider the punishment as well as any errors enumerated by way of appeal” and, with regard to the sentence, determine whether

- (1) [T]he sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor,
- (2) [T]he evidence supports the jury’s or judge’s finding of statutory aggravating circumstances, [and]
- (3) [T]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.²⁹

In conducting the third prong of this review, which is referred to as “proportionality review,” the Kentucky Supreme Court must consider (1) whether other criminal defendants received the death penalty for similar crimes; and (2) whether a particular appellant’s sentence is disproportionate in relation to the crime for which s/he was convicted.³⁰ Having completed its review, the Court may decide either to affirm the sentence of death or to set aside the sentence and remand appellant’s case to the lower court for resentencing.³¹ If the prosecuting attorney decides to again seek the death penalty upon remand,³² the lower court must, in resentencing the appellant, consider (1) the arguments made by counsel before the Kentucky Supreme Court, (2) the records of similar cases to which the Kentucky Supreme Court referred in rendering its decision to remand, and (3) the extracts of all cases in which the death penalty was imposed since January 1, 1970.³³

Finally, as a matter of court procedure, Kentucky law grants the defendant and the Commonwealth “the right to submit briefs within the time provided by the [Kentucky Supreme] [C]ourt.”³⁴

D. Discretionary Review by the U.S. Supreme Court

²⁷ See generally KY. REV. STAT. ANN. § 532.075 (West 2011). If a defendant files a direct appeal, “[t]he sentence review [mandated under KRS 532.075(3)] shall be *in addition to* the direct appeal . . . and the review and appeal shall be consolidated.” KY. REV. STAT. ANN. § 532.075(8) (West 2011) (emphasis added). The Kentucky Supreme Court further is required to “render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.” KY. REV. STAT. ANN. § 532.075(8) (West 2011).

²⁸ KY. REV. STAT. ANN. § 532.075(8) (West 2011).

²⁹ KY. REV. STAT. ANN. § 532.075(2)–(3) (West 2011).

³⁰ *Thompson v. Commonwealth*, 147 S.W.3d 22, 54–55 (Ky. 2004).

³¹ KY. REV. STAT. ANN. § 532.075(5) (West 2011).

³² See generally KY. REV. STAT. ANN. § 15.725 (West 2011) (establishing the duties of Commonwealth’s attorneys and county attorneys). See also *Windsor v. Commonwealth*, No. 2008–SC–000383–MR, 2010 WL 3374240, at *5 (Ky. Aug. 26, 2010) (“The Commonwealth enjoys broad discretion in its consideration of plea bargains and in its decisions with respect to the charging of crimes and the request for certain penalties.”).

³³ KY. REV. STAT. ANN. § 532.075 (5)(b), (6)(a) (West 2011).

³⁴ KY. REV. STAT. ANN. § 532.075(4) (West 2011).

If the Kentucky Supreme Court affirms the death sentence, the appellant has ninety days after that Court's decision is entered to file a petition for a writ of certiorari with the U.S. Supreme Court, seeking discretionary review of the Kentucky Supreme Court's decision.³⁵ If the U.S. Supreme Court reviews the case, it may affirm both the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and the sentence.³⁶ If the U.S. Supreme Court affirms the appellant's conviction and sentence, and if the appellant wishes to continue challenging his/her conviction and sentence, s/he may initiate post-conviction relief under Kentucky law.³⁷

³⁵ 28 U.S.C. §§ 1257, 2101(c) (2011).

³⁶ 28 U.S.C. § 2106 (2011).

³⁷ See generally KY. R. CRIM. P. 11.42; see also Chapter Eight on State Post-Conviction Proceedings, *infra*.

II. ANALYSIS

A. 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.

Kentucky statutory law requires the Kentucky Supreme Court to review “on the record” all death sentences imposed in the Commonwealth.³⁸ This review includes consideration of both the sentence “as well as any errors enumerated by way of [direct] appeal.”³⁹ As to the sentence, specifically, the Kentucky Supreme Court must address each of the following issues:

- (a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (b) Whether the evidence supports the jury’s or judge’s finding of statutory aggravating circumstances as enumerated in KRS 532.025(2), and
- (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.⁴⁰

In determining whether the death sentence “is excessive or disproportionate to the penalty imposed in similar cases,” the Kentucky Supreme Court has stated that this inquiry “simply [involves] compar[ing] one death penalty case with all the other cases *in which the death sentence was imposed* after January 1, 1970.”⁴¹ The proportionality review does not include cases in which the death penalty was sought but not imposed, nor cases in which the death penalty could have been but was not sought. The Court also has held that “sentences imposed on [co-]defendants are not relevant in determining the validity of a death sentence or other sentence.”⁴²

This more limited approach to proportionality review is not mandated by Kentucky law, for the relevant consideration announced in the statute is “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”⁴³ The statute also requires the Chief Justice of Kentucky to direct “an administrative assistant who is an attorney . . . [t]o accumulate the records of all felony offenses in which the

³⁸ KY. REV. STAT. ANN. § 532.075(1) (West 2011) (“Whenever the death penalty is imposed for a capital offense, and upon the judgment becoming final in the Circuit Court, the sentence shall be reviewed on the record by the Supreme Court.”); KY. R. CRIM. P. 12.02.

³⁹ KY. REV. STAT. ANN. § 532.075(2) (West 2011).

⁴⁰ KY. REV. STAT. ANN. § 532.075(3) (West 2011).

⁴¹ *Epperson v. Commonwealth*, 197 S.W.3d 46, 63–64 (Ky. 2006) (emphasis added); *see also* *Fields v. Commonwealth*, 274 S.W.3d 375, 420 (Ky. 2008), *overruled on other grounds by* *Childers v. Commonwealth*, 332 S.W.3d 64, 72 (Ky. 2010).

⁴² *Epperson*, 197 S.W.3d at 63.

⁴³ KY. REV. STAT. ANN. § 532.075(3)(c) (West 2011).

death penalty was imposed after January 1, 1970, or such earlier date as the court may deem appropriate.”⁴⁴ The statute does not suggest that these are the only cases that must comprise proportionality review. Nevertheless, the Kentucky Supreme Court repeatedly has affirmed its reading of the statute and its approach to proportionality review.⁴⁵

A comparison of cases in which the death penalty has been imposed to those in which a defendant received a lesser sentence—for example, life imprisonment without the possibility of parole—reveals some doubts as to whether Kentucky’s death penalty is administered in a fully rational, non-arbitrary manner. The facts and outcomes from the following six murder cases are instructive:

- (1) Samuel Stevens Fields, under the influence of drugs and alcohol,⁴⁶ fatally stabbed Bess Horton in the course of burglarizing her home.⁴⁷ Horton had known Fields because she had rented to his girlfriend, Minnie Burton, a duplex apartment located near Horton’s residence.⁴⁸ Horton was in the process of evicting Burton from the apartment—going so far as to “cut off the water” to it—when Fields committed the homicide.⁴⁹ Upon retrial before a Rowan County jury, Fields was sentenced to death in 2004.⁵⁰
- (2) Charles Kirkland and Preston McKee “entered a Lexington liquor store intending to rob the owner.”⁵¹ In the course of the robbery, Kirkland shot the owner, Warren Renfro, who later died from his wounds.⁵² A Fayette County jury declined to recommend the death penalty for the two defendants, and Kirkland and McKee instead received twenty-five-year and forty-five-year sentences, respectively.⁵³
- (3) Quincy Cross strangled eighteen-year-old Jessica Currin, bludgeoned her with a wrench, and “sexually abus[ed] her body and encourag[ed] others to do the same.”⁵⁴ At the time of her death Currin’s son was seven months old.⁵⁵ Upon the recommendation of a Graves County jury, Cross was sentenced to life imprisonment without the possibility of parole.⁵⁶

⁴⁴ KY. REV. STAT. ANN. § 532.075(6)(a) (West 2011).

⁴⁵ See, e.g., *Hunt v. Commonwealth*, 304 S.W.3d 15, 52 (Ky. 2009) (declining to reevaluate the constitutionality of the Court’s approach to proportionality review); *Fields*, 274 S.W.3d at 419; *Sanders v. Commonwealth*, 801 S.W.2d 665, 683 (Ky. 1990).

⁴⁶ See *Fields v. Commonwealth*, 12 S.W.3d 275, 278, 282 (Ky. 2000); see also *Fields v. Commonwealth*, 274 S.W.3d 375, 390 (Ky. 2008), *overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64, 72 (Ky. 2010). Field’s intoxication at the time he committed the capital offense is relevant to the issue of mitigation under KRS 532.025(2)(b)(7).

⁴⁷ *Fields*, 274 S.W.3d at 391, 415.

⁴⁸ *Fields*, 12 S.W.3d at 277.

⁴⁹ *Id.* at 277–78.

⁵⁰ *Fields*, 274 S.W.3d at 391.

⁵¹ *Kirkland v. Commonwealth*, 53 S.W.3d 71, 73 (Ky. 2001).

⁵² *Id.*

⁵³ *Id.* at 73–74. See also John Cheves, *Two Spared Death Penalty*, LEXINGTON HERALD-LEADER, Sept. 23, 1998, at B3.

⁵⁴ Amy Burroughs, *Jury Recommends Life without Parole for Cross*, PADUCAH SUN, Apr. 10, 2008.

⁵⁵ *Id.*

⁵⁶ *Id.*

- (4) Lloyd Hammond was convicted by a Jefferson Circuit Court jury of murdering William Sawyers, Terrell Cherry, and Kerry Williams.⁵⁷ Despite “show[ing] little remorse” and “no emotion” throughout his trial, Hammond was sentenced to life imprisonment without the possibility of parole.⁵⁸
- (5) Robert Drown allegedly met Jennifer Ison at a bar in Kenova, West Virginia.⁵⁹ He later murdered Ison and her two daughters, ten-year-old Shannah, whom he raped, and three-year-old Marissa.⁶⁰ Drown accepted a plea deal in Carter County Circuit Court in which he received life without the possibility of parole.⁶¹
- (6) Cecil New lured four-year-old César Ivan Aguilar-Cano into his home, “plied him with alcohol, then sexually abused and killed him before putting the body in a garbage container.”⁶² New pled guilty to kidnapping and murder and was sentenced by a Jefferson County Circuit Court judge to life imprisonment without the possibility of parole.⁶³

Of these seven men, only Samuel Fields received a death sentence. His offense of murdering Bess Horton in the course of committing a first-degree burglary is, without question, a very serious one. But it is difficult to conclude that either Fields or this offense is the worst among the aforementioned defendants and offenses.⁶⁴ Had the proportionality review conducted in *Fields v. Commonwealth* included a broader range of cases, the Kentucky Supreme Court’s analysis may have reached a different conclusion.⁶⁵ Regardless, a proportionality review that *does* take into consideration cases in which a defendant was spared a capital sentence—whether through jury deliberation or prosecutorial discretion—would better ensure the rational, non-arbitrary application of Kentucky’s death penalty.

Aside from its exclusion of 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, a separate question exists as to whether Kentucky’s proportionality review is a meaningful one. The Kentucky Supreme Court conducts its proportionality review by referencing “data . . . deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.”⁶⁶ Throughout the past thirty-three years, Kentucky’s Public Advocate has sought to review these

⁵⁷ Jason Riley, *Jury Spares Hammond from Death Penalty*, COURIER-J., June 30, 2010, at A1.

⁵⁸ *Id.*

⁵⁹ Tonia Rose, *Man Pleads to Rape, Murder*, MOREHEAD NEWS, Apr. 30, 2010.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Jason Riley, *Boy’s Killer Gets Life in Prison*, COURIER-J., Dec. 18, 2010, at A1.

⁶³ *Id.*; Harold J. Adams, *Plea Bargains Trump Many Indiana Trials*, COURIER-J. (Louisville, Ky.), Jan. 7, 2011, at A1 (recounting Jefferson County Commonwealth’s Attorney Dave Stengel’s explanation that New pled guilty because both the prosecution and the defense recognized that the case likely would have led to the imposition of the death penalty).

⁶⁴ One possible, if partial, explanation for any charging and sentencing disparities exhibited in Kentucky capital cases over the past thirty-five years may be the 1998 addition of “imprisonment for life without benefit of probation or parole” to the list of available sentences in capital cases. H.B. 455, 1998 Gen. Assemb., Reg. Sess. (Ky. 1998) (effective July 15, 1998). Prior to this amendment, a jury would not have been able to ensure that a convicted defendant remained incarcerated for the remainder of his/her life without delivering a sentence of death, as the pre-1998 “sentence of life” option did not preclude the eventual probation or parole of the defendant.

⁶⁵ *Fields v. Commonwealth*, 274 S.W.3d 375, 420 (Ky. 2008), *overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64, 72 (Ky. 2010).

⁶⁶ KY. REV. STAT. ANN. § 532.075(6)(c) (West 2011).

data; it is the practice of the Court, however, not to make available any more information than what it includes in its official opinions, finding there is “no right to access [the] Court’s KRS 532.075 review data.”⁶⁷

Notwithstanding the absence of this right, the Kentucky Supreme Court seemed to suggest, when first asked by the Public Advocate for its KRS 532.075 review data, that it eventually would grant access to this information: “[T]he materials compiled . . . for this court pursuant to KRS 532.075(6),” wrote Chief Justice Palmore in *Ex parte Farley*, “will be open to the public . . . as soon as we have had the occasion and opportunity to examine and consider them ourselves.”⁶⁸ In the end, any analysis of the meaningfulness of the Kentucky Supreme Court’s proportionality review necessarily is limited due to the Court’s current practices respecting its review data.⁶⁹

Nonetheless, 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. The decision in *Foley v. Commonwealth* offers a typical example. After declaring that “[t]he death sentence was not disproportionate to the penalty imposed in similar sentences since 1970 considering both the crimes and the defendant,” which is an exact recitation of the statutory language,⁷⁰ and listing the cases considered, the Court stated, “[w]e have conducted an independent review of all the circumstances and conclude that they exceed any minimum justifying capital punishment.”⁷¹ Notably, the Kentucky Supreme Court has not overturned a death sentence on proportionality review since reinstatement of the death penalty in 1976.⁷²

To conclude, Kentucky law requires the Kentucky Supreme Court to perform proportionality review of death sentences, but this mandate has been interpreted by the Court to include only cases in which the death penalty was imposed. Proportionality review does not include cases in which the death penalty was sought but not imposed, nor cases in which the death penalty could have been but was not sought. The current review process also offers only minimal analysis.

⁶⁷ The first case in which the Public Advocate sought access to the Court’s proportionality review data was in 1978. *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978). A similar request was made as recently as June 2011. *Meece v. Commonwealth*, No. 2006–SC–000881–MR, 2011 WL 2433733 (Ky. June 16, 2011).

⁶⁸ *Ex parte Farley*, 570 S.W.2d at 627 (emphasis added). At the time the Kentucky Supreme Court decided *Farley*, these data were in the process of being compiled and were termed a “work-in-process.” *Id.* at 624.

⁶⁹ See *Epperson v. Commonwealth*, 197 S.W.3d 46, 63 (Ky. 2006) (“This Court does not use any secret data . . .”); *Harper v. Commonwealth*, 694 S.W.2d 665, 671 (Ky. 1985) (“We state in our opinions all matters considered by us, and in no way are mysterious and secret records or data taken into account in our deliberations.”).

⁷⁰ See KY. REV. STAT. ANN. § 532.075(3)(c) (West 2011) (“Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”).

⁷¹ *Foley v. Commonwealth*, 942 S.W.2d 876, 889–90 (Ky. 1996). See also *Hunt v. Commonwealth*, 304 S.W.3d 15, 52 (Ky. 2009) (“[T]he sentence is not disproportionate to the penalty imposed in similar cases since 1970 considering both the crime and the defendant.”); *Mills v. Commonwealth*, 996 S.W.2d 473, 495 (Ky. 1999) (noting the “particular[]” attention paid to “those [cases] in which a defendant was sentenced to death for intentional murders unaccompanied by other criminal behavior directed toward the victims”), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). But see *Fields v. Commonwealth*, 274 S.W.3d 375, 420 (Ky. 2008) (more thoroughly comparing the instant case to others in which the death penalty was imposed), *overruled on other grounds*, *Childers v. Commonwealth*, 332 S.W.3d 64, 72 (Ky. 2010).

⁷² The Kentucky Supreme Court has reversed death sentences for thirty-eight individuals on direct appeal. In some of these cases, the Court will not reach the issue of proportionality review having found a separate basis upon which to overturn the death sentence. See *Kentucky Death Sentences Imposed, Reversed & Commuted, 1976–2011*, *infra* Appendix.

Therefore, the Commonwealth of Kentucky is only in partial compliance with this Recommendation.

The Kentucky Death Penalty Assessment Team notes its difficulty in obtaining data on all death-eligible cases in the Commonwealth, a problem that would be rectified were the Commonwealth to establish a statewide database for collecting data on these cases. These data should include, at minimum, details on the race of the defendants and the victims, the circumstances of the crime, the nature and strength of the evidence, and—for those cases where the death penalty is sought—the aggravating and mitigating circumstances presented and established at trial. The creation of such a database would provide policymakers better information as they continue to assess Kentucky’s capital system—specifically, that system’s effectiveness and fairness. In turn, these data should be made available to the Kentucky Supreme Court for use in its statutorily mandated proportionality review.

Finally, the Assessment Team again emphasizes that the more thorough proportionality review recommended in this Chapter would no more usurp the charging and sentencing authorities of local prosecutors and juries than does the current proportionality review system. Indeed, the value and appropriateness of such a review was recognized long ago, both by the U.S. Supreme Court in *Gregg v. Georgia* and by Kentucky’s elected legislators through enactment of KRS 532.075(3)(c).⁷³ Broadening proportionality review to include additional, relevant cases would strengthen it and, thereby, better ensure it achieves its important ends.

⁷³ See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments is an integral part of the capital punishment review process. Significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims, claims made possible by the discovery of crucial new evidence, claims based upon prosecutorial misconduct, claims based on unconstitutional racial discrimination in jury selection, and other meritorious constitutional issues.

Collateral review is critically important to the fair administration of justice in capital cases. Because capital defendants may receive inadequate counsel at trial and on direct appeal, and because it is often impossible to uncover prosecutorial misconduct or other crucial evidence until after direct appeal, state post-conviction proceedings often provide the first opportunity to establish meritorious constitutional claims. Moreover, exhaustion and procedural default rules require the inmate to present such claims in state court before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Some federal restrictions include a one-year statute of limitations on federal habeas claims; tight restrictions on evidentiary hearings with respect to facts not presented in state court—irrespective of the justification for the omission—unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal court concludes that the state court’s ruling was erroneous.¹

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the harmless error doctrine.

These limitations on post-conviction relief, as well as the federal government’s defunding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal court. These changes, however, may have also resulted in an inability of death-row inmates to have valid claims heard on the merits in federal court.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to obtain state court rulings on the merits of valid claims of harmful constitutional error. The availability of numerous rounds of judicial review does not guarantee

¹ 28 U.S.C. §§ 2244, 2254 (2010).

that *any* court, state or federal, will rule on the merits of the inmate’s claims—even when compelling new evidence of innocence is discovered shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate’s constitutional claims.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

Post-conviction proceedings, including those initiated by death row inmates, generally are governed by Rule 11.42 of the Kentucky Rules of Criminal Procedure (RCr 11.42).² In addition, death row inmates may also seek post-conviction relief in Kentucky courts through Rule 60.02 of the Kentucky Rules of Civil Procedure (CR 60.02) and state habeas corpus relief.³ Rules 11.42, 60.02, and state habeas proceedings are discussed below. However, because RCr 11.42 is the primary means by which a death row prisoner may collaterally attack his/her conviction and sentence, the bulk of the factual discussion necessarily will focus on the procedures and law related to that provision.⁴

A. *Motions for Post-Conviction Relief Under RCr 11.42*

1. Filing and Content of an RCr 11.42 Motion

Any person who has been convicted of a criminal offense in Kentucky, including death row inmates, may petition the trial court in which the sentence was imposed “to vacate, set aside or correct” the judgment or sentence.⁵ The petitioner, in his/her original or amended motion, must “sign[] and verif[y]” the motion and allege all available grounds for post-conviction relief and specific facts that support those grounds, and “[f]ailure to comply with this [requirement] warrant[s] [] summary dismissal of the motion.”⁶

As the Kentucky Supreme Court has explained: “The requirement for a specific statement of facts [] means that the motion must contain ‘more than a shotgun allegation of complaints.’”⁷ It continued:

[T]he movant “has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding.” Without a “minimum factual basis,” the motion may be summarily overruled. Furthermore, RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to

² KY. R. CRIM. P. 11.42; *see also* *Fraser v. Commonwealth*, 59 S.W.3d 448, 451–56 (Ky. 2001) (describing the history and procedures of RCr 11.42).

³ CR 60.02 codifies, in large measure, the common-law writ of *coram nobis*. *See* *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983); John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265, 330–34 (1995) (“CR 60.02, in some ways, is even more limited than its common law predecessor”). State habeas corpus relief is guaranteed under the Kentucky Constitution and codified at KRS 419.020. KY. CONST. § 16; KY. REV. STAT. ANN. § 419.020 (West 2011).

⁴ A fourth avenue for collateral attack on a judgment in state court, Civil Rule 60.03, also exists, but it may not be invoked to relitigate an issue already decided in a CR 60.02 motion, nor may it be invoked to circumvent the statute of limitations that sometimes applies in the case of CR 60.02 relief. *See* KY. R. CIV. P. 60.02(a)–(c).

⁵ KY. R. CRIM. P. 11.42(1). *See also* KY. R. CRIM. P. 11.42(9) (requiring the transfer of all RCr 11.42 motions to “the court[s] in which the sentence[s] [were] imposed” if those motions have been addressed elsewhere).

⁶ KY. R. CRIM. P. 11.42(2).

⁷ *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005) (quoting *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993)), *overruled on other grounds by* *Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule.⁸

If the motion raises “a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record,” a hearing is required.⁹ A post-conviction court “may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.”¹⁰

Finally, in order for an inmate to avoid having an issue precluded for consideration in any post-conviction review process, s/he must, in the initial RCr 11.42 motion, “state all grounds for holding the sentence invalid of which [s/he] has knowledge.”¹¹ Furthermore, a post-conviction court may consider only those issues “that were not and could not be raised on direct appeal.”¹²

2. Time Limit for Filing an RCr 11.42 Motion

Generally, an inmate has three years “after the judgment becomes final” to file his/her initial RCr 11.42 motion.¹³ This three-year statute of limitations period “serves only as an outer time limit on the bringing of such actions”¹⁴ Therefore, a death row inmate whose execution date is set prior to the expiration of the RCr 11.42 statute of limitations may have substantially less time to file for post-conviction relief than an inmate not awaiting execution.¹⁵

An untimely or successive motion for relief under RCr 11.42 may be filed after the statute of limitations period if “the motion alleges and the movant proves” either of two exceptions:

- (a) [T]he facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (b) [T]he fundamental constitutional right asserted was not established within [three years after the judgment became final] and has been held to apply retroactively.¹⁶

For either of these exceptions to apply, the motion must be filed “within three years after the event establishing the exception occurred.”¹⁷ However, in response to any RCr 11.42 filing, the Commonwealth has available a defense of laches, i.e., if the inmate unreasonably delayed filing

⁸ *Mills*, 170 S.W.3d at 325.

⁹ *Fraser*, 59 S.W.3d at 452 (citing *Stanford*, 854 S.W.2d at 743–44); KY. R. CRIM. P. 11.42(5).

¹⁰ *Fraser*, 59 S.W.3d at 452 (citing *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir. 1971)).

¹¹ KY. R. CRIM. P. 11.42(3).

¹² *Mills*, 170 S.W.3d at 326 (Ky. 2005) (citing *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998)).

¹³ KY. R. CRIM. P. 11.42(10). A judgment becomes “final” when the direct appeal concludes, typically through a denial of certiorari by the U.S. Supreme Court. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000), *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

¹⁴ *Bowling v. Commonwealth*, 926 S.W.2d 667, 669 (Ky. 1996).

¹⁵ *Id.*

¹⁶ KY. R. CRIM. P. 11.42(10).

¹⁷ *Id.*

his/her motion and this delay prejudiced the Commonwealth's case, relief to the inmate may be denied.¹⁸

After the motion is filed, the clerk of the court must "notify the attorney general and the Commonwealth's attorney in writing" of this filing. The Commonwealth's attorney then must "serve an answer on the movant" within twenty days from the date on which the clerk mailed the notice.¹⁹

3. Trial Court Resolution of an RCr 11.42 Motion

If an RCr 11.42 motion is properly signed and verified, and if it specifies grounds and supporting facts that, if true, would warrant relief, then the trial court must "determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required."²⁰ The decision not to conduct an evidentiary hearing may be appealed to the appropriate state appellate court.²¹ Ultimately, "[t]he burden is upon the accused to establish convincingly that [s/]he was deprived of some substantial right [that] would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42."²²

4. Appeal of a Judgment on an RCr 11.42 Motion

Either the inmate or the Commonwealth may appeal an adverse judgment of the trial court in a proceeding brought under RCr 11.42.²³ The Kentucky Supreme Court retains exclusive jurisdiction over all appeals from death row petitioners.²⁴

On appeal, the trial court's decisions related to findings of fact and witness credibility are entitled to deference under an abuse-of-discretion standard.²⁵ By contrast, analysis of mixed questions of law and fact and conclusions of law will be reviewed *de novo*.²⁶

¹⁸ *Id.* See also BLACK'S LAW DICTIONARY 891 (8th ed. 1999) (defining *laches*). The Kentucky Supreme Court amended RCr 11.42 in 1994 to make explicit the long-recognized defense of laches in state post-conviction proceedings. See, e.g., *Wooten v. Commonwealth*, 473 S.W.2d 116, 117 (Ky. 1971) (holding that inmate was "too late," twenty-seven years after being convicted of murder, in claiming that the trial transcript contained inaccuracies and that a bill of exceptions was suppressed).

¹⁹ KY. R. CRIM. P. 11.42(4). Leave to amend either the motion or the answer is permitted consistent with the terms of CR 15.01. *Bowling*, 926 S.W.2d at 670. CR 15.01 states that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." KY. R. CIV. P. 15.01

²⁰ *Fraser*, 59 S.W.3d at 452.

²¹ See, e.g., *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005) (finding that "the trial court . . . erroneously held that Appellant's motion should be dismissed because the record did not prove the allegations in his motion, not because the record conclusively disproved those allegations" (emphasis in original)).

²² *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

²³ See KY. R. CRIM. P. 12.04; *Moore v. Commonwealth*, 199 S.W.3d 132, 134–35 (Ky. 2006).

²⁴ KY. R. CIV. P. 74.02(2) ("The filing of a notice of appeal in a case in which a death penalty has been imposed will automatically serve to transfer the appeal to the [Kentucky] Supreme Court."); *Leonard*, 279 S.W.3d at 155 ("This Court has exclusive appellate jurisdiction over death penalty matters, even when the appeal involves a collateral attack on a sentence of death."). See also *Skaggs v. Commonwealth*, 803 S.W.2d 573, 577 (Ky. 1990) ("[T]he Court of Appeals is without authority to review any matter affecting the imposition of the death sentence.").

²⁵ *Sanborn*, 975 S.W.2d at 909 (citing *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986)).

If the trial court declined to hold an evidentiary hearing and the inmate appeals this decision, appellate review “is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.”²⁷ In the event the Kentucky Supreme Court affirms the trial court judgment, the inmate may file a request for certiorari with the U.S. Supreme Court.²⁸

5. Typical Claims in an RCr 11.42 Motion

An RCr 11.42 motion “provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal.”²⁹ Among the claims often raised through RCr 11.42 is that trial counsel provided ineffective assistance constituting a denial of his/her rights under the Sixth and Fourteenth Amendments of the federal constitution and section 11 of the Kentucky Constitution.³⁰

For an inmate to succeed on a claim of ineffective assistance of trial counsel, s/he must show that counsel’s performance was deficient and that this deficient performance prejudiced the defense.³¹ Counsel’s performance will be deemed deficient if it “fell below an objective standard of reasonableness” to such an extent that, as a consequence of counsel’s egregious errors, s/he no longer was “functioning as the ‘counsel’ guaranteed the [inmate] by the Sixth Amendment.”³² If an inmate’s allegations of ineffective assistance are deemed to have occurred as a result of “reasonable trial strategy,” s/he will be denied relief.³³ As to the prejudice requirement, an inmate must establish that the deficient performance of trial counsel “was so prejudicial” that the inmate had “been deprived ‘of a fair trial and reasonable result.’”³⁴ Elaborating on these requirements, the Kentucky Supreme Court has noted that “[c]ounsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.”³⁵

²⁶ *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (observing that “both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact,” but that “the reviewing court must defer to the determination of facts and credibility made by the trial court”); *Hodge v. Commonwealth*, 2011 WL 3805960, at *3 (Ky. Aug. 25, 2011).

²⁷ *Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

²⁸ 28 U.S.C. § 1257 (2010); *see also* *Sears v. Upton*, 130 S. Ct. 3259, 3261 n.1 (2010) (“Although this is a state-court [post-conviction] decision, it resolved a federal issue on exclusively federal-law grounds. We therefore have jurisdiction. 28 U.S.C. § 1257 . . .”).

²⁹ *Gross*, 648 S.W.2d at 856.

³⁰ *Strickland v. Washington*, 466 U.S. 668 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 38 (Ky. 1985).

³¹ *Strickland*, 466 U.S. at 687; *accord* *Gall*, 702 S.W.2d at 39–40. The Kentucky Supreme Court has, on occasion, succinctly referred to the standard set forth in *Strickland* as the “deficient-performance plus prejudice” test. *See, e.g.,* *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010).

³² *Strickland*, 466 U.S. at 687. *See also* *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007).

³³ *Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002).

³⁴ *Bussell*, 226 S.W.3d at 103 (quoting *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001)).

³⁵ *Id.* (quoting *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)). *See also* *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006) (“*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination.”).

Resolving both prongs of this “deficient-performance plus prejudice” test generally requires a more thorough record than is presented by the trial record.³⁶ Consequently, the Kentucky Supreme Court has recognized a clear preference for raising ineffective assistance of trial counsel claims in post-conviction motions.³⁷

Through the Kentucky Supreme Court’s recent decision in *Hollon v. Commonwealth*, claims of ineffective assistance of *appellate* counsel also are now cognizable in an RCr 11.42 proceeding. However, this ruling is not applicable to cases finalized prior to *Hollon*.³⁸ The Kentucky Supreme Court has emphasized, however, that where an inmate asserts that appellate counsel performed deficiently due to “failure to raise a particular issue on direct appeal,” the inmate must “overcom[e] a strong presumption that appellate counsel’s choice of issues to present to the appellate court was a reasonable exercise of appellate strategy.”³⁹

A claim that counsel was ineffective in a previous *post-conviction proceeding* is not a valid basis for relief in a successive RCr 11.42 motion.⁴⁰ The only exception to this broadly stated rule is that inmates who qualify for state-funded counsel during post-conviction proceedings must be provided with counsel of “some modicum of competency.”⁴¹ Therefore, if the petitioner was denied outright an opportunity to appeal the trial court’s denial of his/her RCr 11.42 motion due to the error of his/her counsel, the Kentucky Supreme Court may reinstate the appeal.⁴²

6. Appointment of Counsel and Provision of Expert and Other Services

A death row inmate is not entitled to counsel to assist in preparing his/her RCr 11.42 motion for post-conviction relief. If an evidentiary hearing is deemed necessary to resolve “a material issue of fact that cannot be determined on the face of the record,” then an inmate will be entitled to state-funded counsel only if s/he is indigent and requests, in writing, the appointment of such counsel.⁴³ Furthermore, “a trial judge has no duty to [appoint counsel] *sua sponte*,” although s/he does have the discretion to, of his/her own volition, appoint counsel “at any stage of the proceedings.”⁴⁴

³⁶ *Leonard*, 279 S.W.3d at 158 n.3.

³⁷ *Id.* (“[A]s it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings . . . where a proper record can be made.”).

³⁸ *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010). Prior to *Hollon*, death row inmates alleging ineffective assistance of appellate counsel routinely were denied relief based on these claims. *See, e.g., Stanford*, 854 S.W.2d at 745; *McQueen v. Commonwealth*, 949 S.W.2d 70, 70–71 (Ky. 1997); *Parrish v. Commonwealth*, 272 S.W.3d 161, 173 (Ky. 2008).

³⁹ *Hollon*, 334 S.W.3d at 436–37 (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

⁴⁰ *Id.* at 437 (“[I]neffective assistance of appellate counsel] claims are limited to counsel’s performance on direct appeal; there is no counterpart for counsel’s performance on RCr 11.42 motions or other requests for post-conviction relief.”).

⁴¹ *Moore*, 199 S.W.3d at 139 (quotations omitted).

⁴² *Id.* at 135.

⁴³ KY. R. CRIM. P. 11.42(5); *Fraser*, 59 S.W.3d at 453.

⁴⁴ *Fraser*, 59 S.W.3d at 453 (citing *Beecham v. Commonwealth*, 657 S.W.2d 234, 237 (Ky. 1983)).

If counsel is appointed, s/he will represent the inmate throughout review of his/her RCr 11.42 motion, as well as during any subsequent appeal from the trial court's decision.⁴⁵ However, if appointed counsel and the court jointly determine that the post-conviction review "is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, [the inmate] has no further right to be represented by counsel."⁴⁶ Separately, an inmate also may be entitled to state funds "for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner's case."⁴⁷ A separate hearing may be held by the trial court to determine if this testimony is, in fact, "reasonably necessary."⁴⁸

Specifically with respect to death row inmates, the Department of Public Advocacy (DPA) typically provides counsel to these inmates prior to and throughout *all* their post-conviction proceedings.⁴⁹ DPA ordinarily begins preparing a death row inmate's RCr 11.42 motion before that inmate's direct appeal becomes final.⁵⁰ Furthermore, it is departmental policy that two public defenders represent a death row inmate during all state post-conviction proceedings, including the filing of the inmate's initial RCr 11.42 petition.⁵¹ This state-funded, elective representation by DPA has been upheld by the Kentucky Supreme Court as consistent with Kentucky statutory law.⁵²

B. Motions for Post-Conviction Relief under Rule of Civil Procedure 60.02

Relief under Kentucky Rule of Civil Procedure 60.02 (CR 60.02) is "special" and "extraordinary"⁵³ and "is not intended merely as an additional opportunity to relitigate the same issues [that] could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings."⁵⁴ As with a motion under RCr 11.42, an inmate who seeks relief under CR 60.02

⁴⁵ KY. REV. STAT. ANN. § 31.110(2)(b) (West 2011).

⁴⁶ KY. REV. STAT. ANN. § 31.110(2)(c) (West 2011).

⁴⁷ *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008).

⁴⁸ *Mills*, 268 S.W.3d at 367.

⁴⁹ Telephone Interview by Sarah Turberville with Marguerite Thomas, Post Conviction Branch Manager, Kentucky Department of Public Advocacy, March 18, 2010 (on file with author).

⁵⁰ Interview with Marguerite Thomas, *supra* note 49; Interview by Sarah Turberville and Paula Shapiro with the Department of Public Advocacy, June 14, 2010 (on file with author). In certain circumstances, an inmate may properly file an RCr 11.42 petition *before* his/her direct appeal has become final. *Wilson v. Commonwealth*, 761 S.W.2d 182, 184–85 (Ky. App. Ct. 1988) (non-capital case) (holding that a prisoner may raise, in an RCr 11.42 motion, claims independent of his/her pending direct appeal, provided those claims would not "properly [be] the subject of the [prisoner's] direct appeal" and are supported "by proper factual allegations").

⁵¹ KY. DEP'T OF PUB. ADVOCACY, POLICIES AND PROCEDURES, *Qualification and Compensation of Counsel in Contract Capital Cases* § 17.20(I)(C) (revised Jan. 1, 2008) ("Two Attorneys shall be assigned to all Death Penalty Cases."); Interview with Marguerite Thomas, *supra* note 49.

⁵² *Fraser*, 59 S.W.3d at 456.

⁵³ *Gross*, 648 S.W.2d at 856.

⁵⁴ *McQueen*, 949 S.W.2d at 416 (quoting *Gross*, 648 S.W.2d at 856) (emphasis added). In describing the relationship between CR 60.02 and RCr 11.42, the Kentucky Supreme Court has stated that "[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete." *Gross*, 648 S.W.2d at 856. It appears, however, that some of the bases for which CR 60.02 offers relief partly overlap with the two exceptions allowing for untimely or successive RCr 11.42 motions. Compare KY. R. CIV. P. 60.02 ("a court may . . . relieve a party . . . from its final judgment . . . upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered [within ten days after the entry of the judgment]") with KY. R. CRIM. P. 11.42(10)(a) ("[Any motion under this rule may be filed

must demonstrate why s/he is entitled to that relief.⁵⁵ The inmate “must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.”⁵⁶

The rule delineates six bases for which relief “from [a] final judgment, order, or proceeding” is offered. Those bases are; “(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered [within ten days after the entry of the judgment]; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void . . . ; [and] (f) any other reason of an extraordinary nature justifying relief.”⁵⁷ The first three bases for relief are subject to a one-year statute of limitations as measured from the date “the judgment, order, or proceeding was entered or taken.”⁵⁸ The remaining three bases are not subject to any specified statute of limitations.⁵⁹ In addition, any motion filed under CR 60.02 must “be made within a reasonable time.”⁶⁰ In *Bowling v. Commonwealth*, the Kentucky Supreme Court also found that an inmate may seek relief through CR 60.02 when a judgment is no longer valid because it “violates a constitutional right that was not recognized as such when the judgment was entered.”⁶¹ Ultimately, an “alleged constitutionally impermissible act” will not, if established, guarantee relief to the inmate, for all CR 60.02 bases for relief are “subject to the qualification that there must be circumstances of an extraordinary nature justifying [that] relief.”⁶² If the trial court receiving the motion decides to deny that motion—with or without conducting an evidentiary hearing—that decision will be reviewed under an abuse-of-discretion standard.⁶³

No inmate is entitled to state-funded counsel in preparing or prosecuting his/her CR 60.02 motion.⁶⁴

C. Pleadings for Post-Conviction Relief on State Habeas Corpus Grounds

In rare circumstances, an inmate may receive relief under the Commonwealth’s constitutionally and statutorily authorized writ of habeas corpus.⁶⁵ If a petitioner challenges the legality of

later than three years after the judgment becomes final only if the motion alleges and the movant proves] that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence[.]”).

⁵⁵ *Gross*, 648 S.W.2d at 856.

⁵⁶ *Id.*

⁵⁷ KY. R. CIV. P. 60.02.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Bowling*, 163 S.W.3d at 364–65. *See also Gross*, 648 S.W.2d at 857 (“Claims alleging that convictions were obtained in violation of constitutionally protected rights do not fit any of [CR 60.02’s six bases] except the last one, ‘any other reason of an extraordinary nature justifying relief.’”). *But see Leonard*, 279 S.W.3d at 161–62 (“A change in the law simply is not grounds for CR 60.02 relief except in ‘aggravated cases where there are strong equities.’”) (quoting *Reed v. Reed*, 484 S.W.2d 844, 847 (Ky. 1972)).

⁶² *Gross*, 648 S.W.2d at 857. *Accord Copeland v. Commonwealth*, 415 S.W.2d 842, 843 (Ky. 1967) (because inmate “could and should have [] raised [the issue] at . . . trial,” inmate is not entitled to relief under CR 60.02 for the alleged constitutional violation of not having been provided counsel during the taking of a plea).

⁶³ *Brown v. Commonwealth*, 932 S.W.2d 359, 362–63 (Ky. 1996); *Gross*, 648 S.W.2d at 857.

⁶⁴ *Gross*, 648 S.W.2d at 857 (“[W]e do not believe that it was the intent of the legislature to include CR 60.02 proceedings in the language of KRS 31.110 . . .”).

his/her detention by arguing that the judgment is void, then s/he properly may seek the writ.⁶⁶ However, “[h]abeas corpus . . . is only available when other relief is inadequate.”⁶⁷

There is some partial overlap in the functions performed by RCr 11.42, CR 60.02, and state habeas corpus. For example, in *Commonwealth v. Marcum* the Kentucky Supreme Court held that, although the inmate could have filed an RCr 11.42 motion in lieu of his pleading for a state writ of habeas corpus, “the prompt relief available by [the] writ” was appropriate “for a prisoner who [could] establish in a summary procedure that the judgment by which he [was] detained [was] void *ab initio*.”⁶⁸

While an evidentiary hearing may be held to investigate an inmate’s claims presented in his/her RCr 11.42 or CR 60.02 motion, KRS 419.100 also specifically permits a court entertaining a pleading for a writ of habeas corpus to “produce[] and compel[]” evidence “as in civil actions.”⁶⁹ However, “[s]ummary disposition,” such as immediate issuance of a writ of habeas corpus to provide relief to the petitioner, “is indispensable where an outrage is obvious and formality needs to be stripped away.”⁷⁰ Thus, if a pleading for habeas corpus relief contains merely “sketchy proof,” then the issuance of the writ would be inappropriate—instead, a petitioner ought to avail himself/herself of alternative post-conviction proceedings, through which proceedings s/he may better establish the factual bases for the claims asserted.⁷¹

D. Review of Error

If a post-conviction court identifies an error in the trial, direct appeal, or other post-conviction proceedings, it may deny relief because the error is deemed harmless.⁷² If the error involves an inmate’s constitutional rights, however, the error generally will not be held harmless unless the post-conviction court finds that “there is no reasonable possibility that it contributed to the

⁶⁵ See KY. CONST. § 16; KY. REV. STAT. ANN. § 419.020 (West 2011).

⁶⁶ *Commonwealth v. Marcum*, 873 S.W.2d 207, 210 (Ky. 1994) (quoting *Smith v. Henson*, 182 S.W.2d 666, 668 (Ky. 1944)).

⁶⁷ *Lear v. Commonwealth*, 884 S.W. 2d 657, 660 (Ky. 1994) (citing *Gray v. Wingo*, 423 S.W.2d 517 (Ky. 1968)). See also *Smith v. Henson*, 182 S.W.2d 666, 667 (Ky. 1944) (“Ordinarily the writ will not be granted where there is another adequate remedy.”).

⁶⁸ *Marcum*, 873 S.W.2d at 212. In *Marcum*, the trial judge entered a new judgment enhancing petitioner’s sentence from five years to ten years—based on petitioner’s status as a first-degree persistent felony offender—nearly eight weeks after entering the final judgment. The second judgment was void because the trial court was without jurisdiction to amend the judgment eleven or more days “after the entry of the final judgment.” *Id.* at 211 (quotations omitted).

⁶⁹ KY. REV. STAT. ANN. § 419.100 (West 2011). Furthermore, “[d]epositions taken in accordance with the provisions of the Rules of Civil Procedure may be read as evidence at the hearing on the writ.” *Id.*

⁷⁰ *Fryrear v. Parker*, 920 S.W.2d 519, 522 (Ky. 1996).

⁷¹ *Id.*

⁷² See KY. R. CRIM. P. 9.24 (requiring relief for errors occurring during trial only if “the denial of such relief would be inconsistent with substantial justice”); *Talbott v. Commonwealth*, 968 S.W.2d 76, 83–84 (Ky. 1998) (“The fact that an error involves a constitutional right does not preclude harmless error analysis.”) (citing *Chapman v. California*, 386 U.S. 18 (1967)). But see *Quarels v. Commonwealth*, 142 S.W.3d 73, 80 (Ky. 2004) (distinguishing so-called *trial errors* from *structural errors*—e.g., denial of the right to self-representation, deprivation of the right to counsel, biased judge—which “affect[] the entire framework of the trial and therefore def[y] harmless error analysis”); *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (distinguishing trial errors from structural errors).

conviction.”⁷³ In other words, the constitutional error must be harmless beyond a reasonable doubt.⁷⁴ As the beneficiary of the error, the Commonwealth generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict or sentence.⁷⁵ However, certain claims of constitutional error—e.g., ineffective assistance of counsel claims and *Brady*⁷⁶ claims—place the burden on the petitioner to show prejudice in order to demonstrate constitutional error.⁷⁷

E. Retroactivity of New Rules

If a new constitutional rule is established after a death row inmate’s conviction is final, s/he may petition for post-conviction relief. This includes filing an untimely or successive motion for relief under RCr 11.42, provided the rule has been held to apply retroactively.⁷⁸ Changes in the law that amount to a new rule will not be given retroactive effect unless the rule (1) “places certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe”; or (2) “requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.”⁷⁹ All other new rules of criminal procedure will be applied only to those cases still on direct appeal. This is in accordance with the U.S. Supreme Court’s general presumption against retroactively applying new rules.⁸⁰

⁷³ *Anderson v. Commonwealth*, 231 S.W.3d 117, 122 (Ky. 2007).

⁷⁴ *Talbott*, 968 S.W.2d at 84; *see also* *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n.1 (Ky. 2009) (“[T]he ‘no reasonable possibility’ test is the harmless-error standard applicable to constitutional errors and is the equivalent of the ‘harmless beyond a reasonable doubt’ standard announced by the United States Supreme Court in [*Chapman*].”).

⁷⁵ *Chapman*, 386 U.S. at 24.

⁷⁶ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

⁷⁷ *See, e.g., Gall*, 702 S.W.2d at 39–40 (applying the test of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether trial counsel provided ineffective assistance, which test requires that the defendant “show that the deficient performance prejudiced the defense”); *Smith v. Commonwealth*, 2008 WL 4683025, at *2 (Ky. App. Ct. Oct. 28, 2008) (“In the absence of any showing of prejudice, any *Brady* violation was at most harmless error.”); *Jones v. Commonwealth*, 2007 WL 1575308, at *5 (Ky. App. Ct. June 1, 2007) (finding that appellant “failed to meet any of [the three components of a true *Brady* violation],” including that “prejudice must have ensued” from the prosecution’s failure to disclose exculpatory evidence) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)).

⁷⁸ KY. R. CRIM. P. 11.42(10).

⁷⁹ *Leonard*, 279 S.W.3d at 159 (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). *See also id.* at 159–60 (“*Teague* is not binding on the states if they choose to broaden the class of retroactively applicable rules . . . [n]or is *Teague* binding as to a new rule grounded solely in state law (as opposed to the federal constitution). . . . Under [*Bowling*, 163 S.W.3d at 361], Kentucky’s constitutional retroactivity rule is no broader than that employed by the federal courts.”).

⁸⁰ *Leonard*, 279 S.W.3d at 160 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

II. ANALYSIS

A. 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.

Certain aspects of Kentucky law governing post-conviction proceedings assist in the adequate development and judicial consideration of a death row inmate's claims—e.g., post-conviction relief is available through RCr 11.42 and, in extenuating circumstances, CR 60.02 or state-court issuance of a writ of habeas corpus. However, other aspects raise serious concerns as to the fairness and thoroughness of post-conviction proceedings.

Summary Dismissal of Post-Conviction Claims

RCr 11.42 specifically permits judges to dismiss motions for post-conviction relief without conducting an evidentiary hearing.⁸¹ This occurs principally in two situations: (1) The motion fails to “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds”; or (2) any material issue of fact raised by the Commonwealth's answer to the motion “can[] be determined on the face of the record.”⁸² Specificity in the motion is critical “because RCr 11.42 does not require a hearing to serve the function of discovery,”⁸³ nor is any presumption given in favor of the inmate as to those facts omitted from the motion.⁸⁴ On the other hand, “extrinsic proof is not necessary for an RCr 11.42 motion.”⁸⁵

A trial court's decision not to conduct an evidentiary hearing and, therefore, to deny a petitioner relief under RCr 11.42 regularly is appealed. In determining whether this decision was justified—that is, whether an evidentiary hearing was necessary—a petitioner must make two showings:

⁸¹ KY. R. CRIM. P. 11.42(2), (5). Both the U.S. Supreme Court and the Kentucky Supreme Court have found constitutional a state court's refusal “to conduct an evidentiary hearing on claims of ineffective assistance of counsel” when an inmate's petition presents “nothing other than conclusionary statements.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 393–94 (Ky. 2002) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

⁸² KY. R. CRIM. P. 11.42(2), (5).

⁸³ *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003) (citing *Stanford*, 854 S.W.2d at 742), *overruled on other grounds by Leonard*, 279 S.W.3d at 159; *see also Sanders*, 89 S.W.3d at 385 (Ky. 2002) (citing *Sanborn*, 975 S.W.2d at 905, *overruled on other grounds by Leonard*, 279 S.W.3d at 159). In *Sanborn*, the Kentucky Supreme Court observed that “the purpose of an RCr 11.42 motion is to provide a forum for known grievances and not an opportunity to conduct a fishing expedition for potential grievances.” *Sanborn*, 975 S.W.2d at 910 (citing *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983)).

⁸⁴ *Sanders*, 89 S.W.3d at 393 (citing *Skaggs v. Redford*, 844 S.W.2d 389 (1992)).

⁸⁵ *Mills*, 170 S.W.3d at 325, *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

First, [s/he] must show that [s/]he is entitled to relief under the rule. This can be done by showing that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. Second, the movant must show that the motion raises an issue of fact that cannot be determined on the face of the record.⁸⁶

It is not uncommon for the judges of an appellate court to disagree as to whether an evidentiary hearing is warranted.⁸⁷ The majority and dissenting opinions in *Sanders v. Commonwealth* offer an illustration for how judges perceive differently “the face of the record”: In discussing a petitioner’s RCr 11.42 claim that trial counsel had failed to provide effective assistance during the penalty phase, a majority of the Kentucky Supreme Court in *Sanders* summarily held that “the reasonableness of the performance of defense counsel can easily be determined from the trial record without an evidentiary hearing.”⁸⁸ The dissent, however, reviewed the same petition and concluded that “[a]n evidentiary hearing is necessary to determine whether counsel’s actions were strategic or incompetent.”⁸⁹ Likewise, in the non-capital case of *Fraser v. Commonwealth*, a divided Kentucky Supreme Court held that “[a]n evidentiary hearing on [the petitioner’s] RCr 11.42 motion [was] required.”⁹⁰

Relatedly, the fact that “discovery is not authorized in [] post-conviction proceeding[s]”⁹¹ enhances the likelihood that meritorious claims for relief will be summarily dismissed, as inmates may be unable to obtain information necessary for raising certain material issues of fact.⁹² Proceedings in which an evidentiary hearing is denied and/or discovery refused can prevent potentially meritorious claims from being brought to light. For example, absent an evidentiary hearing on post-conviction review, John Mills would not have been able to establish the discovery violation that tainted the Commonwealth’s capital case against him⁹³ or the fact that Mills’ “trial counsel [had] abdicated his role as advocate and provided ineffective assistance of counsel during the penalty phase of [the] trial”⁹⁴—a hearing initially refused Mills by the trial court.⁹⁵

⁸⁶ *Mills*, 170 S.W.3d at 325–26 (quotations omitted).

⁸⁷ *See, e.g., Fraser*, 59 S.W.3d at 458 (Wintersheimer, J., dissenting, without separate opinion); *Baze*, 23 S.W.3d at 628–29 (Stumbo, J., dissenting), *overruled on other grounds by Leonard*, 279 S.W.3d at 159; *Davis*, 14 S.W.3d at 15 (Stumbo, J., dissenting). *See also Bowling*, 163 S.W.3d at 387–88 (Keller, J., dissenting) (in a collateral action brought under CR 60.02 but analyzed pursuant to CR 60.03, which provides litigants “an independent action to relieve [themselves] from a judgment, order or proceeding on appropriate equitable grounds,” arguing that the available evidence “creates sufficient doubt to warrant a hearing”).

⁸⁸ *Sanders*, 89 S.W.3d at 394.

⁸⁹ *Id.* at 395 (Stumbo, J., dissenting).

⁹⁰ *Fraser*, 59 S.W.3d at 457–58 (quotations omitted); *id.* at 458 (Wintersheimer, J., dissenting without separate opinion).

⁹¹ *Haight*, 41 S.W.3d at 445, *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

⁹² For further discussion pertaining to discovery during Commonwealth post-conviction proceedings, *see infra* notes 110–123 and accompanying text.

⁹³ *Mills v. Commonwealth*, No. 95-CR-00098, slip op. at 17 (Knox, Ky. Cir. Ct. Aug. 16, 2011) (on file with author). This discovery violation, pertaining to a fingerprint report “not provided to the Commonwealth or [Mills’] trial counsel,” ultimately was deemed non-prejudicial. *Id.*

⁹⁴ *Id.* at 33.

⁹⁵ *See Mills*, 170 S.W.3d at 340 (reversing the trial court’s summary overruling of inmate’s RCr 11.42 motion).

In at least sixteen capital cases, death row inmates have been denied an evidentiary hearing after filing for post-conviction relief following finalization of their conviction and sentence on direct appeal.⁹⁶

Whenever there is any doubt as to whether an evidentiary hearing would facilitate full judicial consideration of an inmate's petition, it should be resolved in favor of holding a hearing. This call for an evidentiary hearing whenever a post-conviction trial court perceives there to be any merit to an inmate's post-conviction claims absent clear evidence that the claim is frivolous, not supported by existing law, or that the record undisputedly rebuts the claim. Moreover, authorizing discovery during post-conviction review also better facilitates judicial consideration of post-conviction claims—a result all the more critical in light of the truncated time period in which death row inmates must prepare their petitions.

The Effect of Setting an Execution Date

The timeline for filing a post-conviction petition is three years from the date of finality, unless:

- (a) [T]he facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (b) [T]he fundamental constitutional right asserted was not established within the [statute of limitations] period . . . and has been held to apply retroactively.⁹⁷

With respect to new rules arising from federal or Commonwealth sources, the Kentucky Supreme Court has adopted the same test for determining retroactivity as is used by the federal courts—that is, the Kentucky Supreme Court has declined to apply a more generous rule of retroactivity.⁹⁸ Consequently, the Court generally disfavors retroactive application of new rules to cases that have reached finality, i.e., that no longer are on direct review. It has, however, shown a willingness to modify its determination of finality in certain circumstances: In *Leonard v. Commonwealth*, the Court recognized that one specific new rule announced earlier in *Martin v. Commonwealth* pertained to “procedures within the collateral attack” and that finality would, therefore, be more fairly measured from the date on which the initial post-conviction review

⁹⁶ See *Baze*, 23 S.W.3d at 622; *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998); *Hodge v. Commonwealth*, 68 S.W.3d 338, 341 (Ky. 2001) (concerning the cases of Benny Lee Hodge and Roger Dale Epperson); *Haight*, 41 S.W.3d at 442; *Harper v. Commonwealth*, 978 S.W.2d 311, 313 (Ky. 1998); *Johnson v. Commonwealth*, 2008 WL 4270731, at *7 (Ky. Sept. 18, 2008); *Mills*, 170 S.W.3d at 320; *Parrish*, 272 S.W.3d at 166; *Sanders v. Commonwealth*, 89 S.W.3d 380, 384–85 (Ky. 2002); *Skaggs*, 803 S.W.2d at 574, 576; *Stanford*, 854 S.W.2d at 743–44; *Stopher v. Commonwealth*, 2006 WL 3386641, at *1 (Ky. Nov. 22, 2006); *Thompson v. Commonwealth*, 2010 WL 4156756, at *1 (Ky. Oct. 21, 2010); *Wheeler v. Commonwealth*, 2008 WL 5051579, at *1 (Ky. Nov. 26, 2008); *Woodall v. Commonwealth*, 2005 WL 3131603, at *2 (Ky. Nov. 23, 2005).

⁹⁷ KY. R. CRIM. P. 11.42(10). An inmate has three years “after the event establishing the exception” to file his/her RCr 11.42 motion, and, whatever the effect of these exceptions, the Commonwealth retains the defense of laches “to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth’s opportunity to present relevant evidence to contradict or impeach the movant’s evidence.” *Id.*

⁹⁸ See *Leonard*, 279 S.W.3d at 159–60 (citing *Danforth v. Minnesota*, 552 U.S. 264 (2008) (holding that state courts may give broader effect to new rules of criminal procedure than is required by *Teague*, 489 U.S. at 288)). See also *infra* notes 176–195 and accompanying text.

concluded.⁹⁹ The Kentucky Assessment Team commends the Kentucky Supreme Court for this flexibility in softening the deadline for filing a post-conviction petition.

Also worthy of commendation are the Kentucky Supreme Court's decisions to reinstate the appeals of John Mills and Douglas Hawkins, both of whom were denied relief under RCr 11.42. Although the facts in those cases were extraordinary,¹⁰⁰ the Court nevertheless should be applauded for exercising discretion to ensure that Mills' and Hawkins' post-conviction claims would be adjudged on the merits, rather than dismissed due to a procedural technicality.

However, far less encouraging is the Court's treatment, in death penalty cases, of the three-year statute of limitations period provided for in RCr 11.42.¹⁰¹ "This provision," the Court held, "serves only as an outer time limit on the bringing of such actions and in no way affects the prerogatives of the Governor with respect to enforcement of criminal judgments."¹⁰² In other words, if an execution date is set prior to the expiration of the RCr 11.42 statute of limitations period, this effectively limits a death row inmate's time to prepare and file his/her post-conviction petition, a limitation not imposed on inmates petitioning for post-conviction relief who are not awaiting execution.¹⁰³ Particularly in light of the complexity that attends capital cases, an abbreviated period to prepare and file a petition for post-conviction relief may result in less thorough consideration being given to a death row inmate's valid claims for post-conviction relief.

The Court also rejected the use of intent-to-file motions that would enable courts to issue restraining orders or temporary injunctions against the carrying out of a death sentence while an inmate further prepares his/her RCr 11.42 motion.¹⁰⁴ While it technically is possible for a death row inmate to file a less-than-complete RCr 11.42 motion with the expectations that (1) later amendments would be accepted by the court and (2) the imminent death sentence would be forestalled because, a motion having been filed, the court is able to enjoin the state from carrying out the execution, the success of such a maneuver relies exclusively on the discretion of the trial

⁹⁹ *Leonard*, 279 S.W.3d at 160. *Martin* recognized that an ineffective assistance of counsel claim is distinct from an underlying claim of direct error. Therefore, a post-conviction petitioner could raise an ineffective assistance of counsel claim based upon that direct error. *Id.* at 157.

¹⁰⁰ Specifically, in *Mills v. Commonwealth*, the Court "decline[d] to use [] a technical understanding of the rules to deny [Mills'] appeal of his RCr 11.42 motion, which challenge[d] his *sentence of death . . .*" *Mills*, 170 S.W.3d at 323 (emphasis in original). Likewise, Hawkins' appeal from an adverse decision under RCr 11.42 was reinstated after counsel mistakenly filed a notice of appeal with the wrong circuit court—this despite there being no right to effective assistance of counsel during post-conviction review. *Moore*, 199 S.W.3d at 139.

¹⁰¹ KY. R. CRIM. P. 11.42(10).

¹⁰² *Bowling*, 926 S.W.2d at 669.

¹⁰³ *See, e.g., Bowling*, 926 S.W.2d at 668 (in the case of Thomas Bowling, 486 days between date of finality and execution date); *id.* (in the case of Charles Bussell, 345 days between date of finality and execution date); *id.* (in the case of Parramore Sanborn, 122 days between date of finality and execution date). *See also* Michael Collins, *Signature Could Speed Executions*, KY. POST, Jan. 4, 1996, at 2K (recounting Kentucky Governor Paul Patton's decision to set execution dates for the express purpose of compelling death row inmates "to pursue their appeals"). It should be noted that in none of the three cases cited in this footnote—the cases of Thomas Bowling, Charles Bussell, and Parramore Sanborn—was the execution carried out on the date set. Faced with a looming execution date, the inmates made a timely, if less thoroughly prepared, post-conviction filing, and this led to a temporary stay of execution in their cases.

¹⁰⁴ *Bowling*, 926 S.W.2d at 669 ("We do not find the filing of any 'pre-RCr 11.42 motions,' however styled, sufficient to invest the circuit court with the power to grant a stay of execution.").

court. Moreover, if the trial court were not so accommodating, the motion could be summarily dismissed for failing to “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds,”¹⁰⁵ with “all issues that could reasonably have been presented in [that] proceeding” precluded from further consideration.¹⁰⁶

Finally, even if an RCr 11.42 motion or other petition for post-conviction relief is pending before a trial court, a stay of execution is not required.¹⁰⁷ Nevertheless, Commonwealth courts can and routinely do issue restraining orders and temporary injunctions once a death row inmate files a post-conviction motion or pleading for a writ of habeas corpus.¹⁰⁸ If the inmate’s motion is overruled by the trial court or if s/he otherwise fails to obtain relief, this temporary stay of execution continues until the appeals process concludes.¹⁰⁹ At minimum, the Commonwealth of Kentucky ought to adopt a similar rule guaranteeing a stay while a trial court considers a death row inmate’s post-conviction petition.

Conclusion

Recommendation #1 requires all post-conviction proceedings at the trial court level to be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. The aspects of the Commonwealth’s post-conviction proceedings explored above, however, raise serious concerns as to the fairness and thoroughness of this review. Thus, the Commonwealth of Kentucky’s post-conviction framework only partially complies with the requirements of Recommendation #1.

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. Furthermore, Kentucky should permit adequate time for counsel to fully research and prepare all meritorious post-conviction claims in death penalty cases, at least equivalent to that afforded to inmates not awaiting execution.

¹⁰⁵ KY. R. CRIM. P. 11.42(2).

¹⁰⁶ KY. R. CRIM. P. 11.42(3).

¹⁰⁷ See KY. R. CIV. P. 65.03(1) (“[a] restraining order *may* be granted at the commencement of an action, or during the pendency thereof”) (emphasis added), 65.04(1) (“[a] temporary injunction *may* be granted during the pendency of an action or motion”) (emphasis added).

¹⁰⁸ See *Bowling*, 926 S.W.2d at 669–70.

¹⁰⁹ KY. R. CRIM. P. 12.76(1) (“A sentence of death shall be stayed pending review by an appellate court . . .”).

B. 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.

Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

In Kentucky, “discovery is not authorized in a post-conviction proceeding.”¹¹⁰ The Kentucky Supreme Court also has clarified that Kentucky’s discovery rules in criminal proceedings, found at RCr 7.24, are also inapplicable in the post-conviction context.¹¹¹

This absence of discovery during post-conviction proceedings fails to recognize the barriers facing death row inmates in obtaining the necessary evidentiary materials to craft and present post-conviction claims demonstrating sufficient grounds for relief. For example, trial counsel may have failed to seek all discoverable material. Additionally, the prosecution may have failed to disclose—inadvertently or deliberately—exculpatory material that would render the inmate’s conviction or sentence invalid. An inmate without knowledge of or access to the government’s records simply would not be able to challenge his/her sentence and conviction, no matter the gravity of the constitutional violation that occurred at trial. Absent full and meaningful discovery during post-conviction review, it is often impossible to determine whether all valid claims and defenses have been raised by the defense, as well as whether all exculpatory material has been disclosed.

Although not a capital murder case, *Commonwealth v. Vettraino* well illustrates this issue. In *Vettraino*, police investigators neglected to disclose the existence of exculpatory evidence available at the scene of the crime and did “not mention [the evidence’s] existence until some six years had elapsed after the trial,” which later led to a reversal of the defendant’s murder conviction on post-conviction review.¹¹² Specifically, “[d]uring the post-conviction phase of [Riccardo] Vettraino’s case, the Department of Public Advocacy uncovered evidence that a silver handgun [matching a description provided by the defendant] was found in the drawer of a nightstand beside [the victims’] bed.”¹¹³ The existence of the handgun was relevant because the defendant had claimed self-defense, and this claim had been “belittled” by the Commonwealth’s Attorney, “taking full advantage of the fact that [the defendant] had no tangible evidence” of a

¹¹⁰ *Haight*, 41 S.W.3d at 445. Kentucky courts have stated that discovery is not necessary in the post-conviction context because “the material would have been turned over during the prosecution phase or the trial phase” and because “the purpose of the RCr 11.42 motion is to provide a basis for known grievances and not an opportunity to conduct a fishing expedition for possible grievances.” *Id.* (citing *Skaggs*, 844 S.W.2d at 389; *Sanborn*, 975 S.W.2d at 905).

¹¹¹ *Sanborn*, 975 S.W.2d at 910; see generally KY. R. CRIM. P. 7.24.

¹¹² *Commonwealth v. Vettraino*, Nos. 2003-CA-001387-MR, 2003-CA-001587-MR, 2004 WL 2320319, at *1–2 (Ky. App. Ct. Oct. 15, 2004).

¹¹³ *Id.* at *1–2.

gun belonging to the victim.¹¹⁴ Notwithstanding cases like *Vettraino*, the Kentucky Supreme Court has maintained that “[w]e have no reason to utilize as a working premise that the Commonwealth Attorney’s potential abuse of the law of discovery needs to be investigated. . . . In any case where there is substantial evidence presenting a reason to investigate the file of a Commonwealth Attorney, *we must trust that the system will provide adequate relief.*”¹¹⁵

In only one of the four instances in which a Kentucky death row inmate has been granted relief through post-conviction proceedings was relief based on undisclosed evidence in the Commonwealth’s possession.¹¹⁶ In 2007, Charles Bussell’s conviction and death sentence were overturned due, in part, to the prosecution’s failure to disclose exculpatory evidence at trial.¹¹⁷ It is unclear how Bussell obtained previously undisclosed police reports without discovery. However, without such disclosure, it *is* clear that he would have been unable to present a meritorious claim for post-conviction relief to correct the serious constitutional errors that occurred at his trial.

Furthermore, the difficulties faced by inmates in proving their claims during post-conviction proceedings are exacerbated by the fact that the Commonwealth prohibits inmates from using the Open Records Act to obtain materials in support of their post-conviction claims. The Open Records Act is a vehicle through which a death row inmate could access exculpatory material that should have been turned over by law enforcement to the prosecution and subsequently disclosed pursuant to *Brady* or the Kentucky Rules. However, Kentucky courts have denied death row inmates’ requests for records in the possession of the government—apparently including the investigative records of Commonwealth law enforcement agencies¹¹⁸—stating that “the Open Records Act should be construed in a manner sufficiently broad to protect a legitimate state interest, and . . . the state’s interest in prosecuting [a death row inmate] is not terminated

¹¹⁴ *Id.* Ultimately, the case settled out of court. *ABC 13 WBKO 5:30 AM News* (ABC television broadcast Mar. 7, 2007).

¹¹⁵ *Skaggs*, 844 S.W.2d at 391 (emphasis added); *see also* *Bowling v. Lexington-Lafayette Urban Cnty. Gov’t*, 172 S.W.3d 333, 339 (Ky. 2005) (declaring that “[a] criminal defendant has ample opportunity to examine the Commonwealth’s litigation files before trial”).

¹¹⁶ In the two cases of Hugh Marlowe and Charles Bussell, post-conviction relief has been affirmed by the Kentucky Supreme Court. *See* *Commonwealth v. Marlowe*, 2006 WL 3386629, at *1–2 (Ky. Nov. 22, 2006) (reversal of death sentence due to ineffective assistance of counsel during the penalty phase); *Bussell*, 226 S.W.3d at 102 (reversal of death sentence due to undisclosed evidence and ineffective assistance of counsel). As of October 1, 2011, the Kentucky Supreme Court has yet to affirm the trial courts’ grant of post-conviction relief in two other cases, Miguel Soto and John Mills. *See* *Soto v. Commonwealth*, No. 99-CR-00041, slip op. at 7 (Oldham, Ky. Cir. Ct. Jan. 31, 2011) (on file with author); *Mills v. Commonwealth*, No. 95-CR-00098, slip op. at 17 (Knox, Ky. Cir. Ct. Aug. 16, 2011) (on file with author).

¹¹⁷ *Bussell*, 226 S.W.3d at 102 (holding that the undisclosed evidence “undermined confidence in the outcome of the trial, denying Bussell the right to a fair trial”). Bussell’s death sentence also was reversed due to ineffective assistance of counsel. *Id.* at 103–07.

¹¹⁸ The Kentucky Attorney General is responsible for enforcement of the Kentucky Open Records Act. *See generally* KY. REV. STAT. ANN. § 61.880 (West 2011). The Attorney General has issued opinions stating that Kentucky law enforcement may deny a request for inspection of records where a party requests investigative records related to a case in which an individual’s full sentence has not been carried out. *See, e.g.,* KY. OP. ATTY. GEN. 10-ORD-094 (“Therefore, under *Skaggs v. Redford* . . . the [law enforcement agency] properly denied inspection of criminal case records where the sentences had not been fully carried out.”); KY. OP. ATTY. GEN. 09-ORD-104 (exempting law enforcement agencies from compliance with a reporter’s request to inspect records related to a criminal conviction, regardless of whether the convicted offender would pursue further judicial proceedings).

until his[/her] sentence has been carried out.”¹¹⁹ That a death row inmate would be denied government documents because the contents of those documents may provide a basis for not executing the inmate—that is, disclosure of the document “harm[s]” the “prospective law enforcement action” by supplying a reason not to end the inmate’s life—is disconcerting.¹²⁰

The result of this framework for post-conviction discovery and open-records disclosure is that an inmate sentenced to death may be unable to secure an evidentiary hearing to better establish that a serious constitutional violation occurred in his/her case, as the very information s/he needs to present a meritorious claim for post-conviction relief remains both undisclosed and undiscoverable.¹²¹ The Commonwealth of Kentucky, therefore, fails to adhere to the requirements of Recommendations #2 and #3.

The need to ensure that a capital trial proceeding is conducted fairly and in accordance with constitutional and statutory safeguards is not outweighed by the Commonwealth’s interest in avoiding frivolous litigation that could result from permitting discovery during post-conviction proceedings. The rationale supporting denial of a post-conviction petitioner’s access to evidence in the possession of third parties, like the Commonwealth’s Attorney or law enforcement, fails to account for the possibility and past instances of individuals who have had their convictions or sentences reversed due to the revelation of prosecutorial misconduct or error that is not uncovered until after the original trial.¹²²

The Kentucky Assessment Team, therefore, recommends that the Commonwealth amend its statutes and court rules to permit inmates to engage in meaningful discovery to better develop the factual basis of his/her claims prior to filing a post-conviction motion or petition. Although

¹¹⁹ *Bowling*, 172 S.W.3d at 339 (citing *Skaggs*, 844 S.W.2d at 390). The Kentucky Open Records Act provides that “records or information compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.” KY. REV. STAT. ANN. § 61.878(1)(h) (West 2011).

¹²⁰ *See Skaggs*, 844 S.W.2d at 390.

¹²¹ The case of John Thompson, prosecuted in 1985 for murder in New Orleans and sentenced to death, is instructive as to the serious need for discovery during post-conviction proceedings. *See Connick v. Thompson*, 131 S. Ct. 1350, 1371–76 (2011) (Ginsburg, J., dissenting) (recounting the facts and procedural history of Thompson’s case). One month before Thompson’s scheduled execution, an investigator hired by Thompson’s post-conviction counsel was permitted to search “[d]eep in the crime lab archives” of Orleans Parish; based on the investigator’s findings and “a serendipitous series of events,” Thompson’s advocates discovered evidence that exculpated him from an earlier robbery conviction, which the prosecution had used to elevate the murder charge to a capital case. *Id.* at 1374–75. Subsequently, the Louisiana Court of Appeals reversed Thompson’s murder conviction. *Id.* Thompson’s defense presented the newly discovered evidence at his murder retrial in 2003, and, “[a]fter deliberating for only [thirty-five] minutes, the jury found Thompson not guilty.” *Id.* at 1376. Under Kentucky’s current approach to post-conviction discovery and open-records disclosure, a law enforcement agency in the Commonwealth could lawfully refuse a Kentucky death row inmate the very access that helped set John Thompson free after he “served more than [eighteen] years in prison for crimes he did not commit.” *Id.* at 1376.

¹²² The reversal of numerous death penalty cases in North Carolina due to the prosecution’s failure to disclose exculpatory information, prior to the state’s enactment of an “open file” discovery rule, demonstrates the need for discovery in post-conviction proceedings: Since 1998, ten death penalty cases in North Carolina were “reversed after trial because of prosecution failures to provide *Brady* information. All involved cases were tried before the first open-file law went into effect, and all were reversed after the files of the prosecution and law enforcement were opened.” Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 261 (2008).

sensitive to the “fishing expedition” concerns that animate Kentucky state court decisions regarding post-conviction proceedings, federal courts nevertheless have recognized that “a habeas petitioner is not required to show that the requested discovery would ‘unquestionably lead to a cognizable claim for relief’ in order to obtain discovery.”¹²³ As the odds increase over time that information essential to an inmate’s petition may become lost or destroyed, Commonwealth courts should make discovery more widely available to death row inmates who are collaterally attacking the judgments in their cases, as is done in the federal courts. The Commonwealth also ought to 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.

C. 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.

A trial court’s denial of relief to a death row inmate under RCr 11.42 may be appealed to the Kentucky Supreme Court.¹²⁴ The civil rules of procedure largely govern the treatment of all criminal appeals, including appeals on collateral review.¹²⁵ Those rules, while allowing that “[a]ppellate court opinions and orders may be announced orally,” further state that such opinions “shall be reduced to writing.”¹²⁶ Moreover, “[o]pinions and orders finally deciding a case on the merits shall include an explanation of the legal reasoning underlying the decision.”¹²⁷

Recent opinions issued by the Kentucky Supreme Court in capital post-conviction cases have addressed issues of fact and law raised by the claims and the Court has issued opinions fully explaining its disposition of those claims. For example, in *Woodall v. Commonwealth*, the Kentucky Supreme Court advised that “[w]e find Appellant’s claims lack merit. However, due to the severity of the punishment involved, we address all of Appellant’s allegations.”¹²⁸ It appears, therefore, that the Commonwealth is in compliance with Recommendation #4.

The importance of explicit and thorough state appellate court decisions is amplified by the legal framework limiting federal habeas corpus review of state court decisions. To succeed in his/her application for a federal writ of habeas corpus, an inmate in state custody must show that state

¹²³ *Simmons v. Simpson*, 2009 WL 4927679, at *5 (W.D. Ky. Feb. 12, 2009) (citing *Keenan v. Bagley*, 262 F. Supp. 2d 826, 838 (N.D. Ohio 2003)).

¹²⁴ See KY. R. CRIM. P. 12.04; *Moore*, 199 S.W.3d at 134–35. See also KY. R. CIV. P. 74.02 (“The filing of a notice of appeal in a case in which a death penalty has been imposed will automatically serve to transfer the appeal to the Supreme Court.”); *Leonard*, 279 S.W.3d at 155–56 (“This Court has exclusive appellate jurisdiction over death penalty matters, even when the appeal involves a collateral attack on a sentence of death.”).

¹²⁵ See KY. R. CRIM. P. 12.02 (applying several of the civil rules pertaining to appeals to the criminal context, which includes motions for post-conviction relief).

¹²⁶ KY. R. CIV. P. 76.28(1)(a).

¹²⁷ KY. R. CIV. P. 76.28(1)(b).

¹²⁸ *Woodall v. Commonwealth*, 2005 WL 3131603, at *1 (Ky. Nov. 23, 2005) (“We find Appellant’s claims lack merit; however, due to the severity of the punishment involved, we address all of Appellant’s allegations.”). *But see Taylor v. Commonwealth*, 63 S.W.3d 151, 168 (Ky. 2001) (“[W]e note that any allegation of error not specifically addressed above has been considered and rejected as having no merit.”), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

court's review of any claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law;" *or* (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding."¹²⁹ Without a state court opinion clearly delineating its reasoning with respect to each of an inmate's claims for post-conviction relief, a federal court simply lacks adequate information to conduct a proper habeas corpus analysis under federal law.¹³⁰ Indeed, "[i]f [a] state court says nothing, most circuits have construed [federal statutory law] as creating a presumption that the state courts correctly identified and applied controlling Supreme Court precedent even when there is no objective reason to believe they did so."¹³¹

The extraordinary deference afforded to state court opinions in death penalty cases underscores the importance of the Kentucky Supreme Court's judicious approach capital post-conviction proceedings. All of a death row inmate's claims should be considered and an opinion issued fully explaining the bases for disposition of those claims.

D. 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.

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 capital cases.

An inmate may base his/her RCr 11.42 motion on a claim of constitutional error, but "[i]t is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding"¹³² Accordingly, for claims of constitutional magnitude to be heard during post-conviction review, an inmate must argue that his/her trial or direct appeal counsel was ineffective and that counsel's ineffectiveness prejudiced the outcome

¹²⁹ 28 U.S.C. § 2254(d) (2010).

¹³⁰ *See, e.g.,* Cone v. Bell, 129 S. Ct. 1769, 1778 (2009) (recounting the federal district court's "[l]amenting that its consideration of [a Tennessee death row inmate's] claims had been 'made more difficult' by the parties' failure to articulate the state procedural rules under which each of [the inmate's] claims had allegedly been defaulted").

¹³¹ *Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 111th Cong. 41 (2009) (prepared statement of John H. Blume, Professor of Law, Director, Cornell Death Penalty Project, Cornell University Law School), available at http://judiciary.house.gov/hearings/printers/111th/111-66_53944.pdf (last visited Nov. 1, 2011).

¹³² *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972); *see also Sanborn*, 975 S.W.2d at 908–09. Similarly, an issue raised and decided on direct appeal will not be entertained during post-conviction review. *Thacker*, 476 S.W.2d at 839 (Ky. 1972) ("This court has previously examined and passed on every ground alleged in the RCr 11.42 motion, and the court will not retry those issues."). An issue raised in a second or successive post-conviction petition also will be precluded from consideration on the merits if the state court determines that "the issue . . . should have been raised in [the initial post-conviction petition]." *See Woodall v. Commonwealth*, 2005 WL 2674989, at *2 (Ky. Oct. 20, 2005) (citing *Gross*, 648 S.W.2d at 857).

of the trial.¹³³ Kentucky post-conviction courts will not, in other words, entertain the underlying claim of constitutional error, not even in rare circumstances for exceptional reasons (e.g., fundamental fairness). It also is not difficult to imagine a death row inmate who is unable to establish an ineffective assistance of counsel claim, but who could have established the underlying claim of constitutional error.¹³⁴ For this reason, application of a knowing, intelligent, and voluntary standard for a waiver of constitutional claims is a fairer approach to review of death row inmates' claims of constitutional import.

In light of the foregoing, Kentucky death row inmates do not enjoy a “knowing, understanding, and voluntary” standard for waivers of their constitutional claims—indeed, they may not present these claims at all once the direct appeal process has concluded. Furthermore, for death row inmates, in particular, the likelihood that an issue will be deemed precluded is heightened through KRS 532.075’s mandate that every death sentence be reviewed on direct appeal by the Kentucky Supreme Court, during which review “every prejudicial error [raised by an appellant] must be considered, whether or not an objection was made in the trial court.”¹³⁵ Thus, in *Parrish v. Commonwealth*—a post-conviction review initiated under RCr 11.42—the Kentucky Supreme Court refused to consider whether a death row inmate had “knowing[ly] and intelligent[ly]” waived his *Miranda* rights, as the inmate had “not raise[d] [the] issue in his direct appeal, [which] he could have”¹³⁶

As post-conviction review in Kentucky precludes raising the issue of an unknowing, misunderstood, or involuntary waiver of an inmate’s constitutional claims whenever that issue could have been raised on direct appeal, the Commonwealth of Kentucky is not in compliance with Recommendations #5 and #6.

¹³³ All ineffective assistance of counsel claims are examined under the standards set forth in *Strickland v. Washington*. See *Strickland*, 466 U.S. at 668; *Gall*, 702 S.W.2d at 39.

¹³⁴ To succeed on a claim of ineffective assistance of counsel, an inmate must show *both* deficient performance *and* prejudice. See *Strickland*, 466 U.S. at 668; *Gall*, 702 S.W.2d at 39. See also *Simmons v. Commonwealth*, 191 S.W.3d 557, 561–62 (Ky. 2006) (“A convicted defendant claiming ineffective assistance of counsel has the burden of: (1) identifying specific errors by counsel; (2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; (3) rebutting the presumption that the actions of counsel were the result of trial strategy; and (4) demonstrating that the errors of counsel prejudiced his right to a fair trial.”), *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

¹³⁵ *Ice v. Commonwealth*, 667 S.W.2d 671, 674 (Ky. 1984). The standard of review for unpreserved errors raised pursuant to KRS 532.075(2) recently was reaffirmed in *Hunt v. Commonwealth*:

Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel’s failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

Hunt v. Commonwealth, 304 S.W.3d 15, 28 (Ky. 2009) (quoting *Johnson v. Commonwealth*, 103 S.W.3d 687, 691 (Ky. 2003)).

¹³⁶ *Parrish*, 272 S.W.3d at 176.

E. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

Trial courts in Kentucky are not required to appoint counsel in state post-conviction proceedings unless the merits of the initial RCr 11.42 motion warrant an evidentiary hearing.¹³⁷ If a hearing is granted and the inmate makes a specific request for counsel in writing, the court then must make a determination as to inmate's indigent status.¹³⁸ If s/he is deemed indigent, counsel must be appointed for the remainder of the proceeding, which includes any appeal taken from the trial court's resolution of the motion.¹³⁹ If the petitioner does not request appointment of counsel, the court has no duty to so *sua sponte*.¹⁴⁰ Furthermore, if appointed counsel and the court jointly determine that "it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there [is] no further right to be represented by counsel."¹⁴¹

In practice, however, the Department of Public Advocacy (DPA) typically provides death row inmates with counsel during post-conviction proceedings.¹⁴² DPA policy requires two public defenders to represent a death row inmate during all state post-conviction proceedings, including the filing of the initial RCr 11.42 petition.¹⁴³

With respect to federal habeas corpus proceedings, staff attorneys from DPA or the Louisville-Jefferson County Public Defender Corporation (Metro Defender) generally represent the Commonwealth's death row inmates.¹⁴⁴ Federal law stipulates that "one or more" qualified attorneys undertaking representation of a death row inmate during federal habeas corpus proceedings must be appointed prior to the filing of a formal, legally sufficient habeas petition.¹⁴⁵

¹³⁷ KY. R. CRIM. P. 11.42(5) ("If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel, shall upon specific request by the movant appoint counsel to represent the movant in the proceeding, including appeal.").

¹³⁸ *Id.*

¹³⁹ *Id.*; *Fraser*, 59 S.W.3d at 453.

¹⁴⁰ *Fraser*, 59 S.W.3d at 452.

¹⁴¹ KY. REV. STAT. ANN. § 31.110(2)(c) (West 2011).

¹⁴² Interview with Marguerite Thomas, *supra* note 49. In *Fraser v. Commonwealth*, the Kentucky Supreme Court found that KRS 31.110(2)(c) describes when DPA *may* provide representation in post-conviction proceedings, even without judicial appointment, whereas RCr 11.41(5) describes when counsel *must* be appointed during post-conviction proceedings. *Fraser*, 59 S.W.3d at 456.

¹⁴³ DPA POLICIES, *supra* note 51; Interview with Marguerite Thomas, *supra* note 49.

¹⁴⁴ DPA Interview, *supra* note 50; Interview by Sarah Turberville and Paula Shapiro with Louisville Metro Public Defender's Office (Metro Defender), June 14, 2010 (on file with author).

¹⁴⁵ 18 U.S.C. § 3599(a)(2) (2010); *see also* *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994).

Finally, while Kentucky has not adopted any rules, regulations, laws, or procedures requiring the appointment of counsel to inmates petitioning for clemency, both DPA and Metro Defender provide representation to their clients through clemency and execution.¹⁴⁶

While it is commendable that the Commonwealth's public defender entities voluntarily undertakes representation of death row inmates during post-conviction proceedings, federal habeas corpus, and clemency, Commonwealth law does not *guarantee* the provision of counsel during evaluation, preparation, and presentation of an initial post-conviction claim or during clemency. The right to counsel during the claim development stage is not assured, especially given the current financial constraints facing the Commonwealth. These constraints pose a real threat that the public defender may not be able to voluntarily undertake such representation of death row inmates in the future.¹⁴⁷

Therefore, Kentucky only partially complies with Recommendation #7.

The Kentucky Assessment Team recommends that the Commonwealth require the appointment of counsel to death row inmates petitioning for post-conviction relief during the claim-development stage of these proceedings and that representation continue through the state and federal collateral review and clemency processes.¹⁴⁸

F. Recommendation #8

For state post-conviction proceedings, the State should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Qualifications of State Post-Conviction Counsel

The Commonwealth has not formally adopted a law or rule governing the requisite qualifications required of an attorney who undertakes representation of a death row inmate during post-conviction proceedings. However, as discussed in Chapter Six on Defense Services, DPA has adopted, by reference, the *ABA Revised Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, as well as specific policies governing the minimum

¹⁴⁶ DPA POLICIES, *supra* note 51, at §§ 18.01(E)(5)–(7), 18.09 (pertaining to “Execution Protocol”).

¹⁴⁷ For example, while Kentucky's public defenders could similarly undertake representation of non-capital cases on post-conviction review during the claim development stage, resources allow for them to undertake this representation only if an evidentiary hearing is granted in those non-capital cases. DPA Interview, *supra* note 50; Metro Defender Interview, *supra* note 144.

¹⁴⁸ *See e.g., Fraser*, 59 S.W.3d at 461–62 (Keller, J. dissenting) (“KRS 31.110 [is] susceptible to only one interpretation—the General Assembly intends to provide for the appointment of counsel in post-conviction proceedings Even if the majority is correct that litigants infrequently obtain relief under RCr 11.42, I believe that fact merely demonstrates the need for the assistance of counsel in the evaluation, preparation, and presentation of those claims”).

performance of post-conviction counsel, to govern its assignment of counsel during post-conviction proceedings.¹⁴⁹

DPA policy also requires counsel contracted to undertake capital representation during post-conviction proceedings to have demonstrated skills in accordance with the *ABA Guidelines*.¹⁵⁰ Contract counsel also must agree to participate in a case review at least ninety days before filing a post-conviction motion on behalf of a death row inmate and to participate in workshops or practice arguments preceding a post-conviction hearing.¹⁵¹ The Kentucky Assessment Team was unable to determine, however, the extent to which these qualification standards are enforced.

Furthermore, staff attorneys with DPA or Metro Defender generally represent the Commonwealth's death row inmates in federal habeas corpus proceedings.¹⁵² In accordance with federal law, these inmates must be represented by at least one attorney who has been admitted to practice in the U.S. Court of Appeals for the Sixth Circuit for at least five years and who has had at least three years of experience in handling felony appeals in the Sixth Circuit.¹⁵³

Finally, in addition to representing death row inmates during clemency, DPA also includes, in its *Post Trial Division Minimum Performance Standards*, specific requirements relating to the performance of its attorneys providing this representation.¹⁵⁴

Compensation for State Post-Conviction Counsel

DPA or Metro Defender attorneys undertaking representation during post-conviction proceedings are paid salaries set in accordance with the merit system.¹⁵⁵ Private contract counsel engaged by DPA or Metro Defender to provide capital representation are compensated at an hourly rate up to a maximum cap, and these funds are paid out of the contracting agency's operating budget.

As of July 1, 2005, counsel contracting with DPA to provide capital representation during post-conviction proceedings are compensated at a rate of \$75 per hour for in-court and out-of-court work, with a maximum fee of \$50,000 per attorney, plus reasonable expenses.¹⁵⁶ Contracts

¹⁴⁹ DPA POLICIES, *supra* note 51, at §§ 8.04(I)(A), 18.01 (pertaining to "Post Trial Division Minimum Performance Standards"). For an exhaustive discussion of the qualification and performance standards required of DPA post-conviction counsel in death penalty cases, see Chapter Six on Defense Services.

¹⁵⁰ *Id.* at § 8.04(I)(C).

¹⁵¹ *Id.* at § 8.04(I)(D)(1), (4).

¹⁵² Interview with Marguerite Thomas, *supra* note 49; Metro Defender Interview, *supra* note 144.

¹⁵³ 18 U.S.C. § 3599(c) (2010). For good cause, the court may appoint another attorney "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." 18 U.S.C. § 3599(d) (2010).

¹⁵⁴ DPA POLICIES, *supra* note 51, at § 18.01(E)(5)-(7).

¹⁵⁵ KY. REV. STAT. ANN § 31.020(4) (2011); Petition for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at 6 (filed Jun. 30, 2008). For a discussion of public defender salaries in the Commonwealth, see Chapter Six on Defense Services.

¹⁵⁶ DPA POLICIES, *supra* note 51, at § 8.04(II)(B)(2)(a). Contracts entered into between February 1, 2004 and July 1, 2005 provided compensation at a rate of \$75 per hour for in-court and out-of-court work, with a maximum fee of \$30,000 per attorney, plus reasonable expenses. *Id.* at § 8.04(II)(B)(2)(a).

entered into before February 1, 2004, which had an established rate of \$50 per hour with a maximum fee of \$20,000, remain in effect.¹⁵⁷ Counsel contracting with Metro Defender to provide post-conviction representation currently are compensated at a rate of \$50 per hour, with a maximum fee of \$15,000 per attorney.¹⁵⁸

These funding restrictions fail to comply with the *ABA Guidelines*.¹⁵⁹ The hourly rates and maximum caps on compensation are inadequate to ensure high quality legal representation and also may serve as a deterrent to attracting individuals with the needed qualifications to undertake the complex and time-consuming representation of inmates awaiting execution.

Finally, attorneys appointed pursuant to 18 U.S.C. section 3599 for the purposes of representing inmates during federal habeas corpus proceedings are entitled to compensation at a rate of not more than \$178 per hour for both in-court and out-of-court work.¹⁶⁰ There is no compensation maximum for appointed counsel during federal habeas corpus proceedings in death penalty cases.¹⁶¹ If DPA undertakes representation of a death row inmate in a federal habeas corpus proceeding, the Department will be compensated in accordance with the fee structure set out in section 3599.¹⁶² Federally-appointed counsel also may undertake and be entitled to compensation for representing death row inmates during state clemency proceedings.¹⁶³

Compensation for Expert Assistance

Under KRS 31.185, Kentucky must provide payment for expert witness fees or any other “direct expense, including the cost of a transcript . . . that is necessarily incurred in representing a needy person”¹⁶⁴ While capital defendants generally are able to show reasonable necessity in

¹⁵⁷ DPA POLICIES, *supra* note 51, at § 8.04(I)(B).

¹⁵⁸ Pet. for Declaratory Judgment, *Lewis v. Hollenbach*, Franklin Circuit Court Division II, Civil Action No. 08-CI-1094, at 11 (filed Jun. 30, 2008); Metro Defender Interview, *supra* note 144.

¹⁵⁹ DPA policy recognizes that its compensation policies for contract counsel in capital cases reflect “DPA’s efforts to meet the [ABA] standards taking into account current fiscal realities The ABA Standards for Criminal Justice set forth that there should be no upper cap placed on capital cases but rather an appropriate per hour fee. Given our current budget situation we are not able to meet that standard completely.” DPA POLICIES, *supra* note 51, at § 8.04(II)(B)(1)(c).

¹⁶⁰ 18 U.S.C. § 3599(g)(1) (2010); *see also* 7 U.S. GUIDELINES FOR ADMINISTERING THE CJA AND RELATED STATUTES § 610.10.10 (2010), *available at* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx> .

¹⁶¹ 7 U.S. GUIDELINES FOR ADMINISTERING THE CJA, *supra* note 160, at § 610.10.20.

¹⁶² Interview by Paula Shapiro with Tim Arnold, Post Trial Division Director, Department of Public Advocacy, Nov. 5, 2010 (on file with author) (noting that DPA attorneys have not always requested such funding).

¹⁶³ 18 U.S.C. § 3599(e) (2010); *Harbison v. Bell*, 556 U.S. 180, 1491 (2009) (stating that petitioner’s “case underscores why it is entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells”) (quotations omitted).

¹⁶⁴ KY. REV. STAT. ANN. § 31.185(3) (West 2011) (the fund is administered by the Finance and Administration Cabinet); SPANGENBERG GRP., PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 10 (2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf> (noting that the KRS 31.185 fund was established “to cover expert witness fees and other comparable expenses associated with providing indigent defense services.”). In addition, “[e]xpenses incurred in the representation of needy persons confined in a state correctional institution” are paid from the KRS 31.185 special fund. KY. REV. STAT. ANN. § 31.185(6) (West 2011).

order to obtain KRS 31.185 funding for their original trial proceedings,¹⁶⁵ the availability of KRS 31.185 funding is limited during post-conviction proceedings.¹⁶⁶

First, an indigent post-conviction petitioner must set forth sufficient allegations to necessitate an evidentiary hearing before a court may consider authorizing KRS 31.185 funds for the petitioner.¹⁶⁷ However, that a post-conviction petition has met the threshold requirement for an evidentiary hearing does not mean the petitioner is “automatically” entitled to funding. Instead, trial courts may exercise their discretion to examine the post-conviction petition to determine whether expending KRS 31.185 funding is “reasonably necessary for a full presentation of the petitioner’s case.”¹⁶⁸ It further appears that death row inmates face much greater difficulty obtaining expert assistance resources for post-conviction—rather than trial and direct review—proceedings.¹⁶⁹

Kentucky death row inmates also appear to have a limited right to receive state-funded expert assistance by entities independent of the government. For example, the Kentucky Supreme Court recently required a death row inmate seeking to establish a claim of mental retardation to undergo an evaluation at a Commonwealth-operated psychiatric center, rather than by “a private psychological expert,” as the inmate had sought.¹⁷⁰ Because the inmate already had been convicted, the Court reasoned that any inquiry by mental health professionals affiliated with the Commonwealth would only, if at all, “minimally” implicate his constitutional rights to remain silent and “to confidential defense communications.”¹⁷¹ The Court separately has held that funding for private mental health testing cannot be provided through KRS 31.185 unless an inmate demonstrates that use of state facilities would be impractical.¹⁷²

¹⁶⁵ For a discussion on the availability of KRS 31.185 funding, see Chapter Six on Defense Services.

¹⁶⁶ Until 2006, KRS 31.185 was deemed inapplicable to post-conviction proceedings by the Kentucky Supreme Court. *Hodge v. Coleman*, 244 S.W.3d 102, 107 (Ky. 2008) (“Confusion in our law has resulted from the fact that *Stopher* seemed to establish a bright line rule that no funds were available under KRS 31.185 for indigent post-conviction petitioners while *Paisley*, without even mentioning *Stopher*, seemed to open up the possibility for expert funding for a post[-]conviction petitioner.”).

¹⁶⁷ *Hodge*, 244 S.W.3d at 108 (“[I]t is clear we went too far in *Stopher* when we said that KRS 31.185 has no application post-conviction proceedings.”) (discussing *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)).

¹⁶⁸ *Mills*, 268 S.W.3d at 367 (noting that the “trial court still maintains the discretion to deny such funds if it determines that the expert testimony is not reasonably necessary”); *Hodge*, 244 S.W.3d at 108 (clarifying that the post-conviction trial court may scrutinize the petitioner’s twenty-three out-of-county witness list and authorize travel expenses “for those out-of-county witnesses reasonably necessary” for the petitioner’s claims to be fully presented).

¹⁶⁹ See, e.g., *Hodge*, 244 S.W.3d at 108; *Mills*, 268 S.W.3d at 367; *Johnson v. Commonwealth*, 2008 WL 4270731, at *7 (Ky. Sept. 18, 2008) (“Finally, Johnson argues for payment of expert expenses in the RCr 11.42 proceedings. An indigent post-conviction prisoner may not receive public funds under KRS 31.185 unless a court of competent jurisdiction has determined that the post-conviction petition sets forth allegations that necessitate an evidentiary hearing. Because we have determined that no hearing is required on the allegations of mental illness, but only on the claims that the guilty plea was involuntary, appellant’s request for expert funds did not need to be granted.”); *Foley v. Commonwealth*, 2010 WL 1005873, at *3 (Ky. Mar. 18, 2010); DPA Interview, *supra* note 49; Metro Defender Interview, *supra* note 144. For more information on access to experts, see Chapter Thirteen on Mental Retardation and Mental Illness; see also Chapter Six on Defense Services.

¹⁷⁰ *White v. Payne*, 332 S.W.3d 45, 47 (Ky. 2010).

¹⁷¹ *Id.* at 50–51. For more discussion of death row inmates’ access to mental health experts, see Chapter Thirteen on Mental Retardation and Mental Illness.

¹⁷² *Commonwealth v. Paisley*, 201 S.W.3d 34, 36 (Ky. 2006).

Finally, in federal habeas corpus and clemency proceedings, a federal court may authorize funding to contract counsel and public defense attorneys for the purposes of obtaining investigative, expert, or other services reasonably necessary to the representation.¹⁷³ These fees are capped at \$7,500, unless the court authorizes expenses in excess of the cap.¹⁷⁴ The availability of counsel, however, does not guarantee counsel's access to necessary resources for filing a clemency petition.¹⁷⁵

Conclusion

It is encouraging that Commonwealth public defender agencies undertake representation of death row inmates during post-conviction proceedings and that DPA, in particular, has promulgated—on its own initiative—minimum qualifications for departmental attorneys providing this assistance. However, this representation is elective and subject to a maximum fee, and death row inmates have limited access to state-funded expert assistance to support their post-conviction motions and petitions. Accordingly, the Commonwealth of Kentucky only partially complies with Recommendation #8.

G. Recommendation #9

State courts should give full retroactive effect to United States 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.

While a State cannot change the retroactivity doctrine applied by federal courts in federal habeas corpus proceedings, it may change its own post-conviction rules and procedures so as to give full retroactive effect to U.S. Supreme Court decisions.¹⁷⁶ This more generous approach to retroactivity better ensures that valid constitutional claims will be equally cognizable and, therefore, that similarly situated inmates will not receive disparate treatment on post-conviction review.

Retroactive Effect of U.S. Supreme Court Decisions

A death row inmate may file for a second or successive motion for post-conviction relief,¹⁷⁷ despite Kentucky's three-year statute of limitations, if the inmate proves that "the fundamental constitutional right asserted [in the petition] was not established within the [three-year, statute-of-limitations] period provided for [in Rule 11.42] and [the right] has been held to apply

¹⁷³ 18 U.S.C. § 3599(f) (2010); *see also* *Baze v. Parker*, 711 F. Supp. 2d 774, 778–79 (E.D. Ky. 2010). *See also* Chapter Nine on Clemency.

¹⁷⁴ 18 U.S.C. § 3599(g)(2) (2010).

¹⁷⁵ *See Baze*, 711 F.Supp.2d at 780–81.

¹⁷⁶ *See Leonard*, 279 S.W.3d at 159–60 (citing *Danforth*, 552 U.S. at 264 (holding that state courts may give broader effect to new rules of criminal procedure than is required by *Teague*, 489 U.S. at 288)).

¹⁷⁷ A *second* or *successive motion* is filed subsequent to the initial post-conviction petition and challenges the same judgment of conviction and sentence as the initial post-conviction petition.

retroactively.”¹⁷⁸ If the right applies retroactively, then the post-conviction petition must be filed within three years after the event creating the exception occurred.¹⁷⁹

However, Kentucky courts will not give full retroactive effect to changes in the law announced by the U.S. Supreme Court unless the new rule (1) “places certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe”; or (2) “requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.”¹⁸⁰ In other words, “Kentucky’s constitutional retroactivity rule is no broader than that employed by the federal courts,” although, as the Kentucky Supreme Court recognized in *Leonard v. Commonwealth*, the Commonwealth could adopt a more generous retroactivity rule.¹⁸¹ If a new rule of criminal procedure is held not to apply retroactively, then only inmates whose cases remain on direct appeal may take advantage of that new rule.¹⁸²

In some instances, the Commonwealth’s courts have refused to recognize a petitioner’s right to avail himself/herself of new substantive rules announced by the U.S. Supreme Court. For example, in *Taylor v. Commonwealth*, the Kentucky Supreme Court held that “*Batson* [*v. Kentucky*] applied retroactively to Taylor’s case because his case was still pending [on direct] review . . . when *Batson* was decided.”¹⁸³ However, this retroactivity does not extend to death row inmates whose direct appeal was final, such as those in the midst of or having completed post-conviction review, who possess viable claims of racial discrimination during jury selection.¹⁸⁴ Likewise, although it recognized that the U.S. Supreme Court’s decisions in *Evitts v. Lucey*¹⁸⁵ and *Smith v. Robbins*¹⁸⁶ had established “the right to effective appellate counsel,” the Kentucky Supreme Court nonetheless declared that its “ruling [in *Hollon v. Commonwealth*] [would] have prospective effect only.”¹⁸⁷

Furthermore, in *Bowling v. Commonwealth*, the Kentucky Supreme Court rejected a successive motion for post-conviction relief based on the U.S. Supreme Court’s then-recent decision in

¹⁷⁸ KY. R. CRIM. P. 11.42(10)(b).

¹⁷⁹ KY. R. CRIM. P. 11.42(10).

¹⁸⁰ *Leonard*, 279 S.W.3d at 159 (quoting *Teague*, 489 U.S. at 307).

¹⁸¹ *Id.* at 159–60 (“*Teague* is not binding on the states if they choose to broaden the class of retroactively applicable rules . . . [n]or is *Teague* binding as to a new rule grounded solely in state law (as opposed to the federal constitution).”).

¹⁸² *Id.* at 160 (citing *Griffith*, 479 U.S. at 328); *Teague*, 489 U.S. at 310. As the Kentucky Supreme Court recognized in *Leonard*, however, determining retroactivity by measuring from the date when a direct appeal became final does not, for all new rules, make sense. See, e.g., *Leonard*, 279 S.W.3d at 160 (“The cutoff for retroactivity of a new collateral attack rule is thus when the order resolving a collateral attack becomes final.”).

¹⁸³ *Taylor*, 63 S.W.3d at 157, *abrogated on other grounds by Crawford*, 541 U.S. at 68.

¹⁸⁴ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (emphasis omitted).

¹⁸⁵ *Evitts v. Lucey*, 469 U.S. 387 (1985).

¹⁸⁶ *Robbins*, 528 U.S. at 259.

¹⁸⁷ *Hollon*, 334 S.W.3d at 439. See also *Curtis v. Commonwealth*, Nos. 2005-CA-001367-MR, 2006-CA-000041-MR, 2007 WL 1192070, at *4 (Ky. App. Ct. Apr. 6, 2007) (declining to afford inmate, on collateral review, the benefit of *Georgia v. Randolph*, 547 U.S. 103, 120 (2006), which held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident”); *Matthews v. Commonwealth*, 2011 WL 4507962, at *5 (Ky. App. Ct. Sept. 30, 2011) (“[R]etroactive application of new rules is generally not given in cases involving collateral review.”).

Atkins v. Virginia, which prohibited the execution of mentally retarded offenders.¹⁸⁸ Because Thomas Bowling had failed to raise mental retardation as a bar to execution in direct appeal proceedings adjudicated prior to *Atkins* but while Kentucky's statutory ban on executing mentally retarded offenders remained in place, the Court would not entertain the claim, reasoning that petitioner had waived his/her constitutional right "by failure to timely assert it."¹⁸⁹ However, even if "*Atkins* [did] reaffirm[] [Kentucky's] preexisting prohibition against executing the mentally retarded,"¹⁹⁰ the U.S. Supreme Court's decision in *Atkins* nonetheless established a new "fundamental constitutional right."¹⁹¹ Accordingly, Bowling and any other petitioner seeking the benefit of *Atkins*' holding ought to have that holding retroactively applied to their case—regardless of whether they had, or could have, raised the issue of mental retardation as a bar to execution in prior proceedings.¹⁹²

Consideration of Federal Appeals and Federal District Courts' Opinions

In their discretion, Kentucky post-conviction courts have not always followed the final opinions of federal district and appeals courts in deciding constitutional claims during post-conviction relief. For example, in a 2008 case, the U.S. Court of Appeals for the Sixth Circuit stated explicitly that the Kentucky Supreme Court's failure to recognize a claim of ineffective assistance of appellate counsel during the first direct appeal as of right was "in direct conflict with the U.S. Supreme Court's holding in *Evitts v. Lucey* and *Smith v. Robbins*."¹⁹³ To its credit, the Kentucky Supreme Court announced in late 2010 that it would, going forward, recognize ineffective assistance of appellate counsel claims.¹⁹⁴ However, in post-conviction cases heard after the Sixth Circuit's decision in 2008 through the Kentucky Supreme Court's decision in 2010, Kentucky courts continued to refuse to entertain claims of ineffective assistance of appellate counsel on the merits.¹⁹⁵

¹⁸⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁸⁹ *Bowling*, 163 S.W.3d at 371. See also KY. REV. STAT. ANN. § 532.140 (West 2011) (barring the execution of mentally retarded offenders).

¹⁹⁰ *Bowling*, 163 S.W.3d at 371 (quotations omitted); see also *In re Bowling*, 422 F.3d 434, 440 (6th Cir. 2005) (denying permission to file a second or successive habeas petition because petitioner did not make a prima facie showing that he was mentally retarded).

¹⁹¹ KY. R. CRIM. P. 11.42(10)(b) (emphasis added). See also *Bowling*, 163 S.W.3d at 385–86 (Keller, J., dissenting) ("Thus, the mere fact that Kentucky's statutes provided (and still provide) a pretrial means to challenge the applicability of the death penalty when the defendant may be mentally retarded is not enough to protect the interest recognized in *Atkins*. As the [U.S.] Supreme Court noted in [*Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (plurality opinion),] a similar case involving the execution of an insane person, 'Once a substantive right or restriction is recognized in the Constitution, . . . its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.'"). For further discussion on Kentucky courts' treatment of mental retardation claims during post-conviction proceedings, see Chapter Thirteen on Mental Retardation and Mental Illness.

¹⁹² *Bowling*, 163 S.W.3d at 371 (citing *In re Hicks*, 375 F.3d 1237, 1240 (11th Cir. 2004) (denying a mental retardation claim predicated on *Atkins* in part because petitioner had unsuccessfully litigated the issue both during his state trial, which relied on a state case, *Fleming v. Zant*, 386 S.E.2d 339, 342 (1989), in which the Supreme Court of Georgia held that executing the mentally retarded is prohibited by the Georgia constitution, and in his federal habeas petition, which relied on a Georgia statute that prohibits the execution of the mentally retarded. See GA. CODE ANN. § 17-70-131 (2010))).

¹⁹³ *Boykin v. Webb*, 541 F.3d 638, 647–48 (6th Cir. 2008) (citing *Lucey*, 469 U.S. at 387; *Robbins*, 528 U.S. at 259), *reh'g and reh'g en banc denied*, 541 F.3d 638, 638 (2009).

¹⁹⁴ *Hollon*, 334 S.W.3d at 436.

¹⁹⁵ See e.g., *Parrish*, 272 S.W.3d at 173; *Wheeler v. Commonwealth*, 2008 WL 5051579, at *9 (Nov. 26, 2008).

Because Kentucky does not always give retroactive effect to changes in the law announced by the U.S. Supreme Court, the Commonwealth is in partial compliance with Recommendation #9.

H. 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.

Counsel's Omissions

Generally, in an initial RCr 11.42 motion for post-conviction relief, an inmate in Kentucky must state all grounds for holding the sentence invalid of which s/he has knowledge, and “[f]inal disposition of [that initial RCr 11.42] motion [will] conclude all issues that could reasonably have been presented in the same proceeding.”¹⁹⁶ Furthermore, Kentucky prohibits inmates from raising, in any post-conviction proceeding, claims that “could and should have been litigated in the direct appeal,” as well as claims that actually were litigated in the direct appeal.¹⁹⁷ Therefore, an omission by counsel in a previous capital post-conviction proceeding resulting in meritorious claim not being raised would not be a permissible basis upon which to file a second or successive post-conviction petition.¹⁹⁸

Intervening Court Decisions

Kentucky appears to permit an exception to the bar against second or successive petitions in the limited circumstance in which a constitutional right has been found to apply retroactively. However, as mentioned in Recommendation #9, Kentucky’s retroactive application of new constitutional rules remains limited.

Moreover, Kentucky courts do not appear to permit the filing of a second or successive petition when an intervening *state* court decision resulted in a possibly meritorious claims not being raised, developed, or accepted as legally valid. For example, prior to the 2006 decision of *Martin v. Commonwealth*,¹⁹⁹ an issue raised and rejected on direct appeal could not be relitigated in post-conviction proceedings “by claiming that it amounts to ineffective assistance of counsel.”²⁰⁰ In *Martin*, however, the Kentucky Supreme Court announced a new rule permitting

¹⁹⁶ KY. R. CRIM. P. 11.42(3); *Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011) (noting that RCr 11.42(3) “has been held to bar successive RCr 11.42 motions”). See also *McQueen*, 949 S.W.2d at 416 (holding that CR 60.02 may not be used to relitigate issues that could have been presented on direct appeal or in RCr 11.42 proceedings).

¹⁹⁷ *Leonard*, 279 S.W. 3d at 156.

¹⁹⁸ *Moore*, 199 S.W.3d at 139 (“Our holding in this regard should not be construed as sanctioning the filing of a subsequent RCr 11.42 motion for the purpose of claiming ineffective assistance of counsel in litigating a previous RCr 11.42 motion.”); *Hollon*, 334 S.W.3d at 437 (“[W]e additionally emphasize that [ineffective assistance of appellate counsel] claims are limited to counsel’s performance on direct appeal; there is no counterpart for counsel’s performance on RCr 11.42 motions or other requests for post-conviction relief.”).

¹⁹⁹ *Martin*, 207 S.W.3d at 1.

²⁰⁰ *Sanborn*, 975 S.W.2d at 908–09 (citing *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990)).

post-conviction petitioners to raise an ineffective assistance of trial counsel claim derived from an error alleged on direct appeal.²⁰¹ Under *Martin*, for example, a prisoner whose claim of prosecutorial misconduct was raised and rejected on direct appeal may seek relief during post-conviction proceedings on a claim that counsel's failure to object to the alleged prosecutorial misconduct at trial constituted ineffective assistance of counsel.²⁰² While a number of death row inmates had unsuccessfully raised this identical claim prior to *Martin*,²⁰³ the Kentucky Supreme Court later determined that inmates whose collateral attacks were final when *Martin* was decided could not raise the issue in a second or successive request for post-conviction relief.²⁰⁴

Similarly, in *Hollon v. Commonwealth*, the Kentucky Supreme Court announced that it would recognize an ineffective assistance of counsel claim "premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal," overruling *Hicks v. Commonwealth*.²⁰⁵ However, despite the new substantive constitutional right recognized in *Hollon*, the Court held that the ruling had "prospective effect only."²⁰⁶

Conclusion

Because Kentucky does not permit successive petitions in capital cases where counsels' omissions resulted in possibly meritorious claims not being raised or fully developed, or where intervening court decisions resulted in possibly meritorious claims not being raised, developed, or accepted as legally valid, the Commonwealth is not in compliance with Recommendation #10.

²⁰¹ See *Martin*, 207 S.W.3d at 1; *Leonard*, 279 S.W. 3d at 155 ("While such an ineffective-assistance [of counsel] claim is certainly related to the direct error, it is simply not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel."). However, where the collateral claim of ineffective assistance of counsel is presented in the course of the direct appeal, the issue cannot be relitigated in post-conviction proceedings. *Leonard*, 279 S.W.3d at 159 n.3 (citing *Bowling*, 981 S.W.2d at 549; *Wilson v. Commonwealth*, 975 S.W.2d 901, 903–04 (Ky. 1998)).

²⁰² *Leonard*, 279 S.W. 3d at 157.

²⁰³ See, e.g., *Sanborn*, 975 S.W.2d at 908–09; *Baze*, 23 S.W.3d at 624; *Haight*, 41 S.W.3d at 441; *Sanders*, 89 S.W.3d at 385; *Hodge*, 116 S.W.3d at 467–68; *Mills*, 170 S.W.3d at 326; *Simmons*, 191 S.W.3d at 561.

²⁰⁴ *Leonard*, 279 S.W. 3d at 159. In *Leonard*, the petitioner's initial RCr 11.42 petition had been filed in 1996 and a decision finalized on appeal in 1999, six years before the Kentucky Supreme Court's decision in *Martin*. *Leonard*, 279 S.W.3d at 160. While "*Martin* broke new ground by allowing claims that were procedurally barred under the prior case law," it could not be applied retroactively to petitioners like *Leonard* whose collateral attacks were final before the rule in *Martin* was decided. *Id.* at 161–62.

²⁰⁵ *Hollon*, 334 S.W.3d at 436. Previous to *Hollon*, ineffective assistance of counsel claims based upon appellate counsel's performance at direct appeal were barred under *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992). Prior to *Hollon*, Kentucky had permitted "a reinstated or belated appeal" when incompetence by counsel, "especially state-appointed counsel," resulted in an indigent defendant's loss of his/her statutory right to appeal. *Moore*, 199 S.W.3d at 139. The *Hollon* Court noted that a panel of the Kentucky Court of Appeals "joined other [Kentucky appellate court panels] and at least one panel of the U.S. Court of Appeals for the Sixth Circuit in urging us to reconsider our *Hicks* policy as incompatible with, or at least as out of harmony with, U.S. Supreme Court precedent." *Hollon*, 334 S.W.3d at 433–34.

²⁰⁶ *Hollon*, 334 S.W.3d at 439 (holding that application of the new right would apply only to the case at bar, to cases pending on appeal in which the issue of ineffective assistance of appellate counsel had been raised and preserved, and to prospective cases in the trial courts and noting that "[p]rospective application is appropriate because, although our courts have not until now provided a forum for [ineffective assistance of counsel] claims based on an allegedly inadequate appellate brief, the federal courts have provided a forum through habeas review.").

I. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the U.S. Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”²⁰⁷ The burden to show that the error was harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his[her] erroneously obtained judgment.”²⁰⁸ The Kentucky Rules of Criminal Procedure applicable to state post-conviction proceedings do not use *Chapman*’s “reasonable doubt” language to describe the Commonwealth’s approach to harmless-error analysis. Instead, in order to provide a basis “for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order,” a reviewing court must find that “the denial of [] relief would be *inconsistent with substantial justice*.”²⁰⁹

Despite this apparent discrepancy, the Kentucky Supreme Court has repeated the standard announced in *Chapman*. For example, in *Talbott v. Commonwealth* the Court reviewed whether a complicity-to-murder conviction should be disturbed due to the improper admission of appellant’s inculpatory statement.²¹⁰ After noting that “[t]he test is . . . whether the error was harmless beyond a reasonable doubt,” the Court held that a separate inculpatory statement by the appellant sufficed to support the conviction and, therefore, that “the error was harmless beyond a reasonable doubt.”²¹¹

As the Kentucky Supreme Court has recognized *Chapman*’s harmless-error standard for determining whether a conviction or sentence will remain settled despite a recognized constitutional error, the Assessment Team concludes that the Commonwealth of Kentucky is in compliance with Recommendation #11. Nevertheless, as post-conviction courts naturally will look to the language found in Kentucky’s Rules of Criminal Procedure to determine whether a constitutional error should be deemed harmless, the Kentucky Assessment Team recommends that the *Talbott* language be incorporated into those rules.

J. 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.

²⁰⁷ *Chapman*, 386 U.S. at 24.

²⁰⁸ *Id.*

²⁰⁹ KY. R. CRIM. P. 9.24 (emphasis added).

²¹⁰ *Talbott*, 968 S.W.2d at 76.

²¹¹ *Id.* at 83–84.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the Commonwealth of Kentucky at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Under a state's constitution or clemency statute, the governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual, and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."¹

From 1976, when the U.S. Supreme Court authorized jurisdictions to reinstate capital punishment, through June 2011, clemency has been granted on humanitarian grounds 269 times in twenty-one of the thirty-eight death penalty states and the federal government.² One hundred sixty-seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.³ Another fifteen of these clemency grants occurred in Illinois when Governor Pat Quinn commuted the death sentences of the remaining men on death row to life without parole upon that state's repeal of its death penalty statute in 2011.⁴

Due to an expansion of restrictions on judicial review of death row inmates' claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions,

¹ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

² See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Nov. 1, 2011). This figure includes states that authorized capital punishment at any time during this period.

³ *Id.*

⁴ 725 ILL. COMP. STAT. 5/119-1 (2011) (amending the Illinois Code of Criminal Procedure to repeal the death penalty); Christopher Wills, *Illinois Gov. Pat Quinn abolishes death penalty, clears death row*, WASH. POST, Mar. 9, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030900319.html>.

clemency can be a state's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the conviction and/or death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and, in many jurisdictions, clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. Clemency Decision-Makers

1. Governor of Kentucky

Section 77 of the Kentucky Constitution provides the Governor with the sole power to grant or deny clemency, including pardons, reprieves, and commutations, except in cases of impeachment.⁵ Section 77 grants the Kentucky Governor “full discretion in relation to clemency issues,” which means s/he “may investigate any and all matters related to a clemency petition and determine the scope of that investigation.”⁶ The Kentucky Governor, at his/her discretion, also may ask the Kentucky Parole Board (Board) to investigate and present to the Governor a report and non-binding recommendation concerning all requests for pardons, reprieves, and commutations, although it does not appear that any Kentucky Governor has so authorized the Board since Kentucky reenacted the death penalty in 1976.⁷

In death penalty cases, the Governor may commute an inmate’s death sentence to life “without privilege of parole,” or any other lesser sentence.⁸ Since 1920, ten Kentucky Governors have commuted thirty-seven sentences of death; however, only two of these have occurred since the death penalty was reinstated in Kentucky in 1976.⁹ Kentucky Governors have granted clemency to Kevin Stanford in 2003 and Jeffrey Leonard in 2007.¹⁰

2. Kentucky Parole Board

⁵ KY. CONST. § 77 (2011) (first adopted in 1891). *See also* KY. CONST. § 145 (2011) (restoring civil rights through executive pardon); KY. CONST. § 150 (2011) (restoring eligibility for office through executive pardon). In the thirty-four states with the death penalty, Kentucky is one of twelve in which the sole authority to grant clemency lies with the Governor. *Clemency*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/clemency> (last visited Nov. 2, 2011).

⁶ *See* ABA Clemency Questionnaire Response from M. Holliday Hopkins, General Counsel, Office of Ky. Governor Steven L. Beshear, July 7, 2011 (on file with author) [hereinafter *Ky. Response to Clemency Questionnaire*], *infra* Appendix.

⁷ KY. REV. STAT. ANN. § 439.450 (West 2011); Ed Monahan, *The Power, Practice and Process of Commutation of Persons Sentenced to Death*, KY. DEP’T OF PUB. ADVOCACY 3 (Oct. 2008), available at <http://www.dpa.ky.gov> (search for “power, practice” then follow top result).

⁸ KY. CONST. 77; *Anderson v. Commonwealth*, 107 S.W.3d 193, 196 (Ky. 2003) (“Section 77 of the Kentucky Constitution vests the Governor with the power to “grant . . . pardons.” . . . A pardon can be full (absolute), conditional or partial. A full pardon restores an ‘offender’s civil rights without qualification’ . . . [and] a partial pardon ‘exonerates the offender from some but not all of the punishment or legal consequences of a crime.’ . . . In Kentucky, the constitutional power to pardon encompasses the power to issue conditional pardons. This is also true of the power to issue partial pardons.”) (internal citations omitted). *See also* KY. REV. STAT. ANN. § 532.030 (West 2011) (listing the possible penalties upon the conviction of a capital crime).

⁹ *Clemency*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/clemency> (last visited Nov. 2, 2011); Monahan, *supra* note 7, at 5, 9 (noting the number of pre-1976 grants of clemency).

¹⁰ Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003) (Commutation of Death Sentence); Henry Weinstein, *Death Sentence Commuted for Ky. Man Who Killed at 17*, L.A. TIMES, June 22, 2003, at 36; Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence).

The Kentucky Parole Board, an independent, autonomous agency housed within the Kentucky Justice and Public Safety Cabinet, consists of nine full-time members appointed by the Governor and confirmed by the State Senate.¹¹ Each Board member must have “at least five years of actual experience in the field of penology, correction work, law enforcement, sociology, law, education, social work, medicine, or a combination thereof, or have served at least five years previously on the Parole Board.”¹² The Governor selects appointees from a list of three candidates provided to him by the Parole Board Nominating Committee, an entity within the Kentucky Corrections Commission.¹³ No more than six Board members are permitted to be from the same political party.¹⁴ Once appointed, the nine Board members are eligible for reappointment for an unlimited number of terms and serve four-year staggered terms until their successors are appointed and confirmed by the Senate.¹⁵ One Board member will be appointed by the Governor to serve as Chair until his/her term expires or s/he is removed by Governor.¹⁶ The Governor may remove members of the Board for “disability, inefficiency, neglect of duty, or malfeasance in office.”¹⁷

Only upon the request of the Governor will the full Kentucky Parole Board investigate and report to the Governor on a death row inmate’s clemency application.¹⁸ The Board’s main function is to conduct reviews and/or hearings to determine the parole eligibility of the Commonwealth’s convicted offenders.¹⁹ The Board is required to keep records of its acts, electronic records of its meetings, written records of the individual members’ votes, the reasons for denying parole to inmates, and is required to submit to the Governor an annual report with statistical data at the end of each fiscal year.²⁰ These records must be available to the public.²¹ The Board is supported by the Office of the Parole Board, which is responsible for the Board’s daily administration.²²

B. Applying for and Obtaining Clemency

To apply for clemency, an inmate or his/her attorney must submit to the Office of the Governor an official Application for Gubernatorial Pardon and/or Commutation of Sentence.²³ The Kentucky Supreme Court has stated that it “is patently clear that there are two basic constitutionally mandated requirements under [Kentucky Constitution] Section 77: (1) that the

¹¹ KY. REV. STAT. ANN. § 439.320(1) (West 2011); *Kentucky Parole Board*, KENTUCKY.GOV, <http://justice.ky.gov/parolebd> (last visited June 28, 2011). As of July 1, 2011, four member positions were unfilled. Telephone Interview by Paula Shapiro with Jennifer Markey, Administrative Specialist III, Office of the Ky. Parole Bd., June 8, 2011 (on file with author).

¹² KY. REV. STAT. ANN. § 439.320(1) (West 2011).

¹³ *Id.*; KY. PAROLE BD., ANNUAL REPORT: FY 2006–2007 (2007), available at <http://justice.ky.gov/NR/rdonlyres/0828EB8C-0E74-4F51-9F40-6B3BB7C1A4A4/0/paroleboard0607FYreport.pdf>.

¹⁴ KY. REV. STAT. ANN. § 439.320(1) (West 2011).

¹⁵ KY. REV. STAT. ANN. § 439.320(3) (West 2011); Interview with Jennifer Markey, *supra* note 11.

¹⁶ KY. REV. STAT. ANN. § 439.320(2) (West 2011).

¹⁷ KY. REV. STAT. ANN. § 439.320(5) (West 2011).

¹⁸ KY. REV. STAT. ANN. § 439.450 (West 2011); Ky. Response to Clemency Questionnaire, *supra* note 6, at 2.

¹⁹ KY. REV. STAT. ANN. §§ 439.330(1), 439.340(2) (West 2011); see also 401 KY. ADMIN. REG. 1:030 (2010) (determining parole eligibility).

²⁰ KY. REV. STAT. ANN. § 439.330(4) (West 2011).

²¹ *Id.*

²² KY. REV. STAT. ANN. § 439.320(8) (West 2011).

²³ Telephone Interview by Paula Shapiro with Selina Bowman, Secretary, General Counsel Office, Ky. Office of the Gov., June 13, 2011 (on file with author).

movant file an application for clemency with the Governor; and (2) that the Governor file with each application a statement of reasons for his decision.”²⁴

Kentucky citizens or advocacy groups have also submitted clemency requests to the Governor on behalf of a death row inmate, although the Governor is not required to consider such petitions.²⁵ At least one previous Governor “declined to entertain requests for clemency from anyone but” the death row inmate.²⁶ However, a death row inmate’s attorney may file a petition for a stay of execution on the grounds that the inmate is insane.²⁷

1. Applications for Clemency

There is no formal application that is specific to commutation of a death sentence in Kentucky. In practice, all applications for clemency, including pardons, reprieves, and commutations, are filed using the same official form, a four-page “Application for Gubernatorial Pardon and/or Commutation of Sentence,” available upon request from the Office of the Governor.²⁸ The application requires the petitioner to provide

- (1) general information including social security number, marital status and number of children;
- (2) criminal information, including a complete list of past and pending felony and misdemeanor charges and any parole or probation violations;
- (3) educational information, including the highest level of education completed;
- (4) military information, including branch of service and type of discharge;
- (5) employment information, including current and most recent employers; and
- (6) contact information for non-family references and emergency contacts.²⁹

The petitioner must include with the application, if applicable: (1) copies of previous clemency applications, (2) a letter in the petitioner’s own words describing the reason(s) s/he is seeking relief and the extenuating circumstances supporting the basis for the request, and (3) a minimum of three letters of recommendation in support of clemency, which may be “submitted from all sources, including but not limited to the following: neighbors, employers, co-workers, pastors, church members, elected officials, judges, prosecutors, family members, etc.”³⁰ According to the General Counsel of the Office of the Kentucky Governor, “[in] addition, written statements,

²⁴ McQueen v. Patton, 948 S.W.2d 418, 419 (Ky. 1997); Baze v. Thompson, 302 S.W.3d 57, 60 (Ky. 2010) (citing *McQueen*). See also Ky. Response to Clemency Questionnaire, *supra* note 6, at 2 (citing *Baze*, 302 S.W.3d at 60).

²⁵ Ky. Response to Clemency Questionnaire, *supra* note 6, at 2; Interview with Selina Bowman, *supra* note 23 (stating that the Governor “only considers official petitions for clemency”); see, e.g., *Advocates Beg for Harper*, CINCINNATI-KY. POST (Ohio), May 21, 1999, at K1 (noting Kentucky’s four Roman Catholic bishops, Amnesty International and other groups requested clemency on behalf of Eddie Lee Harper who had voluntarily waived remaining appeals, effectively volunteering for execution).

²⁶ Lance Williams, *Execution Shakes Death-Penalty Foes at Prison, Elsewhere Protestors Fear Desensitization*, LEXINGTON HERALD-LEADER, May 26, 1999, at A12.

²⁷ KY. REV. STAT. ANN. § 431.2135(1) (West 2011).

²⁸ Interview with Selina Bowman, *supra* note 23; McQueen v. Patton, 948 S.W.2d 418, 419 (Ky. 1997) (stating that a clemency “application is the triggering event for action by the Governor”).

²⁹ OFFICE OF THE KY. GOVERNOR, APPLICATION FOR GUBERNATORIAL PARDON AND/OR COMMUTATION OF SENTENCE (on file with author).

³⁰ *Id.*

documents and other supporting materials concerning the parties' respective positions may be submitted to the Governor for review and consideration."³¹ The inmate must also sign a release authorizing the Office of the Governor to "make all necessary investigations of [the inmate's] work, character, personal history, and financial, credit, and other records."³²

2. Access to Prison Officials for Clemency Applications

Prior to filing a clemency petition, defense counsel for a death row inmate may request access from the Kentucky Department of Corrections to interview prison officials and other death row inmates to obtain information relevant to an inmate's clemency application.³³ However, access to prison personnel and other death row inmates may be limited in the Commonwealth.³⁴ For example, a death row inmate may be permitted "to seek information" for a clemency petition but s/he does not have "a substantive right [] to acquire that information over all possible obstacles."³⁵ For more information on death-sentenced clemency petitioners' access to prison officials, please see Recommendations #5 and #7 in the Analysis Section.³⁶

3. Deadlines for Filing Clemency Petitions

Kentucky does not impose specific deadlines for filing clemency petitions. While clemency petitions usually are filed after judicial remedies have been exhausted and an execution date has been set by the Kentucky Supreme Court,³⁷ petitions also have been filed in anticipation of issuance of a death warrant.³⁸ Kentucky also permits issuance of a death warrant after the direct appeal has been finalized, even if the inmate has other viable avenues for appeal available in the state and federal court systems.³⁹ Kentucky death row inmates have filed successive petitions for clemency.⁴⁰

³¹ Ky. Response to Clemency Questionnaire, *supra* note 6, at 2.

³² OFFICE OF THE KY. GOVERNOR, APPLICATION FOR GUBERNATORIAL PARDON AND/OR COMMUTATION OF SENTENCE (on file with author).

³³ See generally Brief for Petitioner at 1, *Baze v. Thompson*, No. 2009-SC-00018, 2009 WL 5970844 (Ky. July 15, 2009); *Baze v. Parker*, 632 F.3d 338, 340 (6th Cir. 2011) ("Baze believes that certain individuals at the prison where he is confined possess information that could strengthen his bid for clemency. Accordingly, [] he requested permission for his attorneys to speak with prison guards, the death row unit administrator, and other death row inmates.").

³⁴ *Baze v. Thompson*, 302 S.W.3d 57, 58–60 (Ky. 2010) (noting the Kentucky Department of Correction's (DOC) denial of access by clemency counsel to DOC personnel and denying the inmate relief); *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011), *affirming* *Baze v. Parker* 711 F.Supp.2d 774 (E.D. Ky. 2010) (denying relief).

³⁵ *Baze*, 302 S.W.3d at 58; see also *Baze v. Parker*, 632 F.3d 338, 343, 346 (6th Cir. 2011).

³⁶ *Infra* notes 98–103, 112–129 and accompanying text.

³⁷ At the conclusion of an unsuccessful challenge to the prisoner's conviction and sentence, the Kentucky Supreme Court will issue a mandate setting the execution date as the fifth Friday following the date of the mandate. KY. REV. STAT. ANN. § 431.218 (West 2010).

³⁸ Telephone Interview by Paula Shapiro with Tim Arnold, Director, Post Trial Div. Dep't of Pub. Advocacy, Feb. 25, 2011 (on file with author). In practice, Kentucky's Attorney General will request that the Governor issue a warrant for execution. R.G. Dunlop, *Beshear asked to halt executions for study of Kentucky's death-penalty system*, COURIER-J. (Louisville, Ky.), Nov. 24, 2009.

³⁹ See *Bowling v. Commonwealth*, 926 S.W.2d 667, 668–69 (Ky. 1996); see also Recommendation #7, *infra* notes 120–129 and accompanying text.

⁴⁰ See, e.g., *Baze v. Parker*, 632 F.3d 338, 340 n.1 (6th Cir. 2011) (noting that "Baze is currently at work on his second clemency application. Baze first sought clemency in 2007.").

4. Legal Representation During Clemency

While Kentucky has not promulgated any rules, regulations, laws, or procedures that require courts to appoint counsel to represent the Commonwealth's death row inmates petitioning for clemency, KRS 31.110 entitles an indigent defendant or death row inmate to "be counseled and defended at all stages of the matter . . . including revocation of probation and parole."⁴¹ Furthermore, in 2009, the United States Supreme Court clarified that federal law permits, but does not require, "federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."⁴²

In practice, the Department of Public Advocacy and the Louisville Metro Public Defender's Office provide representation to Kentucky death row inmates through clemency and execution, which includes drafting and researching clemency petitions and appeals.⁴³ For more information on the representation of capital defendants and death row inmates during clemency proceedings, please see the Analysis Section, Recommendations #6 and 7, and Chapter Six on Defense Services.⁴⁴

5. Clemency and the Kentucky Parole Board

The Kentucky Governor has sole discretion to authorize the Kentucky Parole Board to investigate and recommend clemency in a death penalty case.⁴⁵ The Commonwealth has not adopted any laws, procedures, or guidelines governing the process by which the Board would investigate and recommend action on a death row inmate's clemency petition. While the Commonwealth has adopted specific procedures governing the decision-making required of the Board when investigating and determining parole recommendations,⁴⁶ these regulations do not apply to death row inmates who are ineligible for parole.⁴⁷

6. Clemency Decisions

The Governor alone has the power to grant or deny clemency.⁴⁸ S/he "may consider any factors [s/]he determines to be relevant to his/her decision."⁴⁹ Section 77 of the Kentucky Constitution requires the Governor to "file with each [clemency] application[,] a statement of the reasons for his[/her] decision thereon, which application and statement shall always be open to public

⁴¹ KY. REV. STAT. ANN. § 31.110(2)(a) (West 2011).

⁴² 18 U.S.C. § 3599(e); *Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009) (authorizing federally-appointed counsel, pursuant to 18 USC 3599, to represent death row inmates in state clemency proceedings).

⁴³ KY. DEP'T OF PUB. ADVOCACY, POLICIES AND PROCEDURES §§ 18.01(E)(5)–(7), 18.09 (revised Jan. 1, 2008) [hereinafter DPA POLICIES]; Interview by Sarah Turberville and Paula Shapiro with Daniel T. Goyette, Chief Public Defender, Louisville Metro Public Defender's Office, Oct. 12, 2010 (on file with author).

⁴⁴ See Recommendations #6–7, *infra* notes 104–129 and accompanying text.

⁴⁵ KY. REV. STAT. ANN. § 439.450 (West 2011).

⁴⁶ See KY. REV. STAT. ANN. §§ 439.340, 439.335, 439.3401 (West 2011).

⁴⁷ See, e.g., KY. REV. STAT. ANN. §§ 439.340, 439.3401 (West 2011).

⁴⁸ KY. CONST. § 77; Ky. Response to Clemency Questionnaire, *supra* note 6 (noting the Governor's discretion throughout the seven pages of its response to the Clemency Questionnaire).

⁴⁹ Ky. Response to Clemency Questionnaire, *supra* note 6, at 4.

inspection.”⁵⁰ A Governor’s grant of clemency, formally issued in an Executive Order, is published in Kentucky’s Executive Journal, which is maintained by the Kentucky Secretary of State.⁵¹ Denials of clemency are also filed with the Secretary of State and appear to be in the form of a letter, written to clemency counsel representing the death row inmate.⁵² All clemency applications, including those that are not granted, are retained by the Office of the Governor until the end of each Governor’s administration, when all such applications are transferred to the Kentucky Department for Libraries and Archives.⁵³

There have been four recent challenges by death row inmates to the Commonwealth’s clemency process, all of which have been unsuccessful.⁵⁴ The Kentucky Supreme Court has also held that in order for a death row inmate to challenge a governor’s refusal to grant clemency, the inmate must have previously filed a clemency application with the Governor.⁵⁵

⁵⁰ KY. CONST. § 77.

⁵¹ Ky. Response to Clemency Questionnaire, *supra* note 6, at 5; *Overview*, KY. SEC’Y OF STATE, <http://www.sos.ky.gov/executive/journal> (last visited Feb. 24, 2011).

⁵² Ky. Response to Clemency Questionnaire, *supra* note 6, at 5; Letter from Paul E. Patton, Governor, Commonwealth of Kentucky, to Hon. Stefanie McArdle, Counsel to Harold McQueen Jr. (June 30, 1997) (on file with author).

⁵³ See PUBLIC RECORDS DIV., KY. DEP’T FOR LIBRARIES & ARCHIVES, RECORDS RETENTION SCHEDULE: GOVERNOR’S OFFICE 1, 5 (Apr. 11, 2011), *available at* <http://kdla.ky.gov/records/retentionschedules/Documents/State%20Records%20Schedules/kygovernor.PDF>.

⁵⁴ *Id.* (denial of relief); *McQueen v. Patton*, 948 S.W.2d 121 (Ky. 1997) (denial of relief); *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010) (denial of relief); *In re Sapp*, 118 F.3d 460, 466 (6th Cir. 1997) (denial of relief); *Baze v. Parker*, 711 F.Supp.2d 774, 781 (E.D. Ky. 2010) (denial of relief), *aff’d*, *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011) (denial of relief).

⁵⁵ *McQueen v. Patton*, 948 S.W.2d 418 (Ky. 1997). In *McQueen*, the inmate had filed for a declaratory injunction due to the Governor’s published statement upon the signing of the inmate’s death warrant that the Governor would not “through the power of clemency, substitute my judgment for that of the General Assembly, the courts, and the juries of the Commonwealth.” *McQueen*, 948 S.W.2d at 419. The Kentucky Supreme Court found that no controversy existed since *McQueen* had not yet filed a petition for clemency with the Governor. *Id.*

II. ANALYSIS

A. 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.

The Commonwealth of Kentucky does not require the Governor, who possesses the sole constitutional and statutory power to grant or deny clemency, to conduct any specific procedural review or to consider independently any specific facts, evidence, or circumstances when making his/her clemency decision.⁵⁶ Instead, “the decision to grant clemency is left to the unfettered discretion of the Governor.”⁵⁷ According to the U.S. Court of Appeals for the Sixth Circuit, section 77 of Kentucky’s Constitution “in no way establishes specific procedures to be followed and imposes no standards, criteria, or factors that the Governor need consider in exercising his power.”⁵⁸ The Kentucky Supreme Court has stated “[t]here exist only two constitutionally mandated requirements under section 77: that the movant file an application for clemency with the Governor; and that the Governor file with each application a statement of the reasons for his decision.”⁵⁹

In addition, the Governor may request the Kentucky Parole Board (Board) to investigate and make a non-binding recommendation on a death row inmate’s clemency petition.⁶⁰ However, there are no laws, rules, procedures, standards, or guidelines governing the scope or nature of the Board’s investigation into a death row inmate’s clemency application. Furthermore, the Kentucky Assessment Team has no knowledge that the Board has ever been authorized to conduct an investigation or make a recommendation in a death penalty case since the reinstatement of the death penalty in Kentucky.⁶¹

Kentucky Governors have granted commutations to two death row inmates since the Commonwealth reinstated capital punishment in 1976.⁶² In each of these cases, the Kentucky Governor has explained his decision by including a statement of reasons within the executive

⁵⁶ Ky. Response to Clemency Questionnaire, *supra* note 5, at 4; KY. CONST. § 77; *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010).

⁵⁷ *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010).

⁵⁸ *In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997).

⁵⁹ *Baze*, 302 S.W.3d at 60.

⁶⁰ KY. REV. STAT. ANN. § 439.450 (West 2011). The Governor is not required to involve the Kentucky Parole Board, and “most of the past commutations of death sentences by Kentucky Governors apparently have not used it.” Monahan, *supra* note 7, at 3.

⁶¹ Telephone Interview by Paula Shapiro with Verman Winburn, Chair, Ky. Parole Bd., Apr. 4, 2011 (on file with author).

⁶² Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003) (Commutation of Death Sentence); Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence). Prior to the 1972 U.S. Supreme Court decision halting executions nationwide, Kentucky Governors granted clemency to six death row inmates. Monahan, *supra* note 7, at 5.

order granting clemency.⁶³ In the 2003 order granting clemency to Kevin Stanford, Governor Paul Patton cited Stanford's age at the time of the offense (seventeen) as the reason for commuting the death sentence of this inmate to life without parole.⁶⁴ In the application for clemency, counsel for the death row inmate noted that "[d]ue to the procedural history of Kevin's case and its current posture, it is likely that [the inmate] will not get relief from the courts."⁶⁵ Although the U.S. Supreme Court had upheld Stanford's death sentence despite his age, Governor Patton commuted the death sentence on this very ground years later.⁶⁶ In 2007, Governor Ernie Fletcher granted clemency to Jeffrey Leonard, citing the ineffective legal representation provided to Leonard by his trial counsel, even though state and federal courts denied relief in numerous appeals alleging this same deficiency.⁶⁷ Based on these two cases, it appears recent Kentucky Governors may reconsider issues, such as age or inadequate defense, which were rejected by the courts during legal proceedings.

However, it remains unclear whether clemency decisions are based on an independent evaluation of the facts. For example, in the letter to an inmate's clemency counsel denying the inmate's request, Governor Patton stated

I am in receipt of the clemency application of Harold McQueen. The purpose of this letter is to advise you of my decision with regard to this application for clemency which is to not exercise the authority granted me pursuant to Section 77 of the Kentucky Constitution to "commute sentences, grant reprieves and pardons" because in my opinion, clemency is not warranted in this case. My reason for this decision is that in this case I do not believe it is proper, through the power of clemency, to substitute my judgment for that of the General Assembly, the Courts and the juries of this Commonwealth.⁶⁸

The substance of this denial makes it difficult to determine whether or not Kentucky Governors assume the courts have reached the merits on all issues bearing on a death sentence and base

⁶³ See, e.g., Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence); Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003). Both Kentucky executive orders are included in the Appendix.

⁶⁴ Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003) (Commutation of Death Sentence).

⁶⁵ See Stanford Application for Pardon or Commutation of Sentence Presented to Kentucky Governor Brereton C. Jones on Behalf of Kevin Nigel Stanford, prepared by Stefanie M. McArdle, Ky. Dep't of Pub. Advocacy, Nov. 16, 1995, at 3-4 ("Although many serious violations of his constitutional rights were made at trial, and his sentence is disproportionate to the sentences received by his co-defendants, procedural and technical rules may prevent the courts from reviewing the merits of Kevin's case. For these reasons, executive commutation is an appropriate measure to save Kevin from an execution that would offend human decency, and result in a travesty of justice.") [hereinafter Stanford Clemency Application].

⁶⁶ Stanford v. Kentucky, 492 U.S. 361 (1989) (permitting the execution offenders who were seventeen or sixteen years old at the time of the offense), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005). Governor Patton granted clemency to Stanford two years before the U.S. Supreme Court's decision in *Roper*.

⁶⁷ Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence) (also listing the inmate's age at time of the crime (eighteen) and during trial (nineteen) as reasons for the commutation). See, e.g., Slaughter v. Parker, 187 F.Supp.2d 755 (W.D. Ky. Sept. 27, 2011) (reversing penalty phase of capital trial due to ineffective assistance of counsel), *aff'd in part, rev'd in part* Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006), *rehearing en banc denied by* Slaughter v. Parker, 467 F.3d 511 (6th Cir. 2006). Please see Chapter 6 on Defense Services for a further discussion of this case.

⁶⁸ Letter from Paul E. Patton, Governor, Commonwealth of Kentucky, to Hon. Stefanie McArdle, Counsel to Harold McQueen Jr. (June 30, 1997) (on file with author).

their decisions upon an independent consideration of facts and circumstances. Furthermore, a press release issued in 1997 by Governor Patton indicated that gubernatorial clemency reviews may be somewhat limited. The press release stated

it is my policy not to grant clemency in cases where the death penalty has been recommended by the jury and imposed by a circuit court of our state. I will not, through the power of clemency, substitute my judgment for that of the General Assembly, the courts, and the juries of the Commonwealth.⁶⁹

In response to the public statement above, a death row inmate applying for clemency filed a motion with the Kentucky Supreme Court arguing that the Governor's stated policy violated the inmate's clemency rights pursuant to section 77 of the Constitution.⁷⁰ The Court rejected the inmate's petition, stating that it "will not presume, as does [the inmate], that the Governor will refuse to follow the constitutional mandate of § 77 in rendering its [clemency] decision."⁷¹ The inmate was executed less than four days later.⁷² Notably, Governor Patton later commuted the death sentence of Jeffrey Leonard.⁷³

By contrast, after third parties requested the Governor commute the death sentence of Marco Allen Chapman, who did not submit a formal clemency application on his own behalf and was subsequently executed in 2008, Governor Beshear issued a statement indicating that he believes "capital punishment is appropriate in the case of particularly heinous crimes, absent some strong extenuating circumstances. I have reviewed the facts of this case in detail and . . . I do not find any such strong extenuating circumstances in this case."⁷⁴ He subsequently noted that "[s]igning a death warrant is a solemn responsibility, and I have given this case serious and thoughtful consideration. It is my duty to carry out the court-imposed punishment."⁷⁵ Similarly, when asked whether the Governor specifically considers claims that were not necessarily previously litigated in court on the merits when making clemency decisions, the Office of Governor Beshear replied that the Governor has the discretion to "consider any factors he determines to be relevant to his decision."⁷⁶ This response provides little insight into the range of facts or circumstances that may be taken into consideration. However, we note that as of July 7, 2011, Governor

⁶⁹ McQueen v. Patton, 948 S.W.2d 418, 418–19 (Ky. 1997).

⁷⁰ *Id.*

⁷¹ McQueen v. Patton, 948 S.W.2d 418, 419 (Ky. 1997); KY. CONST. § 77.

⁷² *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (last visited Feb. 18, 2011) (type McQueen and follow only result).

⁷³ Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence).

⁷⁴ Statement from Gov. Steve Beshear on Marco Allen Chapman, Gov. Beshear's Comm'n Office (Nov. 17, 2008), <http://governor.ky.gov/pressrelease.htm?postingguid={943dbba2-d20c-4ee8-aa7f-c4c0120cc05d}> ("This morning, I met with several church leaders and mental health representatives regarding the capital punishment case of Marco Allen Chapman. I had previously met with the Catholic bishops, who have corresponded with me on this issue. I greatly appreciate their perspective on the issue of clemency and their sincere opposition to capital punishment. . . . Mr. Chapman has been found guilty of a vicious and almost indescribable crime. There is absolutely no dispute about his guilt and Mr. Chapman has been found competent in four different proceedings. Therefore, absent any further legal impediments which might arise, the state will proceed with carrying out the sentence of the court.").

⁷⁵ Press Release, *Gov. Beshear Signs Death Warrant*, Gov. Beshear's Comm'n Office, Aug. 25, 2010, <http://www.governor.ky.gov/pressrelease.htm?PostingGUID={56DE643C-652F-48CD-B12B-87BC3A076E99}> (last visited Mar. 3, 2011).

⁷⁶ Ky. Response to Clemency Questionnaire, *supra* note 6 at 4.

Beshear’s General Counsel stated that the Governor “has received no clemency petitions in death penalty cases nor has he rendered any decisions concerning death penalty clemency petitions during his term as Governor.”⁷⁷

Kentucky Governors have considered issues that were previously considered or rejected by the courts in their decision to grant clemency. However, in cases where clemency is denied, we are unsure of the considerations that the Kentucky Governor has taken in to account. Therefore, the Commonwealth of Kentucky is in at least partial compliance with Recommendation #1.

B. Recommendation #2

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

Recommendation #2 requires clemency decision-makers to consider “all factors” that might lead the decision-maker to conclude that death is not the appropriate punishment. According to the ABA, these factors include, but are not limited to, the following, which are not listed in any particular order of priority:

- (1) constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court rulings;
- (2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) lingering doubts of guilt (as discussed in Recommendation #4);
- (4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) inmates’ mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) inmates’ age at the time of the offense (as discussed in Recommendation #4).⁷⁸

Given that the Kentucky Governor has “unfettered discretion” to “consider any factors [s/]he determines to be relevant to his[/her] decision,” and “no clemency procedures are mandated,”⁷⁹ the factors taken under consideration during the clemency decision-making process are largely unknown and may or may not include consideration of the factors described above. A review of Kentucky’s recent history of clemency decision-making provides little insight into the practical

⁷⁷ Ky. Response to Clemency Questionnaire, *supra* note 6, at 1. For a discussion of current death row clemency applications, please see Recommendation #11, *infra* notes 139–150 and accompanying text.

⁷⁸ ABA, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002).

⁷⁹ Ky. Response to Clemency Questionnaire, *supra* note 6, at 2, 4.

application of the Commonwealth's clemency process. Since Kentucky reinstated the death penalty in 1976, there have been three executions and in only one of these cases—Harold McQueen, Jr.—did the inmate seek clemency.⁸⁰ The other two executions involved inmates Eddie Lee Harper, Jr. and Marco Allen Chapman who waived their remaining appeals and their right to apply for clemency after their death warrants were signed, effectively “volunteering” for execution.⁸¹ In addition, since 1976, two death row inmates sought and were granted clemency.⁸²

Clemency petitions, which are to be made available for public inspection in accordance with section 77 of the Kentucky Constitution, may illuminate some of the issues presented to Kentucky Governors for their consideration during clemency proceedings.⁸³ The Kentucky Assessment Team has uncovered clemency petitions available through the Kentucky Department for Libraries and Archives for Eddie Lee Harper, Kevin Stanford, Gregory Wilson, and Randy Haight.⁸⁴ Stanford's application for clemency included twenty-four pages of signatures of Kentucky residents supporting the commutation of his death sentence, based in part on the inmate's age at the time of the offense and disparate treatment of racial minorities in capital cases.⁸⁵ Harper's application for clemency included letters in support from two prison kitchen personnel with whom Harper worked; Harper's attorney, who described how Harper “renounced any legal interest in his parents' estate, thereby allowing the estate to pass to his son, [] rather than being held in escrow pending the resolution of Eddie's case”; his cousin with whom Harper grew up; a former high school classmate; and a Catholic nun.⁸⁶

Kentucky Governors have publicly relied upon at least one of the seven factors listed above in a decision to grant clemency.⁸⁷ While some Kentucky Governors have complied with their

⁸⁰ *Searchable Database for Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (last visited Apr. 5, 2011); Michael Collins, *Chair's First Victim in 35 Years; McQueen Executed*, CINCINNATI-KY. POST (Ohio), July 1, 1997, at 1K.

⁸¹ See *Harper v. Parker*, 177 F.3d 567, 573 (6th Cir. 1999) (affirming District Court's finding that inmate was competent to waive his right to pursue further habeas corpus litigation); Williams, *supra* note 26, at A12 (noting that Harper stated he would not seek clemency); *Chapman v. Commonwealth*, 265 S.W.3d 156, 180–81 (Ky. 2007) (finding that the defendant had the mental capacity to plead guilty, waive mitigation, and “seek[] the death penalty”); Brett Barrouquere, *Kentucky death row inmate: 'I'm ready and I'm sorry'*, ASSOCIATED PRESS, May 9, 2008 (Chapman waived all appeals and was the third execution in the Commonwealth). Harper had previously requested clemency from Governor Brereton Jones in 1995, but eventually decided to waive his remaining appeals and request execution. Application for Pardon or Commutation of Sentence Presented to Governor Brereton C. Jones on Behalf of Edward Harper, Jr., prepared by Linda K. West, Assistant Public Advocate, Ky. Dep't of Pub. Advocacy, Nov. 10, 1995 (on file with author) [hereinafter Harper Clemency Application]; *Harper v. Parker*, 177 F.3d 567, 573 (6th Cir. 1999) (finding Harper competent to waive any remaining appeals).

⁸² *Supra* note 9 and accompanying text.

⁸³ See PUBLIC RECORDS DIV., KY. DEP'T FOR LIBRARIES & ARCHIVES, RECORDS RETENTION SCHEDULE: GOVERNOR'S OFFICE 1, 5 (Apr. 11, 2011), available at <http://kdla.ky.gov/records/retentionschedules/Documents/State%20Records%20Schedules/kygovernor.PDF>.

⁸⁴ The Kentucky Assessment Team was provided assistance from the Kentucky Department for Libraries and Archives. Emails and Materials from Tim Tingle, Manager, Archival Services Branch, Dep't for Libraries and Archives, to Paula Shapiro, June 1, 2011, July 1, 2011, July 13, 2011, July 28, 2011, July 29, 2011 (on file with author).

⁸⁵ See Stanford Clemency Application, *supra* note 65.

⁸⁶ Harper Clemency Application, *supra* note 81.

⁸⁷ See Ky. Response to Clemency Questionnaire, *supra* note 6, at 1–7; Recommendation #1, *supra* notes 56–77 and accompanying text.

constitutional obligation to provide an extensive statement of reasons in grants of clemency, we were unable to determine whether Governors review all issues that might lead him/her to determine that a death sentence is not the appropriate punishment. Therefore, the Commonwealth is in partial compliance with Recommendation #2.

The Kentucky Assessment Team recommends that the Governor adhere to the existing constitutional requirement to publish a “statement of reasons” for each decision to grant or deny clemency.

C. Recommendation #3

Clemency decision-makers should consider as factors in their deliberations any patterns 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.

In the Commonwealth, exclusion of minority jurors and racial disparity in application of the death penalty particularly due to the race of the victim is well-documented and discussed in greater detail in Chapter Twelve of this Report. To date, no grant of clemency has been made based upon patterns of racial or geographic disparity in carrying out the death penalty or the exclusion of racial minorities from the jury panels that convicted or sentenced a death row inmate. Although Kevin Stanford’s petition for clemency included the fact that he was an African-American sentenced to death by an all-white jury, the statement of reasons provided by the Governor at the grant of clemency cited only Stanford’s minority age at the time of the offense.⁸⁸ Therefore, we are unable to determine if the Commonwealth is in compliance with this Recommendation.

D. Recommendation #4

Clemency decision-makers should consider as factors in their deliberations 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 relating to a lingering doubt about the inmate's guilt.

Considerations of Mental Retardation, Mental Illness, or Mental Competency

It appears that Kentucky Governors have considered mental illness with respect to clemency for death row inmates. In 2008, before the execution of Marco Allen Chapman, who waived his appeals and volunteered to be executed, Governor Beshear met with mental health representatives regarding Chapman’s upcoming execution.⁸⁹ Beshear noted afterwards that he

⁸⁸ Stanford Clemency Application, *supra* note 65, at 3, 8 (describing the circumstances of the trial of Stanford, who is an African-American sentenced to death by an all-white jury for killing a Caucasian woman).

⁸⁹ Statement from Gov. Steve Beshear on Marco Allen Chapman, Nov. 17, 2008, *available at* <http://governor.ky.gov/pressrelease.htm?postinguid={943dbba2-d20c-4ee8-aa7f-c4c0120cc05d}>. Beshear released a statement afterwards, indicating that they discussed clemency issues and he “greatly appreciate[s] their perspective on the issue of clemency.” *Id.* We note that because Chapman volunteered for the death penalty and waived his appeals, his attorneys did not file a clemency application on his behalf.

had “reviewed the facts of this case in detail and [had] given much prayerful thought to it,” and had found no extenuating circumstances in the case that warrant a grant of clemency.⁹⁰

In one letter included with Eddie Lee Harper’s clemency petition, prior to Harper’s decision to forgo clemency and seek execution, a former classmate of Harper stated that

In retrospect as an adult, I believe that Eddie was actually mentally disturbed. As a licensed athletic trainer, I am now trained to recognize behavior like Eddie’s as cause for concern about a young person’s mental and emotional health. It is my belief that if Eddie had received early counseling, the crime of which he was convicted would never have been committed.⁹¹

During clemency, Harper’s attorney also discussed the testimony presented in support of Harper’s insanity defense at trial in which two mental health clinicians has stated that Harper suffered from “schizophrenic form disorder.”⁹²

Prior to 1972, Kentucky Governors granted clemency based on consideration of an inmate’s mental retardation, mental illness, or mental competency, to at least four death row inmates.⁹³

Considerations of Age at the Time of the Offense and Lingering Doubt of Guilt

Governor Patton considered and granted clemency to Kevin Stanford based on the inmate’s age at the time of the offense, a commutation which occurred prior to the U.S. Supreme Court prohibition on the execution of juveniles in 2005.⁹⁴ In an additional clemency case, a Kentucky Governor granted clemency to a death row inmate based, in large part, on the ineffective assistance of the inmate’s trial counsel.⁹⁵ However, the fact that the inmate was eighteen years old at the time of the offense, and nineteen during the trial, was also considered.⁹⁶

Regarding lingering doubt of guilt, Stanford’s clemency application also included evidence that the inmate was not the shooter during the commission of the crime.⁹⁷ It is unclear whether the Governor considered during clemency deliberations evidence relating to lingering doubt of Stanford’s guilt.

It therefore appears that Kentucky is in at least partial compliance with this Recommendation.

⁹⁰ *Id.*

⁹¹ Letter from Jerry May, Head Athletic Trainer, Athletic Department, Univ. of Louisville, in Harper Clemency Application, *supra* note 81.

⁹² Letter from Linda K. West, Assistant Public Advocate, Ky. Dep’t of Pub. Advocacy, Nov. 15, 1995, in Harper Clemency Application, *supra* note 81.

⁹³ Monahan, *supra* note 7, at 5.

⁹⁴ In 2003, Governor Patton granted Kevin Stanford clemency based on Stanford’s age at the time he committed the crime, despite the U.S. Supreme Court’s ruling upholding Stanford’s death sentence. Ky. Exec. Order No. 2003-1243 (Dec. 8, 2003) (Commutation of Death Sentence); Stanford v. Kentucky, 492 U.S. 361 (1989); Roper v. Simmons, 543 U.S. 551 (2005).

⁹⁵ Ky. Exec. Order No. 2007-1175 (Dec. 10, 2007) (Commutation of Death Sentence).

⁹⁶ *Id.*

⁹⁷ Stanford Clemency Application, *supra* note 65.

E. Recommendation #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

It appears that at least one Governor considered and rejected evidence of the rehabilitation of an inmate's while on death row.⁹⁸ Eddie Lee Harper submitted an application for clemency in 1995, prior to his decision to forgo any further appeals, and in his letter to Governor Jones, Harper wrote "[t]here are no rehabilitation programs for Death Row inmates, so I have tried to rehabilitate myself" and went on to describe his daily work in the prison and other activities.⁹⁹ Harper was executed on May 25, 1999.¹⁰⁰ Kevin Stanford's petition for clemency also included information regarding his rehabilitation and positive acts on death row, such as earning a high school equivalency diploma and bachelor's degree from Murray State University while on death row.¹⁰¹ However, it is unclear whether this was considered by the Governor in his grant of clemency to Stanford.

Furthermore, in order to effectively present evidence of rehabilitation to clemency decision-makers, access to prison personnel is needed, since such persons are often the only individuals with whom death row inmates regularly interact, aside from other inmates.¹⁰² The Kentucky Department of Corrections (DOC), however, has refused to grant permission for DOC personnel to speak with an inmate's counsel preparing a clemency petition in at least one documented instance.¹⁰³

Because the factors that the Governor may take in to consideration are largely unknown, we have insufficient information to determine if the Commonwealth is in compliance with Recommendation #5. However, DOC's refusal to permit access to prison personnel for a death row inmate's counsel petitioning for clemency raises a number of concerns about death row inmates' ability to effectively present a claim under this Recommendation. These are discussed more fully in Recommendation # 7, below.

D. Recommendation #6

In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*.

⁹⁸ Harper Clemency Application, *supra* note 81. Kevin Stanford's clemency application to Gov. Jones also described his rehabilitation on death row. See Stanford Clemency Application, *supra* note 65.

⁹⁹ Letter from Edward Lee Harper, Jr., to Governor Brereton Jones, Nov. 3, 1997, in Harper Clemency Application, *supra* note 81. Harper also spoke of his conversion to Catholicism, drug history, familial and relationship history. *Id.*

¹⁰⁰ *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (last visited July 25, 2011) (searching under Edward Lee Harper).

¹⁰¹ See Stanford Clemency Application, *supra* note 65.

¹⁰² See Factual Discussion, *supra* notes 33–35 and accompanying text.

¹⁰³ *Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010); *Baze v. Parker*, 632 F.3d at 340.

The Commonwealth of Kentucky has not adopted any laws, rules, procedures, or guidelines ensuring the appointment and delineating the qualifications of counsel to death row inmates pursuing clemency.¹⁰⁴ However, federal law permits counsel appointed to represent indigent death row inmates under a state-imposed death sentence in federal habeas corpus proceedings “to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”¹⁰⁵

While appointment of counsel in clemency proceedings is not guaranteed under state law, the Department of Public Advocacy (DPA) and the Louisville Metro Public Defender’s Office (Metro Defender) generally provide representation to Kentucky death row inmates during clemency proceedings.¹⁰⁶ DPA has adopted internal policy relating to the qualifications of capital counsel, the *Post Trial Division Minimum Performance Standards* (Standards), which include requirements relating to the performance of DPA attorneys providing representation during clemency.¹⁰⁷ Specifically, the Standards require clemency counsel to “be familiar with the procedures for and permissible substantive content of a request for clemency,” “interview the client and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure. . .” and “take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.”¹⁰⁸ In addition, DPA policy requires its post-conviction capital attorneys, in general, to possess qualifications consistent with the *ABA Guidelines*.¹⁰⁹

The Metro Defender has not formally adopted any written policies or guidelines governing the requisite qualifications of staff attorneys or contract counsel undertaking representation of a death row inmate during clemency proceedings. However, the Metro Defender requires its staff attorneys providing capital representation to successfully complete extensive capital case training and attempts to ensure that each attorney assigned to a capital case has capital litigation experience.¹¹⁰

Private attorneys representing Kentucky death row inmates pursuing clemency are not required to possess qualifications consistent with the *ABA Guidelines*.

Therefore, Kentucky is in partial compliance with Recommendation #6.¹¹¹

G. Recommendation #7

¹⁰⁴ However, KRS 31.110 does contemplate representation being provided to indigent defendants and convicted offenders throughout all stages of criminal proceedings, including to “be counseled and defended at all stages of the matter . . . including revocation of probation and parole.” KY. REV. STAT. ANN. § 31.110(2)(a) (West 2011).

¹⁰⁵ 18 U.S.C. § 3599(e); *Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009) (authorizing, but not requiring, federally-appointed counsel to represent death row inmates in state clemency proceedings, pursuant to 18 U.S.C. 3599).

¹⁰⁶ Interview with Tim Arnold, *supra* note 38 (noting that DPA provides representation during clemency “so long as there is no conflict of interest which would prohibit [DPA] ethically from acting.”); DPA POLICIES, *supra* note 43, at §§ 18.01(E)(5)–(7), 18.09 (Execution Protocol); Interview with Daniel T. Goyette, *supra* note 43.

¹⁰⁷ DPA POLICIES, *supra* note 43, at § 18.01

¹⁰⁸ DPA POLICIES, *supra* note 43, at § 18.01(E)(5)–(7).

¹⁰⁹ See DPA POLICIES, *supra* note 43, § 17.21(I).

¹¹⁰ Interview with Daniel T. Goyette, *supra* note 43.

¹¹¹ For more information on the qualifications of counsel in Kentucky death penalty cases, see Chapter Six on Defense Services.

Prior to clemency hearings, death row inmates’ counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

Clemency Counsel Compensation and Access to Resources

Generally, Kentucky death row inmates petitioning for clemency are represented by either DPA or Metro Defender salaried employees who also have access to on-staff investigative resources and mitigation specialists to prepare for clemency proceedings.¹¹² Additionally, KRS 31.185 may provide indigent death row inmates funding to pay for “reasonably necessary” expert witness fees or any other “direct expense, including the cost of a transcript . . . that is necessarily incurred” during representation in state criminal proceedings.¹¹³ While the Metro Defender has successfully obtained funds under KRS 31.185 for use during clemency proceedings,¹¹⁴ we were unable to determine whether DPA attorneys have been granted funding for this purpose.

Furthermore, 18 U.S.C. § 3599(f) may authorize an inmate’s federally-appointed attorneys to obtain and to fund “reasonably necessary” investigative, expert, and other services.¹¹⁵ However, while DPA and Metro Defender attorneys regularly represent Kentucky inmates during clemency, and the Metro Defender attorneys request section 3599 funds for this representation, DPA clemency counsel have not consistently requested compensation under section 3599 from the federal courts.¹¹⁶ We are unaware whether independently-appointed counsel request compensation under section 3599.

A death row inmate recently sued the Kentucky Department of Corrections (DOC) due to that agency’s repeated refusal to grant permission for DOC personnel to speak with the inmate’s counsel, thereby frustrating the ability of clemency petitioners and their counsel to gather reliable information that could result in a grant of clemency.¹¹⁷ In response, the Kentucky Supreme Court held that due process requires only that the Commonwealth adhere to the clemency

¹¹² *Id.* However, we note that “DPA cannot pay for experts directly, so inmates facing execution are generally not likely to get additional expert assistance.” Interview with Tim Arnold, *supra* note 38.

¹¹³ KY. REV. STAT. ANN. § 31.185(3) (West 2011).

¹¹⁴ Email from Daniel T. Goyette, *supra* note 42.

¹¹⁵ 18 U.S.C. § 3599(f). For a complete discussion about resources for capital defense attorneys in Kentucky, please see Chapter Six on Defense Services.

¹¹⁶ Interview with Tim Arnold, *supra* note 38; *see also* *Baze v. Parker*, 711 F.Supp.2d 774, 778 (E.D. Ky. 2010) (“Baze’s counsel have not sought reimbursement from this Court for their representation of Baze since March 20, 2002. Indeed, no attorney with the KDPA [] has ever requested reimbursement from the federal government for their efforts pursuing clemency for Baze.”). The court also noted that in previous state post-conviction proceedings, “[i]t appears that Baze has received adequate representation without the aid of federal taxpayers.” *Id.*

¹¹⁷ *Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010). *See also* *Baze*, 711 F.Supp.2d at 778; *Baze v. Parker*, 632 F.3d 338, 340 (6th Cir. 2011).

procedures explicitly set forth by state law.¹¹⁸ It does not, according to the Court, encompass the right to access information for inclusion in the clemency petition.¹¹⁹

This denial of access to prison officials and other inmates who are uniquely capable of providing information on an inmate's possible rehabilitation or positive performance while on death row limits an inmate's ability to develop and present relevant information for his/her clemency petition.

Sufficiency of Time to Develop Clemency Applications

There is no specific procedure for clemency petitioners to follow in the Commonwealth. While it appears inmates are permitted to file successive petitions,¹²⁰ the sufficiency of the time available for the development of potential claims for inclusion in a clemency petition will depend upon the executive branch's practice on the filing of execution warrants.¹²¹

Typically, clemency petitions are filed after the Kentucky Governor has signed the death warrant and an execution date has been set.¹²² However, because there are no laws, rules, or procedures governing the gubernatorial clemency process, and the Governor's "policy concerning the signing of death warrants is strictly an executive function,"¹²³ there have been various practices among Kentucky Governors' administrations with respect to death warrants. While some Governors' administrations 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 post-conviction appeals has lapsed. For example, while Governor from 1995 to 2003, Governor Patton's policy was to sign death warrants prior to exhaustion of all available state and/or federal appeals, effectively requiring clemency counsel to quickly assemble petitions for clemency.¹²⁴ Kentucky Governors also may not grant or deny every application for clemency that is received by the Governor's Office.¹²⁵

This, in turn, results in a scenario in which counsel may file a clemency petition that is not ripe for review and is never then reviewed by the Office of the Governor. Conversely, an execution

¹¹⁸ *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010); KY. CONST. § 77.

¹¹⁹ *Baze*, 302 S.W.3d at 60. *See also* *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011) (federal courts do not have the authority to require state prison personnel to comply with an inmate's clemency petitions), *affirming* *Baze v. Parker*, 711 F.Supp.2d 774 (E.D. Ky. 2010).

¹²⁰ Ky. Response to Clemency Questionnaire, *supra* note 6, at 4; *see also* Factual Discussion, *supra* notes 33–36 and accompanying text.

¹²¹ Interview with Tim Arnold, *supra* note 38.

¹²² KY. CONST. § 81; KY. REV. STAT. ANN. §§ 431.218, 431.240 (West 2011); Interview with Tim Arnold, *supra* note 38. In the most recent case, Kentucky Governor Beshear signed a death warrant on August 25, 2010 that set an execution date for twenty-two days later, on September 16, 2010. Ky. Exec. Order No. 2010-722 (Aug. 25, 2010).

¹²³ *See* *Bowling v. Commonwealth*, 926 S.W.2d 667, 668–69 (Ky. 1996).

¹²⁴ Although at one time the Kentucky governor regularly set execution dates for the Commonwealth's death row inmates, the practice of requesting death warrants at the conclusion of each stage of post-conviction proceedings has waned. Interview with Tim Arnold, *supra* note 38. In practice, the Kentucky Attorney General will request that the Governor issue a warrant for execution. R.G. Dunlop, *Beshear asked to halt executions for study of Kentucky's death-penalty system*, COURIER-J. (Louisville, Ky.), Nov. 23, 2009.

¹²⁵ Interview with Selina Bowman, *supra* note 23 (noting that applications received in cases where there is no impending, imminent execution, the Governor will keep the application on file until the end of his term, where it is then transferred to Archives as a record).

date quickly may be set causing difficulty for the inmate to compile an effective petition for clemency. Due to the varying policies of Kentucky Governors, DPA's mitigation specialists assigned to post-conviction cases now also compile relevant information to be included in future clemency applications.¹²⁶ Nonetheless, according to DPA's Post Trial Division Director, one of the greatest obstacles in preparing an effective and persuasive capital clemency petition is the lack of time to develop a thorough and convincing clemency petition.¹²⁷

Because the Kentucky Governor may sign a warrant for execution at any time following the direct appeal, and "no clemency procedures are mandated,"¹²⁸ an opportunity to rebut evidence the Commonwealth may offer in opposition to clemency also may be unavailable.

Based on this information, the Commonwealth only partially complies with Recommendation #7.

Given that clemency is the final safeguard in cases where a life is at stake and that prison officials are often the only individuals with whom a death row inmate may interact for many years, the Kentucky Assessment Team is concerned about the documented lack of access to prison personnel for counsel representing a death row inmate in clemency proceedings. 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 grant of clemency. No impediments, 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.

We also note that in the context of parole eligibility hearings, the Parole Board has the authority "to issue subpoenas requiring the attendance of such witnesses and the production of such records, books, papers, and documents as it may deem necessary for investigation of the case of any person before it."¹²⁹ However, with respect to clemency for death row inmates, the Kentucky Governors have not tasked the Board to review clemency petitions, thereby limiting a death row inmate's ability to develop and provide important, relevant information to the Governor that could be obtained through subpoena. The availability of subpoena authority, though use of the Parole Board, would better ensure that a well-investigated and researched recommendation to the Governor in each capital clemency case occurs.

Finally, as clemency is the last avenue 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, the Commonwealth should adopt specific procedures to be followed for application and consideration of a death row inmate's petition for clemency. This may include, for example, filing deadlines for a clemency application and/or a provision that an execution warrant should not be issued until the Governor has had an opportunity to review and rule upon an inmate's petition for clemency. Standardization of the clemency process would likely provide clemency counsel adequate time to prepare and file an application for clemency, as well as

¹²⁶ Interview with Tim Arnold, *supra* note 38.

¹²⁷ *Id.*

¹²⁸ Ky. Response to Clemency Questionnaire, *supra* note 6, at 2.

¹²⁹ KY. REV. STAT. ANN. § 439.390 (West 2011).

alleviate some of the unpredictability and politicization of the clemency decision-making process in Kentucky death penalty cases.

H. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

Recommendation #9

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

In Kentucky, the Governor is the ultimate decision-maker on clemency in death penalty cases. However, Recommendation #9 is applicable when the Governor authorizes the Kentucky Parole Board (Board) to investigate and make a recommendation on a clemency petition in a capital case. In that event, the Kentucky Assessment Team recommends that the Parole Board hold an in-person meeting with the clemency petitioner prior to making a recommendation to the Governor in *every* capital clemency case.

The Commonwealth of Kentucky does not require the Governor, as the sole clemency decision-maker, to conduct formal clemency proceedings, including a public hearing or an in-person meeting, with a death-sentenced inmate and his/her clemency counsel. According to the General Counsel of the Office of the Kentucky Governor, other than the constitutionally-mandated requirements under Section 77 of the Kentucky Constitution, “[i]n Kentucky no clemency procedures are mandated. . . . ‘No other constitutional provision or statute establishes specific procedures to be followed or imposes standards or criteria for the clemency decision.’”¹³⁰

However, the Governor has “unfettered discretion” over clemency matters, and in this discretion, s/he may choose to hold a formal hearing.¹³¹ To our knowledge, we are aware of no Kentucky Governor who has held a hearing in a death penalty case. In a limited number of instances in cases with an impending execution, upon request, a death row inmate’s attorney may have the opportunity meet with the Kentucky Governor to discuss clemency.¹³²

In the event the Governor authorizes the Board to investigate and make a recommendation on a death row inmate’s application for clemency, the Board is not required to hold a hearing or an in-person meeting with the inmate or his/her counsel.¹³³ Notably, in non-capital cases concerning

¹³⁰ Ky. Response to Clemency Questionnaire, *supra* note 6, at 2 (citing *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010)).

¹³¹ *Baze*, 302 S.W.3d at 60; *In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997) (stating that the Commonwealth “has not made the clemency process an integral part of the state’s overall adjudicative process”) (internal citations omitted).

¹³² Interview with Tim Arnold, *supra* note 38 (noting that Kentucky Governors and/or the governors’ legal counsel met with counsel for Kevin Stanford and Jeffrey Leonard). Information about any instance where a Kentucky Governor has “granted an interview, meeting and/or hearing” is “not known” by General Counsel of the Office of the Kentucky Governor. Ky. Response to Clemency Questionnaire, *supra* note 6, at 3.

¹³³ KY. REV. STAT. ANN. § 439.450 (West 2011) (“On request of the Governor the board shall investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve or remission of fine or

parole eligibility, the Board conducts an in-person meeting with the inmate, which is generally open to the public.¹³⁴ On average, the Board conducts approximately 16,000 statutorily-mandated parole hearings annually.¹³⁵ The Board has never been authorized to investigate and make a recommendation in a capital clemency case.¹³⁶ We are aware that at least one death row inmate requested and was denied the opportunity for a hearing before the Kentucky Parole Board on his clemency application, the denial of which was upheld by the Kentucky Supreme Court and the U.S. Court of Appeals for the Sixth Circuit.¹³⁷

Because the Commonwealth is not required to provide each death row inmate the opportunity for an in-person meeting or a formal public hearing with clemency decision-makers, the Commonwealth is not in compliance with Recommendations #8 or #9.

I. Recommendation #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

We were unable to determine whether each Kentucky Governor has been fully educated on the broad-based nature of his/her clemency powers. We also are unaware of any attempts by clemency decision-makers in the Commonwealth to educate the public on the broad-based nature of executive clemency or the limitations on the judicial system's ability to grant relief under circumstances that might warrant a grant of clemency.

The Kentucky Assessment Team notes that, in the context of parole eligibility, Kentucky Parole Board (Board) members must have a number of years of experience, receive in-house training and annual ongoing training on current practices in the field, participate in the annual Board

forfeiture.”). The Commonwealth has adopted specific procedures for conducting Kentucky Parole Board determinations, including requiring a public hearing for most parole eligibility cases. *See, e.g.*, KY. REV. STAT. ANN. § 439.340(8) (West 2011) (“Any hearing provided for in subsections (5), (6), and (7) of this section shall be open to the public unless the persons having a right to appear before the board as specified in those subsections request closure of hearing for reasons of personal safety, in which event the hearing shall be closed. The time, date, and location of closed hearings shall not be disclosed to the public.”).

¹³⁴ The Parole Board typically sits in panels of two, although KRS 439.320(4) authorizes panels of two, three, or four to decide parole or final parole revocation hearings. KY. REV. STAT. ANN. § 439.320(4) (West 2011) (noting that for policy and procedural purposes, a quorum requires five Board members); *How the Parole Process works*, KENTUCKY.GOV, <http://justice.ky.gov/parolebd/process.htm> (last visited Mar. 1, 2011). In non-death penalty cases, a Board panel unanimously may impose parole with or without conditional releases, final parole revocation, and/or final discharge to eligible inmates. KY. REV. STAT. ANN. § 439.330(1) (West 2011). If a decision is not unanimous, or if the Governor or a Board member so requests, the entire Board will convene and vote before notifying the inmate of its decision. KY. REV. STAT. ANN. § 439.320(4) (West 2011). The Board employs two administrative law judges who conduct initial probable cause hearings for inmates accused of parole violations, which occur before a final Parole Revocation Hearing conducted by the Board. *How the Parole Process works*, KENTUCKY.GOV, <http://justice.ky.gov/parolebd/process.htm> (last visited June 1, 2011).

¹³⁵ *Kentucky Parole Board*, KENTUCKY.GOV, <http://justice.ky.gov/parolebd> (last visited June 1, 2011).

¹³⁶ Interview with Verman Winburn, *supra* note 61.

¹³⁷ *See* Bill Estep & Sheryl Edelen, *Attorney: Defenders Had Set Up McQueen*, LEXINGTON HERALD-LEADER, at A1.

retreat, and may attend the annual Association of Paroling Authorities International Conference each year.¹³⁸ However, since the Board has never been authorized to investigate and provide a clemency recommendation to the Governor in a death penalty case, and Board members are not required to undergo any training on special considerations in death penalty clemency cases, we are unaware of the extent to which the Parole Board's expertise is applicable to clemency determinations in death penalty cases.

In light of the foregoing, we are unable to determine whether the Commonwealth of Kentucky is in compliance with Recommendation #10.

Clemency may be the only available avenue for the Commonwealth to correct serious errors that occurred at a death row inmate's trial or to consider new information related to the appropriateness or validity of a death sentence in a particular case. Furthermore, difficult legal issues—such as procedural default—are also likely to be raised in a death row inmate's petition for clemency. Given the complexity of the issues involved, the Kentucky Assessment Team recommends that all parties involved in the clemency decision-making process should be well-educated on the relevant issues, including the judicial system's inability to grant relief under certain circumstances and the broad-based nature of the clemency power.

J. Recommendation #11

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

Section 77 of the Kentucky Constitution explicitly requires the Governor to file each application for clemency s/he receives, along with a statement of the reasons for his decision on the application, and to make the application and statement “always” available to the public.¹³⁹

The two Kentucky executive orders granting clemency since 1976 were published in the Secretary of State's Executive Journal and contain specific statements on the reasons for the grant of clemency.¹⁴⁰ Harold McQueen was executed on July 1, 1997 after exhausting his state and federal appeals and being denied clemency by Governor Patton.¹⁴¹ The Kentucky

¹³⁸ KY. REV. STAT. ANN. § 439.320 (West 2011) (requiring “at least five (5) years of actual experience in the field of penology, correction work, law enforcement, sociology, law, education, social work, medicine, or a combination thereof, or have served at least five (5) years previously on the Parole Board.”); Interview with Verman Winburn, *supra* note 61 (noting that all training is subject to budgetary restrictions and, at times, Board members pay their own way); KY. PAROLE BD., CODE OF ETHICS, RULE 2.1, *available at* <http://www.justice.ky.gov/parolebd/ethics.htm>.

¹³⁹ KY. CONST. § 77 (The Governor “shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection.”); KY. REV. STAT. ANN. § 439.450 (West 2011).

¹⁴⁰ *Executive Journal Overview*, EXEC. KY. SEC'Y OF STATE, <http://www.sos.ky.gov/executive/journal> (last visited June 9, 2010) (search for “commutation” or “pardon”).

¹⁴¹ Letter from Paul E. Patton, Governor, Commonwealth of Kentucky, to Hon. Stefanie McArdle, Counsel to Harold McQueen Jr. (June 30, 1997) (on file with author) (“My reason for this decision is that in this case I do not believe it is proper, through the power of clemency, to substitute my judgment for that of the General Assembly, the Courts and the juries of this Commonwealth.”). *See also* Ky. Exec. Order No. 97-716 (June 11, 1997) (Death Warrant for Harold McQueen, Jr.).

Assessment Team has been unable to locate clemency applications filed on behalf of McQueen with any Governor during his sixteen years on death row,¹⁴² and we are therefore unable to identify the reasons proffered by McQueen’s counsel in support of a grant of clemency. In addition, in the only formal denial of clemency by a Kentucky Governor, former Governor Patton simply stated that he did “not believe it is proper, through the power of clemency, to substitute [his] judgment for that of the General Assembly, the Courts and the juries of this Commonwealth,”¹⁴³ and we are therefore unable identify the reason for the Governor’s decision in this case.

According to the Kentucky Department of Public Advocacy (DPA), it has filed a number of clemency petitions on behalf of death row inmates over the years,¹⁴⁴ as has the Louisville Metro Public Defender’s Office (Metro Defender).¹⁴⁵ Despite clear language in Kentucky’s Constitution that all clemency petitions and a statement of reasons for every clemency decision be open to public inspection,¹⁴⁶ our search has only uncovered clemency applications filed on behalf of four death row inmates, in addition to one denial of clemency, in the possession of the Kentucky Department of Archives and Libraries.¹⁴⁷ It appears that while Kentucky Governors have received a number of clemency applications for death row inmates over the years, applications for clemency that are not granted may not be officially “denied” by the Governor, but instead are simply not acted upon during the Governor’s administration.¹⁴⁸ Furthermore, concerns raised upon some Kentucky Governors’ use of pardons indicates that, similar to the

¹⁴² Email to Paula Shapiro from Tim Tingle, Manager, Archival Services Branch, Ky. Dep’t for Libraries & Archives, July 28, 2011 (on file with author) (“I can confirm that I did not locate any records related to Harold McQueen in the pardon records from Governors Patton, Jones, Wilkinson (1987–1991) or Collins (1983–1987). One caveat: there is one series of “prisoner” related correspondence in the Wilkinson papers that seems to be in no discernible order. These are several boxes of loose papers, and considering the volume, I was unable to go through it page by page. I did, however, check the actual pardon records for Wilkinson, with no success.”).

¹⁴³ Letter from Paul E. Patton, Governor, Commonwealth of Kentucky, to Hon. Stefanie McArdle, Counsel to Harold McQueen Jr. (June 30, 1997) (on file with author).

¹⁴⁴ Interview with Tim Arnold, *supra* note 38.

¹⁴⁵ According to the Chief Public Defender in Louisville, there have been additional informal requests “that might be characterized as ‘quasi’ or ‘anticipatory’ clemency letters” for gubernatorial clemency by the Metro Defender. Email to Paula Shapiro from Daniel T. Goyette, Chief Public Defender, Louisville Metro Public Defender’s Office, July 29, 2011 (on file with author).

¹⁴⁶ KY. CONST. § 77. We note that according to his General Counsel, Governor Beshear has received no clemency applications from death row inmates. *See* Ky. Response to Clemency Questionnaire, *supra* note 6, at 2 (“Governor Beshear has received no clemency petitions since taking office.”).

¹⁴⁷ Two applications found in the papers of Governor Brereton Jones (1991–1995), another two in Governor Ernie Fletcher’s (2003–2007) papers, and one in Governor Patton’s (1995–2003) papers. Emails and Materials to Paula Shapiro from Tim Tingle, Manager, Archival Services Branch, Ky. Dep’t for Libraries & Archives, June 1, 2011, July 1, 2011, July 13, 2011, July 29, 2011 (on file with author). According to the Manager at the Archival Services Branch for the Kentucky Department of Libraries and Archives (Archives), the process for archiving records from Governors’ administrations is that Archives

receive[s] records from the Governor’s Office at the end of each administration. Any clemency requests would almost certainly go through the General Counsel section of the Governor’s Office. We received extensive series of “pardon application” files from the administrations of Governor Ernie Fletcher (2003–2007) and Paul Patton (1995–2003). . . . I checked the files for the eleven names [of death row inmates] you listed in your message below, but found nothing for any of those names in the records of either administration.

Id.

¹⁴⁸ Interview with Selina Bowman, *supra* note 23.

exercise of pardon power, clemency decisions may not be insulated sufficiently from political decisions or impacts.

Ultimately, we do not have sufficient information to determine if the Commonwealth of Kentucky is in compliance with Recommendation #11.

As discussed, no Kentucky governor has authorized the Kentucky Parole Board (Board) to investigate and make a recommendation in a capital clemency case.¹⁴⁹ One of the ways in which the clemency process in Kentucky could be better insulated from political considerations is through use of the Board to undertake an investigation and conduct a public hearing for clemency petitioners. In addition, the appointment and removal process for Board members may serve to partially insulate the Board's recommendation to the Governor from political considerations.¹⁵⁰ Furthermore, in the event that the Board is authorized to act, the investigation, report, and recommendation of the Board should be made available to the public.

¹⁴⁹ Interview with Verman Winburn, *supra* note 61. Moreover, parole hearings conducted by the Board are open to the public, which gives the parole process some transparency, and parole determinations include the Board's reasoning. *Frequently Asked Questions*, KY. PAROLE BD., <http://www.justice.ky.gov/parolebd/faq.htm#6> (last visited June 9, 2011).

¹⁵⁰ See *supra* notes 133–134 and accompanying text.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.¹ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision-making. Sometimes, however, jury instructions are poorly written and conveyed. As a result, instructions may tend to confuse jurors, rather than communicate.²

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Trial courts may give instructions that lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors may conclude that their decisions are not vitally important in determining whether a defendant will live or die.

Furthermore, courts must ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of “life without parole” does not ensure that the offender will remain in prison for the rest of his/her life. Jurors holding this or other mistaken beliefs may vote to impose a death sentence because they erroneously assume any lesser sentence eventually will result in the release of the offender within some number of years.

Jurors also must understand the meaning of mitigation as well as their ability to bring mitigating factors to bear when considering capital punishment. Unfortunately, jurors often confuse mitigation with aggravation, or they may believe that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

¹ *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (quotations omitted).

² See William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); see also James Luginbuhl, *Comprehension of Judges’ Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing “[p]ast research . . . demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions”).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

Kentucky judges may use sample jury instructions as templates, modifying those instructions substantially at their own initiative or at the request of one of the parties.³ Although regarded by the courts of Kentucky as “invaluable” resources, sample jury instructions found in *Kentucky Instructions to Juries (Cooper)* “or any other established authorities . . . are not holy writs.”⁴ Nevertheless, as it is common practice in the Commonwealth for judges to rely on sample instructions—particularly those found in *Cooper*—these sample instructions are useful in examining jury instructions in Kentucky capital cases.

A. Kentucky Statutory and Case Law on Capital Jury Instructions

Four offenses are labeled “capital offenses” in Kentucky’s penal code.⁵ If a defendant is found guilty of a capital offense, then s/he must receive one of the following five sentences: (1) death, (2) a term of imprisonment for life without benefit of probation or parole, (3) a term of imprisonment for life without benefit of probation or parole until s/he has served a minimum of twenty-five years of his/her sentence, (4) a sentence of life, or (5) a term of not less than twenty years nor more than fifty years.⁶ Moreover, Kentucky law requires the judge to provide specific instructions to the jury “stat[ing], subject to the aggravating and mitigating limitations and requirements of [the capital sentencing statute], that the jury may recommend upon a conviction for a capital offense [one of the five aforementioned sentences].”⁷ In other words, if a convicted defendant is eligible for a death sentence, the jury must be informed of all available sentencing options under the law.

For a capital defendant to receive a death sentence, the jury also must “find[] the existence of at least one [statutorily recognized] aggravating circumstance[] and determine[], after considering all the evidence in aggravation and in mitigation, that death is the appropriate punishment.”⁸ Accordingly, Kentucky law requires judges presiding over the sentencing phase of a capital case

³ KY. R. CRIM. P. 9.54(1)–(2). The duty of the court “to instruct the jury in writing on the law of the case . . . may not be waived except by agreement of both the defense and the prosecution.” KY. R. CRIM. P. 9.54(1). The Commonwealth’s approach to jury instructions regularly has been described as “bare bones,” with “supplementation, elaboration and detailed explanation [as to those instructions] fall[ing] within the realm of advocacy.” *Collins v. Galbraith*, 494 S.W.2d 527, 531 (Ky. 1973); 1 W. COOPER & D. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES, at v (5th ed. 2010) [hereinafter COOPER & CETRULO].

⁴ *Commonwealth v. Leinenbach*, No. 2010-SC-000091-DG, 2011 WL 3760864, at *2 (Ky. Aug. 25, 2011). *But see* *Gordon v. Commonwealth*, No. 2008-CA-001189-MR, 2010 WL 668642, at *3 (Ky. Feb. 26, 2010) (passing favorably on instructions because their “language [was] consistent with [*Cooper*]”).

⁵ See KY. REV. STAT. ANN. § 507.020(2) (West 2011) (classifying murder as a capital offense); KY. REV. STAT. ANN. § 509.040(2) (West 2011) (classifying kidnapping that results in death as a capital offense); KY. REV. STAT. ANN. § 507A.020(2) (West 2011) (classifying fetal homicide in the first degree as a capital offense); KY. REV. STAT. ANN. § 527.200(3) (West 2011) (classifying use of a weapon of mass destruction in the first degree as a capital offense, provided “a person other than the defendant is killed”).

⁶ KY. REV. STAT. ANN. § 532.030(1) (West 2011).

⁷ KY. REV. STAT. ANN. § 532.030(4) (West 2011). Although the statute refers to the jury “recommend[ing]” a sentence, the jury must be instructed to “fix a sentence.” *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988) (citing *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985) and *Grooms v. Commonwealth*, 756 S.W.2d 131, 141 (Ky. 1988)). In so doing, “the responsibility of the jury in [death penalty] cases remains undiminished.” *Ward*, 695 S.W.2d at 407.

⁸ *Brown v. Commonwealth*, 313 S.W.3d 577, 590 (Ky. 2010).

to, “[u]pon the conclusion of the evidence and arguments . . . give the jury appropriate instructions.”⁹ In particular,

the judge . . . *shall include* in his[/her] instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [] statutory aggravating or mitigating circumstances [listed in the statute] which may be supported by the evidence¹⁰

As this statute suggests, Kentucky law recognizes two sources for aggravating and mitigating circumstances. The first source is the Commonwealth’s capital sentencing statute, found at KRS 532.025(1)(b).¹¹ This statute specifies eight aggravating circumstances and eight mitigating circumstances.¹² The eight aggravating circumstances are,

- (1) The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
- (2) The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree;
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one [] person in a public place by means of a weapon of mass destruction, weapon, or other device which would normally be hazardous to the lives of more than one [] person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;
- (5) The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;
- (6) The offender’s act or acts of killing were intentional and resulted in multiple deaths;
- (7) The offender’s act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties; and
- (8) The offender murdered the victim when an emergency protective order or a domestic violence order was in effect, or when any other order designed to protect the victim from the offender, such as an order issued as a condition of

⁹ KY. REV. STAT. ANN. § 532.025(1)(b) (West 2011); KY. R. CRIM. P. 9.54(1). In practice, trial courts often recite these instructions before the Commonwealth and defense counsel present their penalty-phase arguments.

¹⁰ KY. REV. STAT. ANN. § 532.025(2) (West 2011) (emphasis added).

¹¹ See *St. Clair v. Commonwealth*, 319 S.W.3d 300, 316 (Ky. 2010).

¹² KY. REV. STAT. ANN. § 532.025(2) (West 2011).

a bond, conditional release, probation, parole, or pretrial diversion, was in effect.¹³

The eight mitigating circumstances are,

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime;
- (3) The victim was a participant in the defendant's criminal conduct or consented to the criminal act;
- (4) The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime;
- (5) The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor;
- (6) The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime;
- (7) At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and
- (8) The youth of the defendant at the time of the crime.¹⁴

In addition to these sixteen circumstances, the jury also may be instructed on additional aggravating and mitigating circumstances “otherwise authorized by law.”¹⁵ For example, although KRS 532.055 has been called the Commonwealth’s “*non-capital* felony sentencing statute,”¹⁶ the Kentucky Supreme Court has held that the types of evidence described in KRS 532.055 “may be offered by the Commonwealth [as] relevant to sentencing [in capital cases].”¹⁷

¹³ KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011).

¹⁴ KY. REV. STAT. ANN. § 532.025(2)(b) (West 2011).

¹⁵ KY. REV. STAT. ANN. § 532.025(2) (West 2011). The U.S. Supreme Court has permitted jurisdictions to allow juries to consider non-statutory aggravating factors, and has required States to allow juries to consider non-statutory mitigating factors. *See, e.g.*, *California v. Ramos*, 463 U.S. 992, 1008 (1983) (non-statutory aggravators); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (non-statutory mitigators).

¹⁶ *St. Clair*, 319 S.W.3d at 316 (emphasis added).

¹⁷ *Id.* at 316–17. Incidentally, the Kentucky Supreme Court has held that KRS 532.055 “is a legislative attempt to invade the rule making prerogative of the Supreme Court” and, therefore, that “it violates the separation of powers doctrine enunciated in Section 28 of the Kentucky Constitution.” *Manns v. Commonwealth*, 80 S.W.3d 439, 444 (Ky. 2002) (quoting *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987)). Notwithstanding this conclusion, the Court overtly has “declined, under the principle of comity, to strike the statute down as unconstitutional.” *Id.* (citing *Reneer*, 734 S.W.2d at 798). Although the vast majority of KRS 532.055, as amended, remains in effect,

Thus, and as occurred in *St. Clair v. Commonwealth*, victim-impact evidence is admissible in capital sentencing proceedings because such evidence is admissible under the non-capital sentencing statute.¹⁸

The Kentucky Supreme Court has suggested that capital sentencing instructions “conform to the statutory language” establishing the death-eligible offense and applicable aggravators and mitigators.¹⁹ Instructions also must “ensure that a finding of [an] aggravator was unanimously made by the jury.”²⁰ For example, if a capital defendant has multiple prior convictions, only some of which qualify as aggravating circumstances for the purposes of justifying a death sentence,²¹ “the instruction must require the jury specifically to identify the conviction that the jury uses to find [that] particular aggravator.”²² However, the jury is not required to be instructed that it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances,²³ nor must the Commonwealth prove, during the penalty phase of a capital case, the nonexistence of mitigating circumstances.²⁴

Finally, Kentucky law dictates that these mandatory jury instructions, which inform the jury of all available sentencing options,²⁵ direct the jury to consider any aggravating and mitigating circumstances supported by the evidence,²⁶ and other instructions deemed “appropriate” by the trial judge,²⁷ “shall be given in charge and in writing to the jury for its deliberation.”²⁸

B. Kentucky Sample Jury Instructions

1. Instructions on Available Punishments

including a provision pertaining to victim impact evidence, certain parts of the statute have been found unconstitutional and nullified. *See, e.g., id.* at 445 (statute authorizing the use of prior juvenile adjudications for impeachment purposes “falls within the scope of KRE 609(a),” does not comport with the general understanding of KRE 609(a), and therefore is a nullity); *Terry v. Commonwealth*, 153 S.W.3d 794, 804 (Ky. 2005).

¹⁸ *St. Clair*, 319 S.W.3d at 317. *But see Brown*, 313 S.W.3d at 590 (“[KRS 532.025] lists various circumstances tending to aggravate or to mitigate the offense and provides that a defendant convicted of a capital crime may be sentenced to death if, but only if, at the conclusion of a presentence hearing, the [jury] finds the existence of at least one of the *listed* aggravating circumstances . . .”) (emphasis added).

¹⁹ *St. Clair*, 319 S.W.3d at 308.

²⁰ *Id.* *See also* *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires the jury, not the sentencing judge, to find aggravating circumstances warranting imposition of the death penalty because these factors “operate as ‘the functional equivalent of an element of a greater offense’”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

²¹ *See* KY. REV. STAT. ANN. § 532.025(2)(a)(1) (West 2011) (providing, as an aggravating circumstance, that “[t]he offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions”).

²² *St. Clair*, 319 S.W.3d at 308.

²³ *Ice v. Commonwealth*, 667 S.W.2d 671, 678 (Ky. 1984) (citing *Smith v. Commonwealth*, 599 S.W.2d 900 (Ky. 1980)).

²⁴ *Smith*, 599 S.W.2d at 911–12.

²⁵ KY. REV. STAT. ANN. § 532.030(4) (West 2011).

²⁶ KY. REV. STAT. ANN. § 532.025(2) (2011).

²⁷ KY. REV. STAT. ANN. § 532.025(1)(b) (2011).

²⁸ KY. REV. STAT. ANN. § 532.025(3) (2011) (emphasis added).

Cooper offers several sample jury instructions for use during the penalty phase of a capital case. The sample instruction on possible punishments during the penalty phase of a capital case is as follows:

You may fix the Defendant's punishment for the [Murder] [Kidnapping] of _____ (victim) at:

- (1) Confinement in the penitentiary for a term of not less than 20 years nor more than 50 years;
- OR
- (2) Confinement in the penitentiary for life;
- OR
- (3) Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence;
- OR
- (4) Confinement in the penitentiary for life without benefit of probation or parole;
- OR
- (5) Death.

But you cannot fix his sentence at death, or at confinement in the penitentiary for life without benefit of probation or parole, or at confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that one of the statements listed in Instruction No. _____ (Aggravating Circumstances) is true in its entirety, in which event you must state in writing, signed by the foreperson, that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.²⁹

A separate instruction that also may be given to the jury during the penalty phase when "evidence [will] be presented in extenuation, mitigation, and aggravation of punishment"³⁰ underscores that a finding of an aggravating circumstance must be beyond a reasonable doubt:

You have tried the Defendant and have returned a verdict finding him guilty of the [Murder] [Kidnapping] of _____ (victim). From the evidence placed before you in that trial, you are acquainted with the facts and circumstances of the crime itself. You [will now receive] [have now received] additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall fix a sentence for the Defendant. In considering such evidence as may be unfavorable for the Defendant, you will bear in mind . . . that the law presumes a defendant to be innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty. You shall apply that same presumption in determining whether there are aggravating circumstances bearing

²⁹ 1 COOPER & CETRULO § 12.07.

³⁰ 1 COOPER & CETRULO § 12.04A cmt.

on the question of what punishment should be fixed for the Defendant in this case.³¹

Although the instruction provides, in the bracketed text, “alternative language . . . so that [the instruction] may be used at the beginning or at the conclusion of the [presentence] evidentiary hearing,”³² KRS 532.025 clearly requires that the jury be given “appropriate instructions”—presumably including the instruction regarding aggravating circumstances—“[u]pon the *conclusion* of the evidence and arguments.”³³

2. Specific Aggravating and Mitigating Circumstances Instructions

a. Aggravating Circumstances

Cooper also provides sample instructions that direct the jury to consider appropriate aggravating and mitigating circumstances, and these instructions largely mirror the language found at KRS 532.025(2)(a) and KRS 532.025(2)(b).³⁴

With respect to aggravating circumstances, the sample instruction deviates from the aggravating-circumstances statute in two significant respects. First, for the aggravating circumstance regarding “murder . . . for the purpose of receiving money or any other thing of monetary value, or for other profit,” the instruction may be amended to define “for profit” as “a motive of ‘a hope to obtain financial gain’ or ‘a hope to avoid financial loss.’”³⁵ The Kentucky Supreme Court explicitly has sanctioned this suggested definition of “for profit.”³⁶

The second deviation concerns an aggravating circumstance not found in KRS 532.025(2)(a) that may be added to the sample instruction: “In the course of the offense of his act of Kidnapping, the Defendant murdered the victim.”³⁷ Because kidnapping is enhanced to a capital offense “when the victim is not released alive” or later dies as a consequence of the kidnapping, it serves as an aggravating circumstance for the defendant to have murdered the victim—that is, a defendant’s murder of his/her kidnapping victim suffices to impose the death penalty.³⁸

Finally, prior to listing the case-specific aggravating circumstances, the sample instruction reiterates the burden of proof for finding an aggravating circumstance: “In fixing a sentence for

³¹ 1 COOPER & CETRULO § 12.04A.

³² 1 COOPER & CETRULO § 12.04A cmt.

³³ KY. REV. STAT. ANN. § 532.025(1)(b) (West 2011) (emphasis added). *But see* KY. R. CRIM. P. 9.42 (empowering the trial court to vary the order of proceedings “for special reasons,” albeit the rule is silent as to the giving of instructions).

³⁴ Compare 1 COOPER & CETRULO § 12.06 with KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011); compare 1 COOPER & CETRULO § 12.05 with KY. REV. STAT. ANN. § 532.025(2)(b) (West 2011).

³⁵ 1 COOPER & CETRULO § 12.06.

³⁶ *Meece v. Commonwealth*, 348 S.W.3d 627, 721 (Ky. 2011). The genesis of this broader definition of “for profit” is explained in *Cooper* as having arisen in a capital case “where there was evidence that the defendant murdered his estranged wife to avoid paying court-ordered maintenance.” 1 COOPER & CETRULO § 12.06 cmt.

³⁷ 1 COOPER & CETRULO § 12.06.

³⁸ *Harris v. Commonwealth*, 793 S.W.2d 802, 804–05 (Ky. 1990) (finding that the murder of one’s kidnapping victim serves as an aggravating circumstance by way of the “otherwise authorized by law” language of KRS 532.025(2)).

the Defendant for the offense of [Murder] [Kidnapping], you shall consider the following aggravating circumstances *which you may believe from the evidence beyond a reasonable doubt to be true . . .*”³⁹

b. Mitigating Circumstances

The instruction respecting mitigating circumstances conforms to the statutory language found at KRS 532.025(2)(b) and includes, as a ninth circumstance for the jury to consider, a catchall consistent with the U.S. Supreme Court’s holding in *Lockett v. Ohio*⁴⁰:

In fixing a sentence for the Defendant for the offense of [Murder] [Kidnapping], you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true:

[listing the eight mitigating circumstances found at KRS 532.025(2)(b)]

() Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

In addition to the foregoing, you shall consider also those aspects of the Defendant’s character, and those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true.⁴¹

The comment to this instruction clarifies that, “[w]here the jury is instructed to consider other mitigating circumstances, as in the last listed factor, there is no requirement to specifically instruct the jury on additional mitigating factors introduced by the defendant.”⁴² Furthermore, the mitigating circumstances instruction need not explicitly state that each juror may make a determination as to mitigation independent of his/her peers.⁴³

³⁹ 1 COOPER & CETRULO § 12.06 (emphasis added). See also 1 COOPER & CETRULO § 12.04A (“In considering such evidence as may be unfavorable for the Defendant, you will bear in mind . . . that the law presumes a defendant to be innocent *unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty.*”) (emphasis added).

⁴⁰ *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

⁴¹ 1 COOPER & CETRULO § 12.05.

⁴² 1 COOPER & CETRULO § 12.05 (citing *Halvorsen v. Commonwealth*, 730 S.W.2d 921 (Ky. 1986) and *White v. Commonwealth*, 671 S.W.2d 241 (Ky. 1983)). In *Halvorsen*, appellant sought a specific instruction “on nonstatutory mitigating factors, such as ‘[defendant’s] stable upbringing in an obviously healthy, caring home.’” *Halvorsen*, 730 S.W.2d at 926. Likewise, in *White*, the [defendant] argued that “all mitigating circumstances were not considered by . . . or presented to the jury,” a contention the Kentucky Supreme Court dismissed by referring to the sweeping language of the jury instruction, “you shall consider such mitigating or extenuating circumstances as have been presented to you in the evidence, including but not limited to.” *White*, 671 S.W.2d at 246.

⁴³ See *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120–21 (6th Cir. 1990) (“The instructions carefully stated that finding an aggravating factor required [unanimous] agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite.”) (emphasis omitted).

II. ANALYSIS

A. 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.

The Commonwealth of Kentucky has not formally adopted pattern jury instructions for use in death penalty cases, although Kentucky law does impose certain requirements on trial courts with respect to capital jury instructions.⁴⁴ Instead, trial courts routinely rely on *Kentucky Instructions to Juries (Cooper)* and other authorities to formulate the instructions that will be given to jurors in capital cases.⁴⁵ *Cooper*, in particular, periodically has been revised and updated to reflect statutory and case law developments in the Commonwealth.⁴⁶ Nevertheless, there is no indication that the Commonwealth consults with attorneys, judges, linguists, social scientists, psychologists, and jurors to evaluate the extent to which jurors understand the instructions they are given in capital cases.

In presenting an instruction to a jury, “[t]he objective is to present an issue or issues in a form intelligible to the jury.”⁴⁷ Nevertheless, numerous nationwide studies have revealed that jurors, particularly jurors participating in capital cases, often do not understand the applicable law articulated in these instructions.⁴⁸ Kentucky-specific data compiled by the Capital Jury Project indicate that jurors in Kentucky death penalty cases are no exception to this troubling nationwide reality.⁴⁹ The Capital Jury Project conducts three-to-four interviews with jurors who have served in capital trials.⁵⁰ Since 1991, it has interviewed 1,198 jurors who have served in 353 capital trials in fourteen states, including Kentucky.⁵¹

⁴⁴ See, e.g., KY. R. CRIM. P. 9.56(2) (providing that “[t]he instructions should not attempt to define the term ‘reasonable doubt.’”).

⁴⁵ *Commonwealth v. Leinenbach*, No. 2010–SC–000091–DG, 2011 WL 3760864, at *2 (Ky. Aug. 25, 2011); *Gordon v. Commonwealth*, 2010 WL 668642, at *3 (Ky. Feb. 26, 2010) (passing favorably on instructions because their “language [was] consistent with [*Cooper*],” among other reasons); 1 COOPER & CETRULO, at v.

⁴⁶ 1 COOPER & CETRULO, at v.

⁴⁷ *Shewmaker v. Richeson*, 344 S.W.2d 802, 806 (Ky. 1961) (citing *Louisville & Nashville R.R. Co. v. King’s Adm’r*, 115 S.W. 196, 198 (Ky. 1909)).

⁴⁸ See, e.g., William J. Bowers et al., *Jurors’ Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence*, 46 CRIM. L. BULL. 1147, 1151–52 (2010) (summarizing certain findings of the Capital Jury Project, including that jurors “[f]ail[] to understand sentencing requirements” and “[m]istakenly believ[e] the death penalty is required by law”); Luginbuhl, *supra* note 2, at 204 (listing “[p]ast research . . . demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions”).

⁴⁹ See, e.g., Bowers & Foglia, *supra* note 2, at 72 (Kentucky-specific data). The Capital Jury Project “collect[s] . . . information about jury decision making from in-depth interviews with jurors who have actually served in capital trials around the nation.” *Id.* at 55.

⁵⁰ See Capital Jury Project, *What is the Capital Jury Project?*, <http://www.albany.edu/scj/13189.php> (last visited Nov.

⁵¹ *Id.*

For example, 15.6% of interviewed Kentucky capital jurors failed to understand that aggravating circumstances needed to be found beyond a reasonable doubt.⁵² Moreover, high percentages of these jurors misunderstood the guidelines for considering mitigating evidence.⁵³ In particular, 45.9% of these jurors “failed to understand . . . that they [could] consider any mitigating evidence” while 61.8% of these jurors “incorrectly thought [that] they had to be convinced beyond a reasonable doubt on findings of mitigation.”⁵⁴ Finally, 83.5% of these jurors “failed to realize [that] they did not have to be unanimous on findings of mitigation,” despite the U.S. Supreme Court’s decision in *Mills v. Maryland* that held that such unanimity is not required.⁵⁵

Interviewed Kentucky capital jurors also held erroneous beliefs about whether the death penalty is required. As described in a 2003 study summarizing Capital Jury Project methodologies and findings,

[interviewed] jurors were asked whether the evidence in their case established that the defendant’s crime was “heinous, vile or depraved” and whether the defendant would be “dangerous in the future.” . . . Jurors were then asked whether, after hearing the judge’s sentencing instructions, they thought the law *required them to impose death* if the defendant’s crime was “heinous, vile or depraved” or if the defendant would be “dangerous in the future.”⁵⁶

In reply, 42.7% of Kentucky capital jurors believed that death was required if the defendant’s crime was “heinous, vile or depraved,” and 42.2% believed that death was required if the defendant would be “dangerous in the future.”⁵⁷ Yet as a matter of federal and Commonwealth law, the existence of an aggravating circumstance can never suffice to *require* the death penalty.⁵⁸

As the Capital Jury Project data suggest, it is imperative that the Commonwealth of Kentucky take steps to revise the instructions typically given in capital cases. Moreover, the Commonwealth must monitor closely and continually whether any changes to these instructions ameliorate jurors’ tendency to misunderstand their “awesome responsibility.” Because the Commonwealth has not worked to improve jurors’ understanding of the instructions used in capital cases, Kentucky is not in compliance with Recommendation #1.

B. Recommendation #2

Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

⁵² Bowers & Foglia, *supra* note 2, at 68, 71.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; see also *Mills v. Maryland*, 486 U.S. 367, 384 (1988).

⁵⁶ Bowers & Foglia, *supra* note 2, at 72 (emphasis added).

⁵⁷ *Id.* See also Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1032–33 (2001).

⁵⁸ See *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

Kentucky law requires that “[t]he instructions as determined by the trial judge to be warranted by the evidence or as required by KRS 532.030(4) shall be given in charge *and in writing* to the jury for its deliberation.”⁵⁹ As mentioned in the Factual Discussion, mandatory jury instructions include instructions informing the jury of all available sentencing options,⁶⁰ instructions directing the jury to consider any aggravating and mitigating circumstances supported by the evidence,⁶¹ and all other instructions deemed “appropriate” by the trial judge.⁶² Furthermore, Rule 9.54 of the Kentucky Rules of Criminal Procedure puts upon the trial court “the duty . . . to instruct the jury *in writing* on the law of the case, which instructions shall be read to the jury prior to the closing summations of counsel.”⁶³ Finally, although trial courts are not required to provide these written instructions to jurors while the court delivers its oral charge, this practice regularly is followed by the courts of the Commonwealth.⁶⁴

In light of the foregoing, the Commonwealth of Kentucky complies with Recommendation #2.

In addition to commending the Commonwealth for its compliance with Recommendation #2, the Kentucky Assessment Team further recommends that the Kentucky legislature amend KRS 532.025(1)(b) to specify that a copy of capital jury instructions should be given to each juror *before* the prosecution and defense counsel present their penalty-phase arguments. While this amendment benefits capital jurors’ comprehension of their responsibilities at sentencing, it also represents the common practice among Commonwealth trial courts.⁶⁵

C. 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.

Jurors in capital cases routinely struggle to understand jury instructions.⁶⁶ Their confusion may be attributed to a number of factors, including “the syntax of the instructions, the manner of

⁵⁹ KY. REV. STAT. ANN. § 532.025(3) (West 2011) (emphasis added).

⁶⁰ *Id.* at KY. REV. STAT. ANN. § 532.030(4) (West 2011).

⁶¹ *Id.* at KY. REV. STAT. ANN. § 532.025(2) (West 2011).

⁶² *Id.* at KY. REV. STAT. ANN. § 532.025(1)(b) (West 2011).

⁶³ KY. R. CRIM. P. 9.54(1) (emphasis added). Not all parts of a judge’s charge to the jury are necessarily memorialized in writing. In *Smith v. Commonwealth*, for instance, none of the six written instructions repeated the court’s oral instruction that “the law presumes a defendant innocent.” *Smith*, 599 S.W.2d at 910.

⁶⁴ *See, e.g.*, Email from Daniel T. Goyette, Chief Public Defender, Louisville Metro Public Defender’s Office, to Linda Ewald, Co-chair, Ky. Assessment Team (Nov. 7, 2011) (on file with author) (“As a general rule in [Jefferson County], the practice is to provide the jurors with a copy of the instructions at the time they are read by the judge.”).

⁶⁵ *Accord* I COOPER & CETRULO § 12.04A cmt.

⁶⁶ *See* Luginbuhl, *supra* note 2, at 204 (listing “[p]ast research . . . demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10–11 (“[L]inguists, psychologists, and other academics have shown that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decision-making.”)

presentation, and the general unfamiliarity of laypersons with legal terminology.”⁶⁷ Accordingly, judges must respond meaningfully to jurors’ requests for clarification of the instructions to ensure that jurors comprehend and are able to apply applicable law.

Kentucky trial courts may respond to requests for information or clarification that have been submitted “by the jury or any juror after the jury has retired for deliberation.”⁶⁸ “Perplexed juries,” the Kentucky Supreme Court recently explained, “are not simply to be left in the dark, [] and the court does not err if in response to a jury’s question it correctly clarifies a point of law . . . or . . . correctly refers the jury to the pertinent instructions.”⁶⁹ Any response from the trial court must, however, must “be given [] in open court in the presence of the defendant . . . and the entire jury, and in the presence of or after reasonable notice [has been provided] to counsel for the parties.”⁷⁰

For example, in *Muncy v. Commonwealth*, the Court approved of the trial court’s supplying the jury with a definition of the word *quantity* as it related to a charge of cocaine possession.⁷¹ Similarly, although not prompted by jurors’ request for clarification, the Kentucky Supreme Court approved of a definition of “extreme emotional disturbance” for which “jur[ies] should be instructed” in future cases, retreating from its earlier pronouncement that “we know [extreme emotional disturbance] when we see it.”⁷²

Although these are encouraging developments, trial courts ultimately have discretion not to provide jurors with information that may help clarify the instructions.⁷³ Moreover, words and phrases that are not “arcane,” “esoteric,” or “obscure” and that “jurors will have no difficulty understanding” should not be defined for the jury, whether at the request of the parties or the jurors themselves.⁷⁴

Applying this principle, the Kentucky Supreme Court has directed trial courts to “prohibit counsel from defin[ing] ‘reasonable doubt’ at any point in the trial”⁷⁵ and also has admonished

⁶⁷ Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 550 (1994). See also Tiersma, *supra* note 66, at 13–19 (discussing evidence that jurors often do not appreciate the meaning of the words *mitigate* and *mitigation*).

⁶⁸ KY. R. CRIM. P. 9.74; see also *Ingram v. Commonwealth*, 427 S.W.2d 815, 817 (Ky. 1968) (sanctioning the trial court’s oral response to a juror’s question that “made it obvious that at least [that juror] did not understand the written instructions”).

⁶⁹ *Alexander v. Commonwealth*, No. 2007-SC-000369-MR, 2008 WL 4291541, at *4 (Ky. Sept. 18, 2008) (citations omitted).

⁷⁰ *Ingram*, 427 S.W.2d at 817 (citing KY. R. CRIM. P. 9.74).

⁷¹ *Muncy v. Commonwealth*, 132 S.W.3d 845, 848 (Ky. 2004). The Kentucky Supreme Court did express concern that “the definition given by the trial court may not have come directly from a legal text and was given orally to the jury in violation of RCr 9.54(1),” but the Court ultimately determined that these deficiencies had not “unduly impacted Appellant’s rights.” *Id.*

⁷² *Edmonds v. Commonwealth*, 586 S.W.2d 24, 27 (Ky. 1979); *McClellan v. Commonwealth*, 715 S.W.2d 464, 469 (Ky. 1986).

⁷³ See, e.g., *Garland v. Commonwealth*, 127 S.W.3d 529, 538 (Ky. 2003) (approving a trial court’s decision to decline to answer five questions submitted by the jury), *overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005).

⁷⁴ *Hardin v. Savageau*, 906 S.W.2d 356, 359 (Ky. 1995).

⁷⁵ *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984) (quotations added).

counsel from attempting to define “by clear and convincing evidence.”⁷⁶ Furthermore, in death penalty cases trial courts have resisted defendants’ efforts to supply the jury with an instruction defining “mitigating circumstances” despite widespread evidence that the concept of mitigation is poorly understood by capital juries.⁷⁷ This confusion likely is compounded by the fact that jurors are provided instructions explicitly stating that *aggravating* circumstances must be found “beyond a reasonable doubt.”⁷⁸ Kentucky trial courts also have refused to respond to jurors’ request for clarification as to the meaning of “life without the possibility of parole,”⁷⁹ although studies indicate that jurors often hold mistaken beliefs regarding this sentencing option.⁸⁰

While trial courts may respond meaningfully to jurors’ requests for clarification of instructions, Kentucky law permits trial courts to refuse to clarify legal concepts that are of the utmost importance during the penalty phase of a capital case. Therefore, the Commonwealth only partially complies with Recommendation #3.

As mentioned in the analysis discussing Recommendation #1, the Capital Jury Project has found that high percentages of interviewed Kentucky capital jurors misunderstood the guidelines for considering mitigating evidence. The Kentucky Assessment Team therefore recommends that the Commonwealth require trial courts to instruct capital juries on the meaning and legal import of “mitigating circumstances.” While clarifying instructions on mitigation will lead to better-informed decision-making in death penalty cases, it also will help to obviate any need of the jury to seek clarification on this crucial concept in capital cases.

D. Recommendation #4

Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant’s request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors’ understanding of alternative sentences.

Recommendation #4 includes two distinct yet related requirements: First, trial courts must provide clear jury instructions concerning alternative punishments; second, trial courts must allow testimony concerning parole practices to be admitted during the sentencing phase of a capital trial.

⁷⁶ *Hardin*, 906 S.W.2d at 359.

⁷⁷ *McKinney v. Commonwealth*, 60 S.W.3d 499, 506 (Ky. 2001) (“Jury instructions at the sentence stage of a capital trial need not include any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances.”) (citing *Tamme v. Commonwealth*, 973 S.W.2d 13, 37–38 (Ky. 1998)); *see also* Brief of Petitioner-Appellant at 120, *Dunlap v. Commonwealth*, No. 09-CR-00027 (Ky. Aug. 15, 2011) (on file with author) (asserting that “[t]he court did not use Dunlap’s tendered instructions and its instructions do not define ‘mitigating circumstances’ or make clear what role such evidence plays in a determination by the jury to decline to impose the death penalty”).

⁷⁸ 1 COOPER & CETRULO §§ 12.06, 12.07.

⁷⁹ *Garland*, 127 S.W.3d at 538.

⁸⁰ *See, e.g.*, Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423, 429 (1993) (finding that “only half of the jurors [questioned in the study] said they believed that [a] defendant would die in prison if [s/]he received [a] a sentence [of life in prison without the possibility of parole]”).

Alternative Punishments

As a matter of statutory law, Kentucky trial courts must instruct jurors on alternative punishments in capital cases. KRS 532.030(4) specifically states,

[i]n all cases in which the death penalty may be authorized the judge *shall* instruct the jury in accordance with subsection (1) of this section. The instructions *shall* state, subject to the aggravating and mitigating limitations and requirements of KRS 532.025, that the jury may recommend upon a conviction for a capital offense a sentence of death, or at [sic] a term of imprisonment for life without benefit of probation or parole, or a term of imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five [] years of his sentence, or a sentence of life, or to a term of not less than twenty [] years nor more than fifty [] years.⁸¹

Furthermore, the sample instruction contained in *Cooper* closely follows this statutory language:

You may fix the Defendant's punishment for the [Murder] [Kidnapping] of _____ (victim) at:

- (1) Confinement in the penitentiary for a term of not less than 20 years nor more than 50 years;
- OR
- (2) Confinement in the penitentiary for life;
- OR
- (3) Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence;
- OR
- (4) Confinement in the penitentiary for life without benefit of probation or parole;
- OR
- (5) Death.

But you cannot fix his sentence at death, or at confinement in the penitentiary for life without benefit of probation or parole, or at confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that one of the statements listed in Instruction No. _____ [Aggravating Circumstances] is true in its entirety, in which event you must state in writing, signed by the foreperson, that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.⁸²

⁸¹ KY. REV. STAT. ANN. § 532.030(4) (West 2011) (emphasis added). KRS 532.030(1) lists the available sentences for a defendant "convicted of a capital offense" that are recounted at the end of KRS 532.030(4). KY. REV. STAT. ANN. § 532.030(1) (West 2011).

⁸² 1 COOPER & CETRULO § 12.07.

In addition to stating clearly the punishments available under KRS 532.030(1), the sample instruction also contains the caveat that the jury must find an “aggravating circumstance or circumstances to be true beyond a reasonable doubt” in order to impose punishments (3) through (5).⁸³ As the sample instruction states clearly the alternative punishments available for a capital offense, as required by Commonwealth law, Kentucky complies with the first requirement of Recommendation #4.

Parole and Parole Practices Testimony

In *Perdue v. Commonwealth*, the Kentucky Supreme Court held that “when the death penalty is sought, evidence of minimum parole eligibility guidelines may not be introduced *at all*” and that “[u]nder no circumstances should parole eligibility enter into death penalty deliberation.”⁸⁴

In reaching its decision in *Perdue*, the Kentucky Supreme Court hypothesized that, in light of the prosecutor’s “improper and erroneous” remarks concerning parole eligibility, “the jury [might have] considered sentencing [the defendant] to a term of years, but felt that only a death sentence would keep him off the street.”⁸⁵ In other words, the *Perdue* Court’s reasoning rested on concerns that parole eligibility evidence—even if accurate—might confuse jurors and thereby lead them to err on the side of a more harsh penalty.

While the Court should be applauded for protecting against the possibility that jurors will recommend a death sentence simply because they are provided information regarding parole eligibility, depriving jurors of this information can just as readily produce the same outcome. In *Garland v. Commonwealth*, for example, the jury submitted five questions to the trial court during the capital sentencing phase, two of which read, “With life without parole, will [the defendant] ever get out of jail?” and “Is there anyway [sic] we can keep [the defendant] in jail until death, without the death penalty?”⁸⁶ The Kentucky Supreme Court found that the trial

⁸³ *Id.*

⁸⁴ *Perdue v. Commonwealth*, 916 S.W.2d 148, 163–64 (Ky. 1995) (emphasis added); *Garland*, 127 S.W.3d at 538. Interestingly, this prohibition appears to contravene a straightforward reading of KRS 532.055, which applies in “all felony cases” and permits prosecutors to offer evidence concerning “[m]inimum parole eligibility” in “a sentencing hearing *before the jury*.” KY. REV. STAT. ANN. § 532.055(1)–(2) (West 2011) (emphasis added); *see also* KY. REV. STAT. ANN. § 532.010 (classifying capital offenses as felonies). Furthermore, although the statute empowers only the Commonwealth to introduce parole eligibility evidence in a truth-in-sentencing hearing, which is a hearing mandated by KRS 532.055 meant to inform the sentencer of “matters that [may] be pertinent . . . in the assessment of an appropriate penalty,” the Kentucky Supreme Court has held that “[t]he defense, as well as the prosecution, is entitled to inform the jury concerning this issue.” *Reneer*, 734 S.W.2d at 797; *Offutt v. Commonwealth*, 799 S.W.2d 815, 817 (Ky. 1990) (citing *Boone v. Commonwealth*, 780 S.W.2d 615 (Ky. 1989)). While maintaining that KRS 532.055 is the Commonwealth’s “non-capital felony sentencing statute,” the Kentucky Supreme Court also has acknowledged that the statute’s truth-in-sentencing procedures must be followed in all felony cases, including capital ones. *St. Clair*, 319 S.W.3d at 316; *Perdue*, 916 S.W.2d at 164. In a capital case, however, “the capital penalty sentencing phase pursuant to KRS 532.025 should be conducted before the truth-in-sentencing hearing under KRS 532.055(2),” and any testimony about parole and parole practices would be heard by the trial judge, the jury having been discharged upon delivering its sentencing recommendation to court. *See Perdue*, 916 S.W.2d at 164; *Harris v. Commonwealth*, 793 S.W.2d 802, 808 (Ky. 1990) (citing *Skaggs v. Commonwealth*, 694 S.W.2d 672, 679 (Ky. 1985), *vacated in part, and on other grounds, by Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000)).

⁸⁵ *Perdue*, 916 S.W.2d at 163.

⁸⁶ *Garland*, 127 S.W.3d at 538.

court's answering either question would be improper "in a death penalty hearing."⁸⁷ As is evident by their questions, the jurors in *Garland* remained concerned that they might err on the side of leniency, a concern that often pervades juror decision-making in capital cases.⁸⁸

Because Kentucky does not permit evidence regarding parole practices to be admitted by the defendant in order to correct jurors' misconceptions regarding alternative punishments, Kentucky does not comply with the second requirement of Recommendation #4.

The Commonwealth of Kentucky, therefore, only partially complies with this Recommendation.

E. Recommendation #5

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.

During the penalty phase of a capital case Kentucky trial courts instruct jurors to consider "[a]ny other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."⁸⁹ This sample jury instruction, found in *Cooper*, further directs the jury to "consider [] those aspects of the Defendant's character, and those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true."⁹⁰ The Kentucky Supreme Court explicitly has sanctioned the instruction's use of the phrase "you, the jury,"⁹¹ and it also has held that "[t]here is no requirement to enumerate each [] nonstatutory factor in detail."⁹²

The Kentucky Supreme Court has maintained that this instruction on mitigating circumstances, in conjunction with other instructions provided to the jury, suffices to inform "[e]ach individual juror [that s/he is] free to examine and react to any mitigating factor when determining the appropriate sentence."⁹³ "[A]ny juror who found any mitigating factor of sufficient relevance," the Court concluded, "could individually use that fact to prevent the jury from reaching a unanimous sentence of death."⁹⁴ However, the results from the Capital Jury Project's interviews with Kentucky jurors who served in capital cases belies this assertion.⁹⁵ As mentioned in Recommendation #1, 83.5% of interviewed Kentucky jurors failed to understand that they need not be unanimous on mitigating evidence.⁹⁶ Moreover, Commonwealth courts continue to reject

⁸⁷ *Id.*

⁸⁸ See generally William J. Bowers & Margaret Vandiver, *In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions*, Capital Jury Project Working Paper No. 6 (May 26, 1992) (unpublished).

⁸⁹ 1 COOPER & CETRULO § 12.05.

⁹⁰ *Id.*

⁹¹ See *Mills v. Commonwealth*, 996 S.W.2d 473, 492 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336, 349 (Ky. 2010); *Tamme*, 973 S.W.2d at 37.

⁹² *Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1993).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Bowers & Foglia, *supra* note 2, at 55, 72.

⁹⁶ *Id.*

instructions, proposed by capital defendants, that might ameliorate this well documented misconception on the part of jurors in capital cases.⁹⁷

Furthermore, the Kentucky Supreme Court has held that “trial court[s] [are] correct [to] refus[e] to instruct the jury that a preponderance of the evidence is the standard of proof for mitigating circumstances,” reasoning that, as “a jury is not required to make findings with regards to mitigators, . . . there is no need to define the standard of proof.”⁹⁸ A need may be identified, however, when looking to the Capital Jury Project’s findings: 61.8% of interviewed Kentucky capital jurors “erroneously assumed” that “the defendant [had] to prove mitigation beyond a reasonable doubt.”⁹⁹ The Kentucky Supreme Court also has held that jurors need not be instructed “on ‘residual doubt’ as a mitigating factor”¹⁰⁰ and has signaled that a trial court should not approve of an instruction mentioning residual doubt.¹⁰¹ A refusal by the trial court to so instruct a jury might well limit the weight the jury gives to this factor that could serve as a basis for a sentence less than death.¹⁰²

While the Assessment Team commends the Commonwealth for including a catchall in its mitigating circumstances instruction, Kentucky trial courts place limits on jurors’ ability to give full consideration to evidence in support of a sentence less than death. Consequently, the Commonwealth of Kentucky only partially complies with Recommendation #5.

F. Recommendation #6

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.

In *Meece v. Commonwealth*, the Kentucky Supreme Court rejected a capital defendant’s claim of error that “the jury should have been instructed that it could have returned a sentence of less than death even if it found aggravators but did not find the existence of any mitigators.”¹⁰³ The Court reasoned, in reaching its conclusion, that “the instructions [provided to the jury] were adequate to

⁹⁷ See, e.g., *Meece*, 348 S.W.3d at 719–21; Brief of Petitioner-Appellant at 120, *Dunlap v. Commonwealth*, No. 09-CR-00027 (Ky. Aug. 15, 2011) (on file with author) (asserting that “[t]he court did not use Dunlap’s tendered instructions and its instructions do not define ‘mitigating circumstances’ or make clear what role such evidence plays in a determination by the jury to decline to impose the death penalty”).

⁹⁸ *McKinney*, 60 S.W.3d at 508 (quoting *Tamme*, 973 S.W.2d at 38).

⁹⁹ *Bowers & Foglia*, *supra* note 2, at 68–69.

¹⁰⁰ *Tamme*, 973 S.W.2d at 38 (citing *Bussell v. Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994)); *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988); see also *Epperson v. Commonwealth*, 197 S.W.3d 46, 65 (Ky. 2006) (“The United States Supreme Court and [the Kentucky Supreme] Court have held that residual doubt is not a mitigating circumstance for the death penalty.”). “Residual doubt” alternatively has been described as “a lingering uncertainty about facts, a state of mind that exists somewhere between ‘beyond a reasonable doubt’ and ‘absolute certainty.’” *Franklin*, 487 U.S. at 188 (O’Connor, J., concurring).

¹⁰¹ *Stark v. Commonwealth*, No. 2008-SC-000660-MR, 2010 WL 252248, at *4 (Ky. Jan. 21, 2010).

¹⁰² See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (finding, from Capital Jury Project interviews with South Carolina jurors who had served in capital trials, that “[r]esidual doubt’ over the defendant’s guilt [wa]s the most powerful ‘mitigating’ fact”).

¹⁰³ *Meece*, 348 S.W.3d at 722.

so apprise the jury.”¹⁰⁴ The Kentucky Supreme Court similarly held, in *Skaggs v. Commonwealth*, that “[a] careful examination of the entire jury charge indicated that the jury knew it could recommend a life sentence even if it found an aggravating circumstance beyond a reasonable doubt.”¹⁰⁵ However, none of the six jury instructions at issue in *Skaggs* had made explicit this prerogative.¹⁰⁶

Moreover, many Commonwealth trial courts do not appear, in their discretion, to instruct juries in capital cases that a life sentence may be returned absent mitigating factors and despite finding the existence of an aggravating factor beyond a reasonable doubt.¹⁰⁷ The absence of the use of such a clarifying instruction in capital cases is notable considering that, in at least one non-capital case, a comparable instruction was sanctioned at the request of a defendant convicted of murder, sodomy, and robbery.¹⁰⁸ In *Edmonds v. Commonwealth*, the jury was instructed as follows:

You do not have to sentence the Defendant . . . to a term of imprisonment for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence even if you find the aggravating circumstances stated in these Instructions were proven beyond a reasonable doubt.¹⁰⁹

Given the higher stakes in cases for which the death penalty remains a sentencing option, the absence of an instruction along similar lines is troubling.

Therefore, the Commonwealth of Kentucky is not in compliance with Recommendation #6.

G. Recommendation #7

In states where it is applicable, trial courts should make clear in juror 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.

The Commonwealth of Kentucky has been described as a “threshold” jurisdiction: To recommend a death sentence for a capital defendant, “jurors must find at least one aggravating factor and must consider mitigating evidence. They are then free to decide whether a death sentence is warranted without further guidance.”¹¹⁰ Indeed, the Kentucky Supreme Court has

¹⁰⁴ *Id.* (citing *Caudill v. Commonwealth*, 120 S.W.3d 635, 674 (Ky. 2003)).

¹⁰⁵ *Skaggs*, 694 S.W.2d at 679.

¹⁰⁶ *See Smith*, 599 S.W.2d at 910–11. Although the *Skaggs* opinion does not quote directly the six instructions, the opinion notes that “[t]he penalty phase instructions were essentially the same as those in *Smith v. Commonwealth*” *Skaggs*, 694 S.W.2d at 679.

¹⁰⁷ *See, e.g.*, Brief of Petitioner-Appellant at 117, *Dunlap v. Commonwealth*, No. 09-CR-00027 (Ky. Aug. 15, 2011) (on file with author) (“The court should have instructed the jury it could return a sentence of less than death even if it found aggravators and did not find the existence of any mitigators.”).

¹⁰⁸ *Edmonds v. Commonwealth*, Nos. 2007-SC-000350-MR, 2007-SC-000359-MR, 2009 WL 4263142, at *1, 18 (Ky. Nov. 25, 2009).

¹⁰⁹ *Id.* at *18 (emphasis omitted).

¹¹⁰ *Bowers & Foglia, supra* note 2, at 67. *See KY. REV. STAT. ANN.* § 532.025(3) (West 2011) (“The jury, if its verdict be a recommendation of death . . . , shall designate in writing . . . the aggravating circumstance or

held that, “[u]nder KRS 532.025, a jury is not required to weigh mitigating factors against aggravating factors.”¹¹¹ In *Thompson v. Commonwealth*, the Court elaborated as follows:

[A] burden of proof instruction regarding the existence of aggravating circumstances and that such factors must outweigh the mitigating factors *is not required* under Kentucky law where the jury has been otherwise properly instructed to weigh the evidence. An instruction requiring that the aggravators outweigh the mitigators beyond a reasonable doubt *is also not required* under Kentucky law.¹¹²

Based on this reading of Commonwealth law, the Court explicitly has approved the following jury instruction:

We, the jury, find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist in this case:

and we fix the Defendant’s punishment for the [Murder] [Kidnapping] of _____ (victim) at _____.¹¹³

Furthermore, the Kentucky Supreme Court has not addressed whether the weighing process involves no more than a comparison of the *numbers* of aggravating and mitigating factors. In *Meece v. Commonwealth*, for example, the defendant “complain[ed] that the use of multiple aggravators for each of the three murders create[d] a significant risk that the jury may give undue weight to the mere number of aggravators found,”¹¹⁴ and a similar objection was raised in *Furnish v. Commonwealth*.¹¹⁵ In neither case, however, did the Court address defendants’ “undue weight to the mere number of aggravators” argument.

Because the Commonwealth does not require trial courts to guard against the possibility that jurors will consider aggravating and mitigating factors merely by comparing the total numbers of each factor, the Commonwealth is not in compliance with Recommendation #7.

circumstances which it found beyond a reasonable doubt.”). This “threshold” approach is in contrast with that taken in “balancing” jurisdictions, wherein jurors explicitly are called upon to determine that aggravating factors outweigh mitigating factors in recommending a death sentence. *See, e.g.,* CAL. PENAL CODE § 190.3 (2011) (“[T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.”). *See generally* James R. Acker, Jr. & C.S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299 (1994).

¹¹¹ *Bowling v. Commonwealth*, 942 S.W.2d 293, 308 (Ky. 1997) (citing *Sanders v. Commonwealth*, 801 S.W.2d 665, 681 (Ky. 1990)), *overruled on other grounds by* *McQueen v. Commonwealth*, 339 S.W.3d 441, 448 (Ky. 2011).

¹¹² *Thompson v. Commonwealth*, 147 S.W.3d 22, 49–50 (Ky. 2004) (footnotes omitted) (emphasis added). *See also* *Skaggs*, 694 S.W.2d at 679 (“There is no requirement that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt.”)

¹¹³ *See* 1 COOPER & CETRULO § 12.10 (citing *Caudill*, 120 S.W.3d at 674–75).

¹¹⁴ *Meece*, 348 S.W.3d at 721.

¹¹⁵ *See* *Furnish v. Commonwealth*, 95 S.W.3d 34, 51 (Ky. 2002).

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Our criminal justice system relies on the independence of the judicial branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments, and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases. Sometimes these judges are defeated because their decisions are unpopular, even where these decisions are reasonable, are binding applications of the law, or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the constitutional doctrine in the case but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law but rather on the basis of how their decisions might affect their careers. This also makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. *Selection of Judicial Candidates and Judges*

When Kentucky became the fifteenth state in 1792, its constitution conferred the power of judicial appointment on the Governor and provided for judicial offices with indefinite tenure.¹ In 1850, the Commonwealth amended the constitution to require judges to be selected through popular elections to finite terms.² In 1975, the Kentucky General Assembly adopted a constitutional amendment, known as the “Judicial Article,” which created a unified judicial system composed of a Supreme Court, a Court of Appeals, trial courts of general jurisdiction known as circuit courts, and trial courts of limited jurisdiction known as district courts.³

1. Judicial Elections in the Commonwealth

Since 1975, all judges in the Commonwealth have been selected in nonpartisan elections.⁴ Kentucky Supreme Court justices, Court of Appeals judges, and circuit court judges are eligible for reelection after eight-year terms, and district court judges stand for reelection after four-year terms.⁵

A judicial candidate seeking election to the Kentucky Supreme Court, Court of Appeals, or any circuit court must be a U.S. citizen, a resident of both the Commonwealth and the circuit from which s/he is elected for at least two years preceding his/her taking office, licensed to practice law in the Commonwealth, and a licensed attorney for at least eight years.⁶

Each judicial candidate must submit a nomination petition to Kentucky’s Secretary of State, who certifies the eligibility of all judicial candidates and designates which, and in what order, candidates appear on ballots.⁷ The clerks of each circuit court or district court then hold primary elections for every judicial seat, without including party identifiers and positioning names on ballots as specified by the Secretary of State.⁸ The two candidates who receive the most votes during the primary are then certified and listed on the ballot in the general election, also without any party identifiers.⁹

¹ KY. CONST. art. 2, § 8 (1792); KY. CONST. art. 5, § 2 (1792).

² KY. CONST. art. 4, §§ 4, 6 (1850).

³ KY. CONST. § 109.

⁴ KY. CONST. § 117 (1976); KY. REV. STAT. ANN. § 118A.060 (West 2011) (“No party designation or emblem of any kind, nor any sign indicating any candidate's political belief or party affiliation, shall be used on voting machines or special ballots.”).

⁵ KY. CONST. § 119; *Candidate Qualifications, Filing Officer and Filing Fees*, KY. STATE BD. OF ELECTIONS, <http://www.elect.ky.gov/candidate.htm> (last visited Nov. 12, 2011).

⁶ KY. CONST. § 122. Candidates for Commonwealth district courts must be U.S. citizens, a resident of the district for two years, and licensed to practice law for two years. *Id.*

⁷ KY. REV. STAT. ANN. § 118A.090(2)–(3), (5) (West 2011).

⁸ KY. REV. STAT. ANN. § 118A.060 (West 2011); *Carey v. Wolnitzek*, 614 F.3d 189, 194 (6th Cir. 2010). There are seven electoral districts for the Justices of the Kentucky Supreme Court and judges of the Court of Appeals, fifty-seven electoral districts for elections for circuit court judges, and sixty electoral districts for district court judges. KY. REV. STAT. ANN. §§ 21A.010, 22A.010, 23A.020, 24A.030 (West 2011).

⁹ KY. REV. STAT. ANN. § 118A.060 (West 2011).

The Kentucky General Assembly oversees the election process and further possesses the authority to restructure judicial districts and to change the number of Court of Appeals and circuit court judges, upon certification of such a necessity by the Kentucky Supreme Court.¹⁰

2. Judicial Appointments in the Commonwealth

All judicial offices in the Commonwealth are held by elected judges. However, if an interim judicial vacancy arises in any Commonwealth court, the Governor may appoint a replacement from a list of three candidates selected and screened by the appropriate judicial nominating commission (JNC).¹¹ Kentucky currently has sixty-one JNCs: one for the Kentucky Supreme Court and Court of Appeals, one for each judicial circuit, and one for each judicial district, although each circuit and district with the same boundary has only one JNC.¹² Each JNC comprises seven members, one of whom is the Chief Justice of the Kentucky Supreme Court, who serves as chair of each commission.¹³ Two members are attorneys “elected by all attorneys in the vacancy’s jurisdiction,” and the four remaining members are non-attorney Kentucky citizens appointed by the Governor who must equally represent the two major political parties.¹⁴ Each JNC member other than the Chief Justice serves renewable four-year terms.¹⁵ In addition, each member of a judicial circuit or district nominating commission must reside in the district or circuit s/he represents and may not hold “any other public office or any office in a political organization or party.”¹⁶

Upon a judicial vacancy, the executive secretary of the JNC notifies the public and all attorneys in the judicial circuit or district.¹⁷ Attorneys may nominate themselves or someone else by completing an application and returning it to the executive secretary.¹⁸ Of these names, the Chief Justice and other members of the nominating committee select candidates to forward to the Governor.¹⁹

¹⁰ KY. CONST. §§ 110(4), 111(1), 112(3). The General Assembly may also “reduce, increase or rearrange the judicial districts” that structure the jurisdiction of Kentucky circuit courts, upon certification by the Kentucky Supreme Court that such changes are necessary. KY. CONST. §112(2).

¹¹ KY. CONST. § 118(1). If the Governor fails to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made from the same list by the chief justice of the Court. *Id.* See also KY. REV. STAT. ANN. §§ 61.710–61.780 (West 2011).

¹² KY. CONST. § 118(2); *Composition of the Judicial Nominating Commissions*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Apr. 12, 2011).

¹³ KY. CONST. § 118(2); *Composition of the Judicial Nominating Commissions*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Apr. 12, 2011).

¹⁴ KY. CONST. § 118(2); KY. REV. STAT. ANN. § 34.010(1) (West 2011); *Composition of the Judicial Nominating Commissions*, KY. COURT OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Apr. 12, 2011).

¹⁵ KY. REV. STAT. ANN. § 34.010(1) (West 2011); *Composition of the Judicial Nominating Commissions*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Apr. 12, 2011) (“Members are not compensated for their services, but are reimbursed for expenses for the days they perform their duties.”).

¹⁶ KY. CONST. § 118(2).

¹⁷ *Judicial Nominating Commission—Application Process*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jnc/#app> (last visited May 5, 2011).

¹⁸ KY. REV. STAT. ANN. 61.740 (West 2011).

¹⁹ *Composition of the Judicial Nominating Commissions*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Apr. 12, 2011) (“The names of the three nominees are listed in alphabetical order without indicating the commission’s preference.”).

Judicial appointments last for the remainder of an unexpired term if the term ends at the next annual election.²⁰ If the unexpired term does not end at the next scheduled election, and the next election is more than three months away, the appointment also lasts until the next annual election.²¹ However, if the next election is less than three months away, the appointment lasts until the second succeeding annual election.²² If the Governor does not appoint one of the three candidates within sixty days of receiving the list, then the Chief Justice of the Supreme Court must appoint someone from the same list.²³

B. *Conduct of Judicial Candidates and Judges*

1. Requisite Conduct of Judicial Candidates During Campaigns Elections

Kentucky's Code of Judicial Conduct (Code) is a set of standards for the ethical conduct of judges and judicial candidates promulgated by the Kentucky Supreme Court and enforced by the Kentucky Judicial Conduct Commission (Commission),²⁴ by which all judges must abide.²⁵ Canon 5 of the Code, applicable to both judges and judicial candidates, broadly provides that a "judicial candidate shall refrain from inappropriate political activity" and requires all judicial candidates and incumbent judges to maintain a certain standard of conduct during their campaigns.²⁶ Specifically, Canon 5A prohibits any judicial candidate from

- (a) acting as a leader or holding any office in a political organization;
- (b) making speeches for or against a political organization or candidate or publicly endorsing or opposing a candidate for public office;
- (c) soliciting funds for or pay an assessment or making a contribution to a political organization or candidate;²⁷ and
- (d) engaging in any "political activity[,] except on behalf of measures to improve the law, the legal system, or the administration of justice."²⁸

Previously, Canon 5A(2)'s "party affiliation clause" prohibited a judicial candidate from identifying "as a member of a [particular] political party in any form of advertising, or when speaking to a gathering," except in answer to a direct question not initiated by the candidate.²⁹ The Code's "solicitation clause" also prohibited judicial candidates from personally soliciting campaign funds.³⁰ However, in 2010, the U.S. Court of Appeals for the Sixth Circuit invalidated both the party affiliation and solicitation clause as violative of the First Amendment.³¹ Still, the

²⁰ KY. CONST. § 152.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ The Kentucky Code of Judicial Conduct is found at Kentucky Supreme Court Rule 4.300. SCR 4.300, Canon 5.

²⁵ SCR 4.300, Canon 5. Sitting judges for reelection are also required to adhere to the standards of conduct described in this Section. *Id.*

²⁶ SCR 3.130(8.2), 4.300, Canon 5.

²⁷ SCR 3.130(8.2), 4.300, Canon 5A(1).

²⁸ SCR 3.130(8.2), 4.300, Canon 5A(4).

²⁹ SCR 4.300, Canon 5A(2).

³⁰ SCR 4.300, Canon 5B(2). *See also* KY. REV. STAT. ANN. § 121.150 (West 2011).

³¹ *Carey*, 614 F.3d at 189.

use of campaign contributions for the private benefit of the candidate and/or the candidate's family is strictly prohibited.³²

In addition, Canon 5B(1) mandates that all candidates for judicial office, including incumbent judges, must

- (a) maintain the dignity appropriate to judicial office, and encourage members of his/her family to adhere to the same standards of political conduct;
- (b) prohibit public officials and employees subject to the candidate's direction and control, and any other person, from doing for the candidate what the candidate is prohibited from doing under the sections of this Canon;
- (c) not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court;³³ and
- (d) not misrepresent any candidate's identity, qualifications, present position, or other facts.³⁴

Furthermore, “[w]here false information concerning a judicial candidate is made public, a judge or candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.”³⁵

2. Conduct of Sitting Judges

The Code further contains a number of standards of conduct to which active judges are required to adhere. This discussion, however, will focus on the standards of conduct pertaining to three issues: (1) judicial impartiality, (2) public commentary on cases, and (3) the conduct of prosecutors and defense attorneys.

a. Judicial Impartiality

The Code mandates that Commonwealth judges “should actively participate in establishing, maintaining, and enforcing high standards of conduct” and are required to “personally observe those standards so that the integrity and independence of the judiciary will be observed.”³⁶ Specifically, judges are required to be “faithful to the law” and “not be swayed by partisan interests, public clamor[,], or fear of criticism.”³⁷ Judges are also required to perform their judicial duties “without bias or prejudice,” and a judge must disqualify him/herself if the judge’s “impartiality might reasonably be questioned” in a proceeding.³⁸

³² SCR 4.300, Canon 5B(2).

³³ SCR 4.300, Canon 5B(1)(c), In *Carey v. Wolnitznek*, the Sixth Circuit remanded the case in order for the lower court to determine the scope of the commits clause prohibition on judicial candidates’ statements on an “issue that is likely to come before the court”). *Carey*, 614 F.3d at 207–10 (quoting SCR 4.300, Canon 5B(1)(c)).

³⁴ SCR 4.300, Canon 5B(1).

³⁵ SCR 4.300, Canon 5A(1) cmt.

³⁶ SCR 4.300, Canon 1 cmt.

³⁷ SCR 4.300, Canon 3B(2).

³⁸ SCR 4.300, Canon 3B(5) & cmt, 3E.

In addition, the Code mandates that a “judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin[,]” noting that “public manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis . . . diminishes public confidence in the integrity and impartiality of the judiciary.”³⁹

The statute also requires Kentucky judges to recuse themselves from legal proceedings where they have “a personal bias or prejudice concerning a party,” “personal knowledge of disputed evidentiary facts concerning the proceedings,” or “knowledge of any other circumstances [such that their] impartiality might reasonably be questioned.”⁴⁰ Judges also must recuse themselves if they have “expressed an opinion concerning the merits of the proceeding.”⁴¹

b. Public Commentary on Cases

While a proceeding is pending or impending in any court, including on direct appeal, the Code requires judges to refrain from making “any public comment that might reasonably be expected to affect [the proceeding’s] outcome or impair its fairness or [from] mak[ing] any nonpublic comment that might substantially interfere with a fair trial or hearing”.⁴² Canon 3B(9) notes that this section “does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court . . . [nor does it] apply to proceedings in which the judge is a litigant in a personal capacity.”⁴³ In cases where “the judge is a litigant in an official capacity, the judge must not comment publicly.”⁴⁴

The Code also includes a “commits clause” in Canon 5B(1), which states that a judge or judicial candidate “shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court.”⁴⁵ Although the U.S. Court of Appeals for the Sixth Circuit recently upheld the “case” and “controversy” parts of the clause in a facial challenge to its constitutionality,⁴⁶ the Court remanded the case for further consideration of the meaning and validity of the clause’s prohibition on candidates making a statement on an “issue” likely to come before the court.⁴⁷

Furthermore, Canon 5A(3) requires that a judge “resign office when the judge becomes a candidate either in a party primary or in a general election for a non-judicial office, except that

³⁹ SCR 4.300, Canon 2E & cmt.

⁴⁰ KY. REV. STAT. ANN. § 26A.015(2)(a), (e) (West 2011) (listing other reasons a judge must disqualify him/herself).

⁴¹ *Id.*

⁴² SCR 4.300, Canon 3B(9) & cmt.

⁴³ SCR 4.300, Canon 3B(9).

⁴⁴ SCR 4.300, Canon 3B(9) cmt.

⁴⁵ SCR 4.300, Canon 5B(1)(c); *Carey*, 614 F.3d at 207–10.

⁴⁶ *Carey*, 614 F.3d at 207.

⁴⁷ *Id.* at 207–09.

the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law.”⁴⁸

c. Conduct of Judicial Officers, Prosecutors, and Defense Attorneys

The Code provides that a judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code or that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct “should take appropriate action.”⁴⁹ Such action “may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.”⁵⁰ A judge is obligated to report the violation to the appropriate authority if the violation “raises a substantial question as to the other judge’s fitness for office” or “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁵¹ The KRS also mandates that any Commonwealth judge report to the appropriate authority when it comes to his/her attention that another Kentucky judicial officer “may have been guilty of unprofessional conduct.”⁵²

3. Complaints and Disciplinary Action Against Judges and Judicial Candidates

Kentucky’s judges may be removed from office by the Kentucky Judicial Conduct Commission or through impeachment by the Kentucky General Assembly.

a. Kentucky Judicial Conduct Commission

The Commission, “a constitutionally mandated state body subject to judicial review by the Kentucky Supreme Court,” enforces the Code.⁵³ The Commission was created to investigate, review complaints, hold hearings, and, when warranted, remedy complaints against all Commonwealth judges and judicial candidates.⁵⁴ The Commission is authorized to discipline judicial candidates and Commonwealth judges who violate the Code and to refer them to the Kentucky Bar Association (KBA) for possible suspension or disbarment.⁵⁵ The Commission is

⁴⁸ SCR 4.300, Canon 5A(3). The Kentucky Constitution forbids any Commonwealth judge from “engag[ing] in the practice of law, or run[n]ing for elective office other than judicial office, or hold[ing] any office in a political party or organization.” KY. CONST. § 123.

⁴⁹ SCR 4.300, Canon 3D(1)–(2).

⁵⁰ SCR 4.300, Canon 3D cmt. “A judge acting in good faith in the discharge of disciplinary responsibilities required or permitted by Sections 3D(1) and 3D(2) shall be immune from any action, civil or criminal.” SCR 3.130(8.2); 4.300, Canon 3D(3).

⁵¹ SCR 4.300, Canon 3D(1)–(2).

⁵² KY. REV. STAT. ANN. § 26A.080 (West 2011).

⁵³ KY. CONST. § 121; Ky. Sup. Ct. Order 98-2 (changing the name of the Judicial Retirement and Removal Commission to the Judicial Conduct Commission).

⁵⁴ KY. CONST. § 121; KY. REV. STAT. ANN. § 34.330 (West 2011); SCR 4.000; *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011).

⁵⁵ KY. CONST. § 121; SCR 4.020. The Commission is the only Commonwealth entity authorized by the Kentucky Constitution to take disciplinary action against a sitting Commonwealth judge. *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011) (noting that the “Commission functions under rules established by the Supreme Court of Kentucky and has authority over judges, trial commissioners, domestic relations commissioners, master commissioners and attorneys who are candidates for judicial office.”).

comprised of six voting members who serve four-year, renewable terms.⁵⁶ Commission members include one representative and one alternate from both district courts and circuit courts, selected by a majority vote of district and circuit judges; a representative from the Kentucky Court of Appeals, selected by that court; one attorney appointed by the KBA; and two citizens appointed by the Governor who are neither judges nor attorneys.⁵⁷

Complaints against Commonwealth judges may be filed by any person or group with knowledge of alleged judicial misconduct or wrongdoing.⁵⁸ The formal complaint requests the complainant to list his/her contact information, the judge's identifying information, the relevant case name and docket number, attorneys involved in the relevant case, and specific facts outlining the allegations.⁵⁹ The Commission initially reviews the complaint and will dismiss it if it is not within the Commission's jurisdiction.⁶⁰

If there is "probable cause for action concerning a judge," the Commission will initiate a preliminary, confidential investigation and meet with the accused judge.⁶¹ The Commission must decide whether to initiate "formal proceedings" within 180 days of commencement of the preliminary investigation.⁶² If formal proceedings are initiated, the judge will be provided public notice of the charges and offered an opportunity to respond at a formal hearing, unless the judge concedes to the charges in exchange for a stated sanction.⁶³ Once an answer to the notice of formal proceedings is filed or the time to file an answer expires, the notice and all subsequent pleadings filed with the Commission are no longer confidential.⁶⁴ However, the Commission's internal deliberations and internal papers "shall remain confidential and shall not be a part of the formal file."⁶⁵ At a formal Commission hearing, the judge may be represented by an attorney and the Commission's attorneys will present its case, which it must prove by "clear and convincing evidence."⁶⁶ At the conclusion of the hearing, the Commission will make written

⁵⁶ KY. REV. STAT. ANN. § 34.010(1)–(4) (West 2011); *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc> (last visited Nov. 13, 2011).

⁵⁷ *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011). "Members of the Judicial Retirement and Removal Commission who do not otherwise receive a salary from the State Treasury shall receive sixty dollars (\$60) for each day they are in session or on official duty." KY. REV. STAT. ANN. § 34.320 (West 2011).

⁵⁸ *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011) (noting that the "Commission has received complaints from litigants, attorneys, judges, jurors, citizens, court personnel and prisoners").

⁵⁹ KY. JUDICIAL CONDUCT COMM'N, COMPLAINT, available at http://courts.ky.gov/NR/rdonlyres/5411B29D-C086-48DD-B994-ED1F78A03D0E/0/JCC_ComplaintForm.pdf.

⁶⁰ SCR 4.170(3); *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011).

⁶¹ SCR 4.170(1); *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011).

⁶² SCR 4.170(5).

⁶³ KY. CONST. § 121; SCR 4.180.

⁶⁴ SCR 4.130(2) (an answer to the notice must be filed within fifteen days), 4.170.

⁶⁵ SCR 4.130(1)–(2). Prior to the adoption of SCR 4.130 in 1999, the public did not have access to information about complaints and proceedings handled by the Commission unless and until the Commission issued a sanction upon a judge. Mark R. Chellgren, *Analysis Judge's Case Points Up Need to Lift Veil of Secrecy*, CINCINNATI POST, Nov. 1, 1995, at 4K; Ky. Sup. Ct. Order 98-2.

⁶⁶ SCR 4.130, 4.160, 4.210 (procedural rights of judges), 4.220; *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011) (Additionally, the "complainant may be subpoenaed to testify at the hearing if [s/he] has personal knowledge of any wrongdoing.")

findings of fact and conclusions of law, and the complainant will be notified as to what action will be taken.⁶⁷ Upon request, the Commission may make available to the “Kentucky Bar Association any of the Commission’s records pertinent to a disciplinary matter or inquiry under investigation by the Commission or by the Association.”⁶⁸

Violations of the Code include (a) misconduct in office, (b) persistent failure to perform duties, (c) incompetence, (d) habitual intemperance, (e) violations of the Code, Rule 4.300, (f) willful refusal or persistent failure to conform to official policies and directives adopted by the Kentucky Supreme Court, or (g) conviction of a crime punishable as a felony.⁶⁹ Upon a majority vote, the Commission may issue a private reprimand, a public censure, removal from office, or a referral to the KBA for disbarment from the practice of law.⁷⁰ Disciplinary action taken by the Commission is subject to review by the Court.⁷¹

The Commission is not empowered to review or change a judicial decision, and filing a complaint with the Commission will not allow a party to side-step the formal recusal process for a judge.⁷²

Commonwealth judges also may be removed from office after impeachment by the Kentucky House of Representatives and conviction by a two-thirds vote of the Kentucky Senate.⁷³ The KBA has the power to discipline attorneys, and may “conduct hearings, administer necessary oaths, take testimony under oath, compel the attendance of witnesses, and compel the production of records and other evidence.”⁷⁴

b. Judicial Ethics Committee

Kentucky’s Judicial Ethics Committee (Committee) “serves in an advisory capacity by giving judges and judicial candidates guidance on prospective conduct . . . regarding a variety of matters, including permissible campaign conduct, when disqualification from a case is necessary, and other possible conflicts of interest in financial and personal matters.”⁷⁵ The Committee issues formal and informal opinions, all of which are “advisory only.”⁷⁶ However, when

⁶⁷ SCR 4.260; *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011). “Upon making a determination ordering the censure, suspension, retirement or removal of a judge, the commission shall promptly file a copy of the order certified by the chairman or secretary of the commission, together with the findings and conclusions and the record of the proceedings, in a permanent file.” SCR 4.280.

⁶⁸ SCR 4.130(3) (noting that the Commission may on its own initiative or upon request of the director or Board of Governors of the Kentucky Bar Association, provide such materials).

⁶⁹ SCR 4.020(1)(b).

⁷⁰ KY. CONST. § 121; SCR 4.020(1)(b); KY. REV. STAT. ANN. § 34.340 (West 2011); *Carey*, 614 F.3d at 189.

⁷¹ KY. CONST. § 121; SCR 4.290.

⁷² *Judicial Conduct Commission*, KY. CT. OF JUSTICE, <http://courts.ky.gov/jcc/> (last visited Nov. 13, 2011); KY. REV. STAT. ANN. § 26A.015(2)(a), (e) (West 2011) (recusal).

⁷³ KY. CONST. §§ 66–67, 68 (Governor and all civil officers are impeachable); KY. REV. STAT. ANN. §§ 63.020, 63.030 (West 2011).

⁷⁴ KY. REV. STAT. ANN. § 21A.150 (West 2011); KY. CONST. § 116.

⁷⁵ Press Release, *State Judicial Ethics Committee elects new chair, fills 2 vacancies on committee*, KY. CT. OF JUSTICE (Feb. 7, 2006), available at <http://courts.ky.gov/NR/rdonlyres/6A16EAD6-2D2C-4C1C-A6A8-93FA8F579F05/0/JudicialEthicsCommitteeNewChairMembers020706.pdf>; SCR 4.310.

⁷⁶ SCR 4.310(3); Press Release, *State Judicial Ethics Committee elects new chair, fills 2 vacancies on committee*, KY. CT. OF JUSTICE (Feb. 7, 2006), available at [http://courts.ky.gov/NR/rdonlyres/6A16EAD6-2D2C-4C1C-A6A8-](http://courts.ky.gov/NR/rdonlyres/6A16EAD6-2D2C-4C1C-A6A8-93FA8F579F05/0/JudicialEthicsCommitteeNewChairMembers020706.pdf)

deciding whether a violation of the Code occurred, the Judicial Conduct Commission and the Kentucky Supreme Court “shall consider reliance by a justice, judge, trial commissioner or by any judicial candidate upon the ethics committee opinion”.⁷⁷ The Committee is composed of three judges elected by their peers at the Court of Appeals, circuit courts, and district courts, and two attorneys appointed by the KBA’s Board of Governors, all of whom serve four-year terms.⁷⁸ The Committee elects its own chair and is supported administratively by a staff attorney who acts as executive secretary of the Committee.⁷⁹

C. Training for Judges Who Handle Capital Cases

New Commonwealth circuit and district judges participate in a four-day orientation program offered by the Kentucky Administrative Office of the Courts (AOC), which is conducted by experienced judges and AOC staff.⁸⁰ The AOC is the administrative arm of the Kentucky Court of Justice and supports the activities of approximately 3,700 court personnel, including the elected offices of justices, judges and circuit court clerks.⁸¹ At the orientation program, new circuit court judges who preside over capital trials receive training on criminal and capital issues.⁸² The AOC’s Office for Judicial Branch Education provides ongoing training and education to Kentucky judges, including sponsoring an annual Circuit Judges Fall Conference.⁸³ Additionally, pursuant to Commonwealth law, the Kentucky Supreme Court provides multidisciplinary in-service training for circuit and district judges on a variety of issues relevant to their court jurisdiction.⁸⁴

93FA8F579F05/0/JudicialEthicsCommitteeNewChairMembers020706.pdf. Formal opinions are issued for matters of statewide importance. SCR 4.310(2).

⁷⁷ SCR 4.310(3).

⁷⁸ SCR 4.310(1) (also noting that no member may also be a member of the Judicial Conduct Commission).

⁷⁹ Press Release, *State Judicial Ethics Committee elects new chair, fills 2 vacancies on committee*, KY. CT. OF JUSTICE (Feb. 7, 2006), available at <http://courts.ky.gov/NR/rdonlyres/6A16EAD6-2D2C-4C1C-A6A8-93FA8F579F05/0/JudicialEthicsCommitteeNewChairMembers020706.pdf>.

⁸⁰ Press Release, *44 judges participate in orientation program for new Kentucky judges*, KY. CT. OF JUSTICE (Mar. 17, 2010), <http://migration.kentucky.gov/newsroom/kycourts/03172010JB1.htm> (last visited Nov. 20, 2011).

⁸¹ *Id.*

⁸² *Id.* (noting that “Circuit judges learned about civil proceedings, jury management, discovery, summary judgment, criminal issues and capital trials.”).

⁸³ *Id.*

⁸⁴ See KY. REV. STAT. ANN. §§ 21A.170, 21A.180 (West 2011).

II. ANALYSIS

A. Recommendation #1

States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

Judicial Elections

The Commonwealth maintains a “non-partisan” judicial election system for the Kentucky Supreme Court, Court of Appeals, circuit courts and district courts.⁸⁵ Gubernatorial appointments are made for interim judicial vacancies, which last only until the next election cycle, or in some circumstances, the second election cycle.⁸⁶ Circuit court judges and Kentucky Supreme Court Justices—who hold primary responsibility in death penalty cases—must participate in general elections to obtain and/or retain office.⁸⁷

As “[a]n independent and honorable judiciary is indispensable to justice in our society,”⁸⁸ organizations within the Commonwealth have sought to examine the fairness of the judicial election process and, in specific cases, to educate the public about the importance of judicial independence. For example, in 2005 the Kentucky Judicial Campaign Conduct Committee (KJCCC) was established as a committee of twenty-one bar association and other community leaders to examine judicial campaign conduct in the 2006 election year in which all but two of the state’s 266 judicial seats would be up for election.⁸⁹ The KJCCC’s stated goals are “to educate the public about the important differences between judicial campaigns and campaigns

⁸⁵ KY. CONST. art. 4, §§ 4, 6 (1850); KY. CONST. § 117 (1976). *See also* KY. CONST. § 109.

⁸⁶ KY. CONST. §§ 118, 152.

⁸⁷ KY. CONST. § 118. In *Carey v. Wolnitzek*, the Appendix described judicial selection processes in the U.S. as follows: Seven states elect their judiciaries in partisan elections: Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, West Virginia; two states, Michigan and Ohio, have partisan nominations with nonpartisan elections; thirteen states, Arkansas, Georgia, Idaho, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, Wisconsin, including Kentucky, elect the judiciary in nonpartisan elections; fifteen states have a retention election system, Alaska, Arizona, California, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, Wyoming; two states, South Carolina and Virginia, have a legislative election system; and ten states have a system of gubernatorial appointment with or without confirmation, including Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont. *See Carey*, 614 F.3d at 211 app. A.

⁸⁸ SCR 4.300, Canon 1 cmt. Recently, the Sixth Circuit, in *Carey v. Wolnitzek*, adopted the central premise of Kentucky’s judicial canons, that “[j]udicial elections differ from legislative elections, and the Kentucky Supreme Court has a compelling interest in regulating judicial campaign speech to ensure the reality and appearance of an impartial judiciary.” *Carey*, 614 F.3d at 194.

⁸⁹ CHIEF JUSTICE LAMBERT ANNOUNCES MEMBERS OF FIRST JUDICIAL CAMPAIGN CONDUCT COMMITTEE IN KENTUCKY, SUP. CT. OF KY. (July 25, 2005), *available at* <http://courts.ky.gov/NR/rdonlyres/1CBC1F4E-74A8-4BB3-895F-4347E5BD9732/0/JCC07252005.pdf>. The Committee was created shortly after the Family Trust Foundation of Lexington filed suit against the Kentucky Bar Association challenging Kentucky’s judicial rules that prohibits candidates from making statements on controversial issues to come before the court. Beth Musgrave, *Judicial Hopefuls’ Speech Limitations Could Be Loosened*, LEXINGTON HERALD-LEADER, Feb. 4, 2005, at A1 (on file with author); Jack Brammer, *Justice Sets Up Panel to Monitor Campaigns; Will Guide Ethics of Judicial Candidates*, LEXINGTON HERALD-LEADER, July 8, 2005, at A1.

for partisan political office, to help candidates campaign in an ethical and dignified manner, to monitor advertising to detect and deter improper campaigning, and to investigate complaints about unfair campaign tactics and issue public statements about such tactics.”⁹⁰ The KJCCC investigates complaints about judicial campaigning and issues opinions regarding the appropriateness of investigated judicial campaign conduct.⁹¹ The KJCCC is not financially supported by the Commonwealth, nor is it affiliated with the Kentucky Supreme Court, Kentucky Bar Association (KBA), or any other official entity, and its opinions are advisory and have no formal legal authority.⁹²

Importantly, the KJCCC also provides additional guidance, similar to Kentucky’s Ethics Committee,⁹³ to the Commonwealth’s judicial candidates and judges running for reelection.⁹⁴ For example, following a federal court’s invalidation of provisions of the Kentucky Code of Judicial Conduct (Code) that had prohibited solicitation of campaign funds and pronouncement of party affiliation by judicial candidates,⁹⁵ the KJCCC cautioned that

judicial candidates should refrain from making statements about issues that might come before them. Judicial races are not like races for the executive or legislative branches In judicial races . . . candidates should only promise to fairly interpret and apply the law and the U.S. and Kentucky constitutions, to treat all litigants fairly and with dignity, and to approach every case with an open mind and without pre-judgment.⁹⁶

The KJCCC also recently issued a statement in which it counseled judicial candidates who speak out on issues to remind voters not only of a judge’s obligation to ensure impartiality and independence, but also that a judge “who appears to promise how he or she will decide an issue has an obligation to let another judge handle the case if the issue arises in the judge’s court.”⁹⁷

⁹⁰ *Judicial Campaigns and Elections: Kentucky*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_oversight.cfm?state=KY (last visited Nov. 21, 2011); KY. JUDICIAL CAMPAIGN CONDUCT COMM., <http://www.loubar.org/jccc/kjccchome.htm> (last visited Nov. 21, 2011).

⁹¹ KY. JUDICIAL CAMPAIGN CONDUCT COMM., <http://www.loubar.org/jccc/kjccchome.htm> (last visited Nov. 21, 2011). KJCCC “took the position that even though *White* allows judicial candidates to campaign on disputed social, political, and legal issues, candidates who do so are likely to compromise their independence.” Al Cross & William H. Fortune, *Kentucky 2006 Judicial Elections*, 55 DRAKE L. R. 637, 644 (2007) (noting the KJCCC is supported by private contributions), citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002).

⁹² Cross, *supra* note 91, at 642.

⁹³ See *supra* notes 75–79 and accompanying text (describing the Kentucky Judicial Ethics Committee).

⁹⁴ KY. JUDICIAL CAMPAIGN CONDUCT COMM., <http://www.loubar.org/jccc/kjccchome.htm> (last visited Nov. 21, 2011).

⁹⁵ See generally *Carey*, 614 F.3d at 189.

⁹⁶ *Ruling eases fundraising for judicial candidates*, CINCINNATI ENQUIRER, Oct. 31, 2010 (discussing the Kentucky Judicial Campaign Conduct Committee’s response to the Sixth Circuit’s decision in *Carey v. Wolnitzek*).

⁹⁷ *Kentucky Judicial Campaign Conduct Committee cautions judicial candidates about soliciting and accepting contributions*, NEWS.LAWREADER.COM, Aug. 14, 2010, <http://news.lawreader.com/?p=3226> (last visited Nov. 19, 2011). The KJCCC did not receive any complaints to investigate during the 2010 election cycle. Telephone Interview by Sarah Turberville with Al Cross, Secretary, Ky. Judicial Campaign Conduct Comm., May 6, 2011 (on file with author).

Although Kentucky does not evaluate the conduct of judges eligible for reelection statewide,⁹⁸ the Louisville Bar Association (LBA) has conducted evaluations of Jefferson County judges since 1979.⁹⁹ The LBA states that the purpose of the evaluation is to “provide constructive feedback to sitting judges in order to improve the judiciary and the quality of justice delivered throughout Jefferson County.”¹⁰⁰ Letters and postcards describing the Jefferson County Judicial Evaluation are sent to approximately 4,200 members of the KBA with addresses in Jefferson County.¹⁰¹ Recipients who are qualified to participate in the survey, as determined by the postcard reply, are then mailed a survey packet.¹⁰² Judges are evaluated on “general satisfaction, judicial temperament, court management, judicial integrity, legal ability, civil cases and criminal cases,” and the results are published on the LBA website.¹⁰³

LBA leaders also established *Citizens for Better Judges* (CBJ), an organization that identifies, interviews, and endorses potential judicial candidates in order to ensure “a competent, conscientious and professional judiciary.”¹⁰⁴ CBJ is composed of a twenty-seven member Steering Committee of attorney litigators and retired judges, a Citizens Review Board “consisting of an equal number of community-minded citizens drawn from the ranks of business, labor, government, education, medicine, mental health, as well as other civic and religious leaders,” and an Advisory Board composed of past CBJ chairpersons and the current chairs of the steering committee and the Review Board.¹⁰⁵ CBJ conducts confidential interviews with candidates for the Louisville-Jefferson County judiciary on five main topics:

- (1) personal attributes such as physical and mental health, family or financial problems that the candidate believes would affect his/her ability to preside impartially, reasons for seeking election or re-election, public service and civic involvement;
- (2) legal knowledge and ability including academic record, experience, professional achievements, continuing legal education, analytical approach;
- (3) court management skills such as supervisory and organizational abilities, work ethic, ideas about improvement of the judicial system;
- (4) judicial temperament relating to qualities such as fairness and impartiality in the conduct of proceedings, decisiveness, dignity, decorum, compassion; and
- (5) judicial integrity as reflected by adherence to the Code of Judicial Conduct, enforcement of the Rules of Professional Conduct with respect to attorneys

⁹⁸ *Methods of Judicial Selection: Kentucky, Retention Evaluation Programs*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state=KY (last visited Nov. 12, 2011).

⁹⁹ *Judicial Evaluation Results Announced*, LOUISVILLE BAR ASS’N, <http://www.loubar.org/story.cfm?STID=1602> (last visited Nov. 21, 2011). The complete LBA 2010 judicial evaluation results are available at http://www.loubar.org/download/JudicialEval_10comparative.pdf. We are unaware of additional bar associations or organizations undertake an evaluation of judges in other circuits or districts.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* Some of the performance standards, such as “civil cases” and “criminal cases,” are not defined.

¹⁰⁴ *What is Citizens for Better Judges?*, CITIZENS FOR BETTER JUDGES, <http://www.citizensforbetterjudges.org/about.html> (last visited Nov. 13, 2011) [hereinafter *Citizens for Better Judges*].

¹⁰⁵ *Citizens for Better Judges*, *supra* note 104.

appearing before him/her, uniformity of rulings, susceptibility to influence, ratings in the Louisville Bar Association's Judicial Evaluation and Judicial Candidate Poll.¹⁰⁶

In addition to the interviews, CBJ members consider “(1) the candidate’s resume; (2) a summary of the questions asked and answers given at the interview; (3) personal observations and opinions of those attending the interview; and (4) comments of members based upon personal experience with the candidate which are relevant to his or her qualifications.”¹⁰⁷ CBJ then follows a written endorsement procedure where a candidate must first “receive a favorable vote of three-quarters, or at least ten, of the voting Steering Committee members, and then must be approved by the Citizens Review Board.”¹⁰⁸ If a candidate’s endorsement is not approved by the Citizens Review Board, “the matter is returned to the Steering Committee for further consideration and appropriate action.”¹⁰⁹ Endorsements are published on the CBJ website and in the Louisville *Courier-Journal* three to four times within the week before a judicial election.¹¹⁰

Furthermore, in 2005, the LBA adopted a resolution on “Supporting Fair Judicial Elections” in which it stated that it “dedicates itself to the education of the public on the importance of maintaining judicial integrity during campaigns for office and calls upon candidates for judicial office to conduct themselves during campaigns in accordance with the principles of neutrality and judicial independence.”¹¹¹

Kentucky judicial candidates have also made public statements about the importance of judicial independence and discussed the politics that can erode the fair administration of justice. For example, in the 2006 election for a seat on the Kentucky Supreme Court, the incumbent justice remarked that controversial issues “may be excellent questions for a legislative or governor candidate, but that an interpreter of the law is much different from a lawmaker and his personal views are irrelevant.”¹¹² In a 2005 Kentucky Supreme Court race, one incumbent noted that “[I]itigants . . . deserve to have a judge that has not made up his or her mind about issues that may be involved in that person’s lawsuit. They should have a judge who has not expressed views even if they have thought about the issues outside the context of a specific case.”¹¹³

¹⁰⁶ Daniel T. Goyette, *Citizens for Better Judges: An Effective Effort to Inform and Improve Judicial Selection*, CITIZENS FOR BETTER JUDGES, <http://www.citizensforbetterjudges.org/history.html> (last visited Nov. 13, 2011) (recognizing that judicial candidates are bound by the Code, and therefore avoiding questions which would infringe on candidates’ ethical obligations).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (which includes determining “that the interview process and endorsement procedure was fully and fairly conducted . . . in accordance with CBJ’s bylaws”).

¹⁰⁹ *Id.*

¹¹⁰ Telephone Interview by Paula Shapiro with Homer Parent III, Chair, Citizens for Better Judges (Apr. 25, 2011) (on file with author).

¹¹¹ Louisville Bar Ass’n, *Resolution On Supporting Fair Judicial Elections*, June 27, 2005 (on file with author).

¹¹² Editorial, *Schroder for Supreme Court*, CINCINNATI ENQUIRER, Oct. 31, 2006, at B6.

¹¹³ Feoshia Henderson, *Unmuzzling Judges; Challenges to Rules that Limit How Judges Campaign Have Set up a Showdown Between Two Long-Held Constitutional Rights—the Right to Free Speech, and the Right to a Fair Trial*, CINCINNATI-KY. POST, Feb. 2, 2005, at K8 (quoting Justice Stumbo, who further noted that “[j]udges are supposed to not just avoid impropriety, they’re supposed to avoid the appearance of impropriety”).

Despite efforts to ensure independence and impartiality, the politicization of judicial elections in Kentucky has increased over the years. Media coverage of judicial elections has reported candidates' party affiliations.¹¹⁴ For example, in the 2006 judicial election, reports noted that candidates "touted their conservative credentials in three [] contested high court races."¹¹⁵ Public discussion of judicial candidates' political party affiliation is likely to increase since the Sixth Circuit invalidated the portion of the Code that prohibited judges and judicial candidates from publicly disclosing their party affiliation.¹¹⁶

In addition, there have been numerous instances where judicial candidates have stated their view on capital punishment and/or campaigned on a "tough on crime" platform. During Judge Rick Johnson's 2006 campaign for a seat on the Kentucky Supreme Court, he publicly pronounced his views concerning issues to come before the court, including the death penalty.¹¹⁷ In response, the KJCCC wrote:

Judge Johnson may have a First Amendment right to make such statements But while candidates now enjoy broader rights to comment, they should couple that with the responsibility to uphold the independence and integrity of the judicial system Judicial candidates who publicly state their views on disputed issues inevitably create the impression that such views would affect how they would rule from the bench, and that runs counter to the principle of judicial independence.¹¹⁸

The KJCCC also rebuked Judge Johnson for use of campaign materials in which he portrayed his opponent, Judge Bill Cunningham, as "soft on rapists," alleging that Cunningham had attempted to make six rapists eligible for parole, one of whom allegedly committed sodomy and rape within a day of being out on parole.¹¹⁹ In a 2008 Jefferson County District Court race, one judicial candidate promised that, if elected, her priorities would include "putting crime victims over criminals" and stopping the "revolving door of criminals at the courthouse" and that she would "partner with police in their efforts to control crime."¹²⁰

¹¹⁴ For example, multiple articles noted in one election that a judicial candidate was a former Republican Party chairman and another is a registered Democrat. Andrew Wolfson, *Kentucky Supreme Court: McAnulty beats Shake to keep seat*, COURIER-J. (Louisville, Ky.), Nov. 8, 2006, at K5; Samira Jafari, *Fletcher's Supreme Court appointees face tough competition*, ASSOCIATED PRESS, Nov. 7, 2006.

¹¹⁵ Andrew Wolfson, *Kentucky Supreme Court: McAnulty beats Shake to keep seat*, COURIER-J. (Louisville, Ky.), Nov. 8, 2006, at K5 (noting those candidates "either lost or appeared headed toward defeat"); Andrew Wolfson, *Candidates for judge can reveal party*, COURIER-J. (Louisville, Ky.), Oct. 12, 2006, at A1.

¹¹⁶ *Carey*, 614 F.3d at 203–04.

¹¹⁷ *Committee: Johnson Ad Misrepresents Cunningham's Record*, KY. JUD. CAMPAIGN CONDUCT COMM., <http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/kjccchome.pdf> (last visited Nov. 14, 2011).

¹¹⁸ *Id.*; *Kentucky Judicial Campaign Conduct Committee Activity for 2006*, KY. JUDICIAL CAMPAIGN CONDUCT COMM., <http://www.loubar.org/jccc/kjccc2006.htm> (last visited Nov. 14, 2011).

¹¹⁹ Matt Sanders, *Johnson Defends Ads Criticizing Rapist Sentences*, PADUCAH SUN (Ky.), Nov. 1, 2006.

¹²⁰ Editorial, *A real stinker*, COURIER-J. (Louisville, Ky.), Nov. 7, 2008, at A8.

The specter of judicial elections may also affect judges' treatment of litigants in the Commonwealth's courtrooms.¹²¹ For example, during a December 2010 sentencing hearing, a Jefferson County Circuit Court judge publicly exclaimed that she decided to sentence a defendant to life in prison without the possibility of parole rather than the death penalty, noting that he will be surrounded by "bigger, meaner men who have nothing to lose" and that "[h]e will fear for his life every day. He will wish this court had put him on death row."¹²² Some commentators noted that "[i]t seems likely that in crafting her statement, Judge McDonald-Burkman was trying to protect her backside from attacks in a future election campaign that she was soft on crime."¹²³

Judicial Appointments to Fill Vacancies

Kentucky's electoral selection process also authorizes the Governor to appoint judges to fill vacancies on the bench between elections.¹²⁴ Under Kentucky's appointment scheme, the Governor must appoint a judicial candidate from a list of three nominees submitted by a Judicial Nominating Commission (JNC).¹²⁵ There are sixty-one JNCs located throughout the Commonwealth.¹²⁶ The composition of the JNC includes the Kentucky Supreme Court Chief Justice, who serves as chair, two attorneys elected by the attorneys in the vacancy's jurisdiction, and four additional non-attorney Kentucky citizens appointed by the Governor who must equally represent the two major political parties.¹²⁷ However, as the Governor appoints four of the seven positions on each JNC, and the Governor also selects who will fill a vacancy from the list of approved candidates provided by each JNC, a Governor may wield great influence in determining which judicial candidates appear on the list of prospective judges and who is ultimately appointed to fill the Commonwealth's vacant judgeships.

The Kentucky Death Penalty Assessment Team applauds the work of the LBA and CBJ,¹²⁸ as well as the efforts of some judges and judicial candidates, to educate the public and to help ensure the independence and impartiality of the judiciary. However, the prevalence of partisan politics in elections for Kentucky's judiciary, the undue influence that the Governor may wield in the appointment of judges to vacant positions on the bench, and the Commonwealth's failure to examine the fairness of its statewide judicial selection process places the Commonwealth in partial compliance with Recommendation #1.

¹²¹ Notably, the Code explicitly states "[a] judge shall not be swayed by partisan interests, public clamor[,] or fear of criticism." SCR 4.300, Canon 3B(2).

¹²² *Transcript of Judge Judith McDonald-Burkman's Sentence*, WAVE3.COM, <http://www.wave3.com/story/13702702/burkman-comments> (last visited Nov. 20, 2011).

¹²³ Editorial, *Injudicious Conduct*, COURIER-J. (Louisville, Ky.), Dec. 21, 2010, at A10.

¹²⁴ KY. CONST. §§ 117, 118; *Citizens for Better Judges*, *supra* note 104 (noting "the growing trend toward merit selection and appointive systems designed to counteract the soaring costs and potential conflicts in judicial elections which threaten the quality, integrity and independence of the judiciary.").

¹²⁵ KY. CONST. § 118.

¹²⁶ *Composition of the Judicial Nominating Commissions*, KY. COURT OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Nov. 20, 2011).

¹²⁷ *Id.*; KY. CONST. § 118(2); KY. REV. STAT. ANN. § 34.010(2) (West 2011); *Composition of the Judicial Nominating Commissions*, KY. COURT OF JUSTICE, <http://courts.ky.gov/jnc/#comp> (last visited Nov. 12, 2011).

¹²⁸ Citizens for Better Judges has been referred to by the Courier-Journal as "the major and most influential civic group interested in judicial elections," and commended the organization for earning a reputation "for careful screening of candidates before making endorsements." *Citizens for Better Judges*, *supra* note 104.

Ultimately, the viability of Kentucky’s judicial system demands the separation of the courts from political influence.¹²⁹ Therefore, the Commonwealth should also appoint a bipartisan Commission to undertake a comprehensive evaluation of the fairness of Kentucky’s judicial selection processes and the effect of unfair practices on compromising the independence of the courts. The Kentucky Assessment Team also recommends that judicial evaluation systems similar to the CBJ be established throughout the Commonwealth which will improve citizens’ understanding of the importance of the independence of the judiciary, as well as educate citizens on the relevant qualifications of judicial candidates before an election.

B. Recommendation #2

A judge who has made any promise—public or private—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.

The Code prohibits judicial candidates and judges from making statements that may affect any future decisions. Specifically, Canon 2 of the Code mandates that a judge “avoid impropriety and the appearance of impropriety in all of the judge’s activities.”¹³⁰ Canon 3 requires that a judge “perform the duties of judicial office impartially and diligently.”¹³¹ While a proceeding is pending or impending in any court, judges also must refrain from making “any public comment that might reasonably be expected to affect [the proceeding’s] outcome or impair its fairness or [from] mak[ing] any nonpublic comment that might substantially interfere with a fair trial or hearing”¹³²

Similarly, the Code’s “commits clause,” Canon 5B(1)(c), prohibits judges and judicial candidates from “mak[ing] pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”¹³³ Canon 5B(1)(c) also prohibits judges and judicial candidates from “intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or *issue* that is likely to come before the court,” thereby prohibiting a judge or judicial candidate from making a promise regarding his/her prospective decision in capital case that amounts to prejudgment.¹³⁴

¹²⁹ Carolyn B. Lamm, *ABA President’s Message: Let’s Leave Politics Out of It*, 10 ABA JOURNAL (March 2010).

¹³⁰ SCR 4.300, Canon 2. For example, Canon Two prohibits membership in certain organizations, and prohibits certain relationships from impairing the judge’s objectivity. SCR 4.300, Canon 2, 2D, 2E.

¹³¹ SCR 4.300, Canon 3.

¹³² SCR 4.300, Canon 3B(9) (noting that this Canon “does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court . . . [nor does it] apply to proceedings in which the judge is a litigant in a personal capacity,” “but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.”).

¹³³ SCR 4.300, Canon 5B(1)(c) cmt.

¹³⁴ *Id.* (emphasis added).

However, the current status of the fifth canon’s “commits clause” with respect to candidates making statements about controversial issues, such as the death penalty, is unclear.¹³⁵ The Kentucky Supreme Court previously has provided great latitude to judges and judicial candidates to state their views on disputed issues.¹³⁶ Indeed, the Court recognized that there exists a strong public interest in the education of the public about judicial candidates’ views, stating

[w]e believe a well informed electorate is essential to the democratic election process guaranteed by the Kentucky Constitution. The right[] of the voting public to hear what a candidate has to say is a compelling one. We further believe candidates for judicial office can announce their views on legal and political issues without jeopardizing the integrity and independence of the legal system or undermining the impartiality of the judiciary.¹³⁷

It appears that judicial candidates are permitted to state their views on controversial issues, short of “intentionally or recklessly”¹³⁸ making a statement that would amount to prejudgment or would commit the speaker to a particular ruling in a case. In fact, judicial candidates in Kentucky have spoken publicly about their personal philosophies on the death penalty.¹³⁹ For example, during his successful 2004 judicial campaign for a seat on the Kentucky Supreme Court, Justice Will T. Scott made public comments about a death row inmate whose case would later come before the Kentucky Supreme Court.¹⁴⁰ In 2006, Judge Rick Johnson also publicly declared his support for the death penalty, among other controversial issues.¹⁴¹

Kentucky also requires “a judge [to] disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned,”¹⁴² and Commonwealth statutory law

¹³⁵ As mentioned in the Factual Discussion, the U.S. Court of Appeals for the Sixth Circuit recently remanded the case of *Carey v. Wolnitzek* to the district court “for further consideration of the meaning and validity of [the] clause” with respect to its mention of “issue[s].” *Carey*, 614 F.3d at 207–10. Regarding the clause’s prohibition against statements on “cases” and “controversies” likely to come before the court, the Sixth Circuit held that the clause narrowly advances the Commonwealth’s “compelling interest in ‘prohibit[ing] candidates from promising to rule a certain way on cases.’” *Id.* at 207 (“By preventing candidates from making statements that commit them to rule a certain way on a case or controversy, the clause secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read.” (quotations omitted)).

¹³⁶ See *Family Trust Found. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224 (6th Cir. 2004) (striking down Kentucky’s previous announce clause).

¹³⁷ *Family Trust Found.*, 388 F.3d at 228 (citing *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (dismissing a disciplinary case against a Kentucky Supreme Court Justice) (all special justices sitting)).

¹³⁸ SCR 4.300, Canon 5B(1)(c) cmt.

¹³⁹ In *Republican Party of Minnesota v. White*, the U.S. Supreme Court ruled that Minnesota’s canon of judicial conduct which prohibited judicial candidates from announcing his/her views on disputed legal or political issues “both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our first Amendment freedoms’—speech about the qualifications of candidates for public office.” 536 U.S. 765, 774 (2002).

¹⁴⁰ Beth Musgrave, *Was Scheduled to Die Sept. 25: State Supreme Court Stays Baze Execution*, LEXINGTON HERALD-LEADER, Sept. 13, 2007.

¹⁴¹ *Committee: Johnson Ad Misrepresents Cunningham’s Record*, KY. JUD. CAMPAIGN CONDUCT COMM’N, <http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/kjccchome.pdf> (last visited Nov. 20, 2011).

¹⁴² SCR 4.300, Canon 3E(1); KY. REV. STAT. ANN. § 26A.015(2)(e) (West 2011). See also *Family Trust Found.*, 388 F.3d at 228 (noting another “narrowly tailored mechanism[] exists under Kentucky law to preserve the impartiality of the judiciary—namely Kentucky’s recusal statute”).

further requires judges to recuse themselves from legal proceedings where they have “a personal bias or prejudice concerning a party,” “personal knowledge of disputed evidentiary facts concerning the proceedings,” or “knowledge of any other circumstances [such that their] impartiality might reasonably be questioned.”¹⁴³ For example, the Kentucky Supreme Court overturned a murder conviction due, in part, to the trial court’s denial of a capital defendant’s motion for recusal based on the judge’s (1) previous participation in guardianship proceedings involving the defendant and the two minor victims in the case, (2) statements to the press following the indictment, (3) extra-judicial knowledge of the defendant’s background, and (4) “insistence on an October 23rd trial date while being a candidate for election in November, juxtaposed with the adverse publicity which he had received as a result of the [victims’] deaths.”¹⁴⁴ The Court further recognized that the trial judge “stood to gain significant public favor by conducting a trial in which a guilty verdict was returned in this high-profile case, shortly before the November election.”¹⁴⁵

Similarly, in response to the campaign statements regarding a death row inmate, in 2007 Justice Scott recused himself at the request of the inmate’s attorneys, when the Kentucky Supreme Court heard the inmate’s request for a stay of execution.¹⁴⁶ In another capital case, a judge recused himself upon a motion of the defendant, stating that “he could not impose the death penalty if recommended by the jury because the capital defendant’s accomplice had received a probated sentence.”¹⁴⁷ However, under the Code, judges may continue to preside over capital cases

¹⁴³ KY. REV. STAT. ANN. § 26A.015(2)(a), (e) (West 2011) (listing other reasons a judge must disqualify him/herself). However, prior to the commencement of trial in *Bussell v. Commonwealth*, the judge stated that he had represented the defendant on a murder case seventeen years earlier and “indicated some willingness to recuse . . . if a motion was made at that time.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 112–13 (Ky. 1994). The defense counsel declined, at that time, to move for recusal but, five days prior to trial, reversed course and filed a motion for recusal. The trial judge overruled the motion. *Id.* On appeal, the Kentucky Supreme Court stated that the trial court’s refusal to recuse was not reversible error and that the motion should have been made “immediately upon discovery of the facts upon which the disqualification rests.” Because this had not been done, the issue was deemed waived. *Id.* The Court also noted that the “conduct of the trial judge was not a textbook example of judicial patience,” but it found “no violation of the [capital] defendant’s rights.” *Id.* See also *Hester v. Commonwealth*, No. 2004-SC-000794-MR, 2006 WL 2707441, at *5–7 (Ky. Sept. 21, 2006) (finding no reversible error, but labeling trial court’s comments as “not ideal” for trial judge’s denial of motion to recuse where the trial court had stated on a television news broadcast, following escape from prison by a co-defendant, that “[i]t’s my policy that if both sides agree I will recuse myself from this case. But I believe that I would be much more harsh than anyone else could at this point.”).

¹⁴⁴ *Sommers v. Commonwealth*, 843 S.W.2d 879, 881 (Ky. 1992).

¹⁴⁵ *Id.* at 882.

¹⁴⁶ Beth Musgrave, *Was Scheduled to Die Sept. 25: State Supreme Court Stays Baze Execution*, LEXINGTON HERALD-LEADER, Sept. 13, 2007; *Baze v. Commonwealth*, 276 S.W.3d 761 (Ky. 2008) (noting Justice Scott not sitting). See also *Baze v. Commonwealth*, No. 2005-SC-0889-MR, 2006 WL 1360281 (Ky. May 18, 2006) (noting Justice Scott not sitting). Justice Scott also recused himself when the Kentucky Supreme Court heard the direct appeal of a death sentence in *Fields v. Kentucky*. See CHIEF JUSTICE LAMBERT, SUP. CT. OF KY. ORAL ARGUMENTS CALENDAR (Jan. 30, 2008), available at <http://www.aoc.state.ky.us/Supreme/CALENDAR/SCOMAR08.htm>. See also *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007) (all sitting except Justice Scott); *Fields v. Commonwealth*, 274 S.W.3d 375 (Ky. 2008) (all sitting except Justice Scott).

¹⁴⁷ *Tamme v. Commonwealth*, 973 S.W.2d 13, 23 (Ky. 1998). However, in *Hodge v. Commonwealth*, the trial court judge did not recuse himself in a death penalty case where the judge had dated the prosecutor’s girlfriend—who was the jury foreman’s stepdaughter—and the prosecutor’s son had served as a law clerk for the judge. *Hodge v. Commonwealth*, 68 S.W.3d 338, 346 (Ky. 2001) (“We cannot say that the trial court abused its discretion in denying the motion to recuse. But we believe that, if it appears likely that Combs will be called as a witness at the

notwithstanding such statements.¹⁴⁸ The KJCCC also issued a mild rebuke of Judge Rick Johnson in response to his public declaration of his stance on controversial issues.¹⁴⁹

Unfortunately, there is no public record of the number of judicial misconduct complaints filed, investigated, or charged, the facts underlying each complaint, and whether judges were disciplined and/or whether charges were dismissed. Kentucky rules prohibit disclosure of much of the information in complaints filed with the Judicial Conduct Commission.¹⁵⁰ As a result, the Assessment Team are unable to determine whether judges whose promises or statements may have amounted to prejudgments have recused themselves or been removed from presiding over a capital case.

Due to the uncertainty surrounding the Code's prohibition on a judge or judicial candidate from making a statement on a controversial "issue that is likely to come before the court," it is unclear whether a judge's or judicial candidate's statement on the death penalty is tantamount to prejudgment and, therefore, whether that judge or judicial candidate should not preside over any capital case. As such, the Assessment Team are unable to determine whether the Commonwealth of Kentucky is in compliance with this Recommendation.

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

- a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not "technicalities" and that judges and lawyers are bound to protect those rights for all defendants.**
- b. Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.**
- c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.**

evidentiary hearing on the jury tampering allegations, then Judge Wright should reconsider the recusal motion in order to prevent the appearance of impropriety.").

¹⁴⁸ See, e.g., *McQueen v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007) (where Justice Scott concurred in upholding the death sentence for an inmate executed four days later); *Furnish v. Commonwealth*, 267 S.W.3d 656 (Ky. 2007) (where Justice Scott concurred in upholding the death sentence); *Halvorsen v. Commonwealth*, 258 S.W.3d 1 (Ky. 2007) (where Justice Scott concurred in denying the inmate's post-conviction relief).

¹⁴⁹ *Committee: Johnson Ad Misrepresents Cunningham's Record*, KY. JUD. CAMPAIGN CONDUCT COMM., <http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/kjccchome.pdf> (last visited Nov. 14, 2011).

¹⁵⁰ See *supra* note 65; SCR 4.130(1)–(2).

Political assaults on judges may not only affect the way judges decide death penalty cases, they also may affect the public's perception of the judiciary's proper role. The negative image created by such attacks is exacerbated by the inability of the judiciary to speak in its own defense. It is therefore imperative that bar associations and community leaders publicly defend judges from assaults that undermine the independence of the judiciary.

Kentucky judges have been criticized for their decisions in capital cases.¹⁵¹ In fact, at least one candidate defeated an incumbent and was elected to the Kentucky Supreme Court after an election during which he publicly criticized his opponent for "sid[ing] with criminal defendants in more than 65 percent of the criminal cases to come before the Supreme Court."¹⁵²

We were unable to identify any instances where Kentucky bar associations or community leaders have publicly defended Commonwealth judges who have been criticized for their decisions in criminal cases. However, various Kentucky bar associations and community leaders have taken steps to protect the *overall* independence and impartiality of the Commonwealth's judiciary. For example, in 2005 the Louisville Bar Association adopted a "Resolution On Protecting the Independence of Our Judiciary," in which it advised that government officials who disagree with a court decision "should not threaten to punish members of the judiciary through impeachment and other means for decisions rendered by the courts as part of the proper performance of their duties on behalf of the public."¹⁵³

The KJCCC and CBJ are also two entities whose mission is to encourage fairness in judicial campaigns.¹⁵⁴ In 2006, the KJCCC publicly rebuked a judicial candidate for campaign conduct in which misleading statements were made regarding his opponent's rulings on habeas corpus and other constitutional and procedural issues in a series of high-profile criminal cases.¹⁵⁵ The KJCCC also rebuked the incumbent judge for stating his views on social issues, including the death penalty, during the judicial campaign.¹⁵⁶

¹⁵¹ See, e.g., *Kentucky Teen Killer Todd Ice Dead at 47*, UPI TOP STORIES, Oct. 25, 2010, http://www.upi.com/Top_News/US/2010/10/25/Kentucky-teen-killer-Todd-Ice-dead-at-47/UPI-56401288021355/ (noting that a Kentucky Supreme Court decision to overturn a death sentence created a fury "that included a recall campaign against two [Kentucky Supreme Court] justices," this despite the fact that Commonwealth law does not provide for such recall elections); Editorial, *Injudicious Conduct*, COURIER-J. (Louisville, Ky.), Dec. 21, 2010, at A10 (noting criticism for a circuit court judge's decision not to impose a death sentence after defendant plead guilty to capital murder); *Never Too Early To Prepare To Avoid The Death Penalty*, SIMPLE JUSTICE, Nov. 21, 2009 (criticizing a judge's decision not to find a defendant mentally retarded, therefore making defendant eligible for the death penalty). *But see* Chapter Thirteen on Mental Retardation and Mental Illness, discussing Kentucky trial courts' comprehension of modern, scientific understanding of mental retardation.

¹⁵² Will T. Scott, *Record of Being Tough on Criminals*, LEXINGTON HERALD-LEADER, Oct. 29, 2004.

¹⁵³ LOUISVILLE BAR ASS'N, RESOLUTION ON PROTECTING THE INDEPENDENCE OF OUR JUDICIARY, June 27, 2005 (on file with author). The resolution noted that "when the judiciary makes decisions with which citizens disagree, citizens have a responsibility to pursue legitimate opportunities of redress available to them." *Id.*

¹⁵⁴ KY. JUDICIAL CAMPAIGN CONDUCT COMM., <http://www.loubar.org/jccc/kjccchome.htm> (last visited Nov. 14, 2011); *History for Citizens for Better Judges*, CITIZENS FOR BETTER JUDGES, <http://www.citizensforbetterjudges.org/history.html> (last visited Nov. 14, 2011).

¹⁵⁵ *Committee: Johnson Ad Misrepresents Cunningham's Record*, 1-2 KY. JUD. CAMPAIGN CONDUCT COMM., <http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/kjccchome.pdf> (last visited Nov. 14, 2011).

¹⁵⁶ *Id.* at 6.

Furthermore, in 2005, when the Family Trust Foundation of Kentucky presented judicial candidates with a questionnaire on controversial social issues, some Commonwealth leaders and community organizations publicly requested “judicial candidates in the state to sign a pledge not to answer any questionnaires from special-interest groups.”¹⁵⁷ Other Commonwealth entities, such as the KJCCC, educated judicial candidates on the “possible consequences” of filling out such questionnaires and ultimately left it up to each individual candidate to determine whether or not to respond.¹⁵⁸

In light of recent litigation over the constitutionality of the Kentucky Code of Judicial Conduct, it appears that special interest groups may request, and judicial candidates may lawfully respond to, inquiries concerning a candidate’s view on controversial social issues.¹⁵⁹ In addition, it appears judicial candidates may speak to “issue[s] that [could] come before the court” for which they seek office. These developments reinforce the need for educating the public on judges’ responsibility to protect the constitutional rights of all defendants and to not use a judicial candidate’s view on the death penalty or habeas corpus as an important factor in the selection of a judge. Given that the KJCCC, CBJ, and other organizations have spoken out against attacks on the judiciary that undermine its independence, but have not specifically opposed the questioning or criticizing of judges for their rulings in capital cases, Kentucky is in partial compliance with Recommendation #3.

D. 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 that the defendant receives a proper defense.

Recommendation #5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during capital case should take immediate action

¹⁵⁷ Jack Brammer, *Justice Sets Up Panel to Monitor Campaigns; Will Guide Ethics of Judicial Candidates*, LEXINGTON HERALD-LEADER, July 8, 2005, at A1 (quoting Richard Beliles of Common Cause of Kentucky, who stated that “[i]f [judges] answer a questionnaire from a special interest group wanting to know how they stand on abortion, the death penalty, or any other social issue, that could hurt their impartiality in deciding cases on subjects like that”); *Family Trust Found.*, 388 F.3d at 224.

¹⁵⁸ Jack Brammer, *Justice Sets Up Panel to Monitor Campaigns; Will Guide Ethics of Judicial Candidates*, LEXINGTON HERALD-LEADER, July 8, 2005, at A1 (noting that Common Cause of Kentucky made this request). At least nine 2006 judicial candidates refused to answer the Foundation’s questionnaire due to reservations about the public’s view of their impartiality, and the uncertainty whether it would be a violation of the Kentucky Code of Judicial Conduct. *Family Trust Found.*, 388 F.3d at 224.

¹⁵⁹ See *Family Trust Found.*, 388 F.3d at 227–28 (denying the Kentucky Judicial Conduct Commission motion for stay for failure to meet the standard, pending appeal, of District Court injunction prohibiting enforcement of Kentucky Supreme Court Rule prohibiting judicial candidates from making pledges other than the faithful and impartial performance of their duties during judicial campaigns); *Carey*, 614 F.3d at 210 (invalidating two of Kentucky’s Canons of Judicial Conduct known as the “party affiliation” and “solicitation” clauses while remanding for further consideration the meaning of Canon 5B(1)(c), the “commits clause,” prohibition on judicial candidates from making a statement on “issues” to come before the court). Code commentary notes that Clause 5B(1)(c) does not specifically address judicial responses to questionnaires or media or community organization’s requests for interviews to learn candidates’ views on disputed or controversial legal or political issues. SCR 3.130(8.2), 4.300, Canon 5B(1)(c) & cmt.

authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

Trial courts are in the best position to view the conduct of prosecutors and defense attorneys, assess its impact, and choose the appropriate action to ensure a fair trial. To assist trial courts in the management of a death penalty case, the Administrative Office of the Courts sponsors a four-day orientation program for new circuit court judges, which includes training on capital trials.¹⁶⁰ However, no continuing education regarding death penalty cases is required of Kentucky's judges.¹⁶¹

The Kentucky Code of Judicial Conduct (Code) advises judges to “take appropriate action” when they “receive[] information indicating a substantial likelihood that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct.”¹⁶² Appropriate action may include “direct communication with the . . . lawyer who has committed the violation . . . and reporting the violation to the appropriate authority.”¹⁶³ The Code also advises judges to report the violation to the appropriate authority if they have knowledge that an attorney's violation of the Rules of Professional Conduct “raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.”¹⁶⁴

It is clear that ineffective assistance of defense counsel and prosecutorial misconduct has occurred in Kentucky death penalty trials.¹⁶⁵ Since the death penalty was reinstated in 1976, at least fifty of the seventy-eight defendants sentenced to death have had a death sentence overturned by a Commonwealth or federal court; at least sixteen of these reversals were based in whole or in part on prosecutorial misconduct/error or ineffective assistance of counsel.¹⁶⁶ The prevalence of reversals of death sentences in Kentucky demonstrates that trial courts have failed, in some instances, to take effective action to ensure that capital proceedings are fair.

For example, in one capital case, the Kentucky Supreme Court reversed a death sentence because the prosecution had notified the defense counsel that it would seek the death penalty only six days before the commencement of trial and the trial court permitted the case to move forward.¹⁶⁷ In another case, the Kentucky Supreme Court reversed a death sentence for, among other reasons, the Commonwealth Attorney's “flagrant conduct,” which included eliciting testimony from the defendant that the perpetrator of the crime should be put to death and misinforming the jury during the penalty phase that “they had an obligation to the judge to impose the death

¹⁶⁰ Press Release, *44 judges participate in orientation program for new Kentucky judges*, KY. CT. OF JUSTICE, Mar. 17, 2010, <http://migration.kentucky.gov/newsroom/kycourts/03172010JB1.htm> (last visited Nov. 14, 2011).

¹⁶¹ See SCR 8.070 (“Every appellate judge and justice and every trial judge, not exempted, shall attend a minimum of twenty-five [] hours in continuing judicial education courses approved by the Judicial Education Commission At least once every two years, a portion of the required continuing judicial education shall consist of programs which focus on the dynamics and effects of domestic violence including the availability of community resources, victims' services and reporting requirements.”)

¹⁶² SCR 4.300, Canon 3D(2).

¹⁶³ SCR 4.300, Canon 3D cmt.

¹⁶⁴ SCR 4.300, Canon 5D(2).

¹⁶⁵ See also Chapter Six on Defense Services and Chapter Five on Prosecutorial Professionalism.

¹⁶⁶ Kentucky Capital Case Basis for Reversals, 1976 to 2011, compiled by the ABA Death Penalty Moratorium Implementation Project (on file with author).

¹⁶⁷ *Smith v. Commonwealth*, 845 S.W.2d 534, 536–37 (Ky. 1993).

penalty. . . ,” each of which were not addressed by the trial court.¹⁶⁸ One Kentucky death row inmate’s conviction and sentence were overturned during post-conviction proceedings due to ineffective assistance of counsel and prosecutorial misconduct at the original trial in which the “the conduct of the trial judge was not a textbook example of judicial patience”¹⁶⁹

Furthermore, instances of ineffective lawyering and unfair practices may have occurred at trial and deemed improper, but nonetheless found to be harmless or non-prejudicial to the outcome of the proceeding, or procedurally defaulted. For example, the Kentucky Supreme Court remarked on a trial court’s failure to ensure impartiality when a capital juror “brought a Bible into the jury room and read Bible passages to the jurors and led jurors in prayer during deliberations.”¹⁷⁰ However, the Court ultimately concluded that the petitioners’ claim was barred as untimely.¹⁷¹ During the penalty phase of another capital trial of co-defendants, neither defense counsel presented any witnesses to testify on either capital defendants’ behalf, nor did they introduce any other mitigating evidence.¹⁷² The trial court did not inquire or take action regarding the lack of defense during the penalty phase, despite the fact that one defendant’s attorney conceded at trial “that he was unprepared to proceed.”¹⁷³

In the trial of Gregory Wilson, the trial court did not take effective action to ensure that he received an effective defense, despite one defense counsel’s complete lack of felony criminal trial experience and his co-counsel’s absence from more than half of the trial, including during the direct examination of the forensic pathologist, in which the co-counsel “later had to ask the judge to summarize that witness’s testimony before his cross examination.”¹⁷⁴ After a year had

¹⁶⁸ *Dean v. Commonwealth*, 777 S.W.2d 900, 903–04, 907 (Ky. 1989) (“Not only did the court in appellant’s trial fail to perceive that the repeated references to the jury’s ‘recommendation’ warranted an admonition, but the trial court highlighted the diminution of the jury’s responsibilities in the drafting of the instructions submitted to the jury.”).

¹⁶⁹ *Bussell*, 882 S.W.2d at 112 (The Court stated in Bussell’s direct appeal that “This court has carefully reviewed the video tape of all the proceedings and concludes that reversible error did not occur. Although the conduct of the trial judge was not a textbook example of judicial patience, we find no violation of the defendant’s rights.”); *Bussell*, 226 S.W.3d at 102–03 (post-conviction). On direct appeal, the Court also determined the trial judge’s refusal to recuse himself from the original capital trial was not reversible error, despite the fact that the trial judge had previously represented the defendant on a murder charge fifteen years earlier, because the defendant had waived any objection. *Bussell*, 882 S.W.2d at 112–13.

¹⁷⁰ *Willoughby v. Commonwealth*, Nos. 2006-SC-000071-MR, 2006-SC-000100-MR, 2007 WL 2404461, at *1–3 (Ky. Aug. 23, 2007).

¹⁷¹ *Id.*

¹⁷² *Hodge*, 68 S.W.3d at 342–43. For more information on the death row inmates’ attorney, see Chapter Six, Recommendation #3 (describing the reasons why the attorney was disbarred). See also Bill Estep, *Death Row Inmates allege Jury Tampering Epperson, Hodge Accuse Prosecutor of Wrongdoing*, LEXINGTON HERALD-LEADER, Jan. 13, 2000 (noting that in addition to taking pain killers during the capital trial, defense counsel was under investigation for receiving stolen money).

¹⁷³ *Hodge*, 68 S.W.3d at 343.

¹⁷⁴ *Wilson v. Rees*, 624 F.3d 737, 741 (6th Cir. 2010) (Martin, J., dissenting) (“Wilson gave a closing argument that took [one-and-a-half] pages to transcribe; the prosecutor’s took [fifty-four]”). Furthermore, it appears that during this capital trial, the prosecuting attorney knew of an on-going extra-marital affair between Wilson’s co-defendant, who testified against Wilson at his trial, and a judge who was a friend of the trial judge and whose chambers were in the same courthouse as the trial judge, although it is unclear whether trial judge had knowledge of the relationship. *Id.* at 738–39 (Martin, J. dissenting). See also Mark R. Chellgren, *Killer Who Had Relationship with Judge Not Entitled to Relief*, ASSOCIATED PRESS, Apr. 21, 2005 (noting that the affair began in 1985, about two years before Wilson and his co-defendant went to trial for capital murder).

transpired in which multiple attorneys resigned from representation of the defendant, the “defense in this case began with a handwritten note begging for volunteers, and ended with Wilson clumsily attempting to defend himself because he lacked competent counsel.”¹⁷⁵ Descriptions of the conduct of defense counsel at the trial, and the failure of the trial court to remedy continued ineffectiveness apparent during the trial, prompted a judge on the U.S. Court of Appeals for the Sixth Circuit to remark that “[o]ver my more than thirty years on the bench, Wilson’s trial stands out as one of the worst examples that I have seen of the unfairness and abysmal lawyering that pervade capital trials.”¹⁷⁶

Despite training offered to new trial court judges on capital cases, the occurrence of ineffective lawyering and unfair practices in Kentucky death penalty cases indicates that Commonwealth trial courts are not always taking specific measures to ensure that capital proceedings are fair. Therefore, Kentucky is not in compliance with Recommendations #4 or #5.

E. Recommendation #6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Neither the Kentucky Revised Statutes nor the Code explicitly requires judges to ensure that capital defendants are provided with full discovery. However, Canon 3 of the Code does require judges to be “faithful to the law” and perform their duties impartially, which includes enforcing existing discovery rules.¹⁷⁷

Pretrial discovery is governed by Kentucky RCr 7.24.¹⁷⁸ The Commonwealth and defense counsel may agree to other discovery terms, such as reciprocal open file discovery, made enforceable by order of the trial court delineating the specific discovery agreement.¹⁷⁹ If one party fails to comply with discovery, the trial judge can impose any sanction that “may be just under the circumstances,” including: (1) ordering the offending party to “permit the discovery or inspection of materials not previously disclosed,” (2) “grant[ing] a continuance,” (3) “prohibit[ing] the party from introducing in[to] evidence the material not disclosed,” (4) granting a continuance to enable the other party to examine the evidence, or (5) dismissing the charge, which is the most severe penalty a court may impose.¹⁸⁰

¹⁷⁵ *Wilson*, 624 F.3d at 741 (Martin, J., dissenting). In addition, “[a]t many points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson’s words, ‘unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience.’” *Wilson v. Commonwealth*, 836 S.W.2d 872, 878 (Ky. 1992), *overruled on other grounds by* *St. Clair v. Roark* 10 S.W.3d 482, 487 (Ky. 1999); Andrew Wolfson, *Kentucky Death Row Inmate’s Trial Littered with Problems*, *COURIER-J.* (Louisville, Ky.), Sept. 8, 2010.

¹⁷⁶ *Wilson*, 624 F.3d at 741 (Martin, J., dissenting).

¹⁷⁷ SCR 4.300, Canon 3B(2).

¹⁷⁸ KY. R. CRIM. P. 7.24. *See also* KY. R. CRIM. P. 7.26 (demand for production of statement and reports).

¹⁷⁹ *See, e.g., Hicks v. Commonwealth*, 805 S.W.2d 144, 148 (Ky. App. 1990) (capital-eligible case); *McQueen v. Commonwealth*, 948 S.W.2d 415, 417 (Ky. 1997) (capital case); *Denton v. Commonwealth*, No. 2002-CA-001042-MR, 2004 WL 178386, at *1 (Ky. App. Jan. 30, 2004) (capital-eligible case).

¹⁸⁰ KY. R. CRIM. P. 7.24(9); *Berry v. Commonwealth*, 782 S.W.2d 625, 627–28 (Ky. 1990), *overruled on other grounds by* *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008); *Neal v. Commonwealth*, 95 S.W.3d 843, 848 (Ky. 2003).

Trial court status conferences also may permit the court to monitor discovery in capital cases, however, the utility and frequency of the use of a status conference for this purpose is in the court's discretion.

Thus, 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 discovery requirements of RCr 7.24 in capital cases. Due to the lack of uniformity among the Commonwealth's trial courts' practices to monitor and enforce discovery obligations in capital cases, we cannot determine if the Commonwealth is in compliance with this Recommendation.

Furthermore, the Commonwealth does not permit discovery in capital post-conviction proceedings and therefore Commonwealth courts are under no obligation to ensure discovery in this context.¹⁸¹ With respect to the Commonwealth's failure to permit discovery in this context, see Chapter Eight on State Post-Conviction Proceedings.

The Kentucky Death Penalty Assessment Team recommends that the Commonwealth 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.¹⁸² This type of pretrial conference will permit the court to monitor the status of discovery in a capital case to ensure proper and timely disclosure. Furthermore, it may also ease the burden on post-conviction courts in determining whether the prosecution had knowledge of the existence of discoverable or *Brady*¹⁸³ material and failed to disclose it.¹⁸⁴

¹⁸¹ See *Sanborn v. Commonwealth*, 975 S.W.2d 905, 910 (1998), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (stating that the pretrial discovery rule is not applicable in post-conviction proceedings); *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), *overruled on other grounds by Leonard*, 279 S.W.3d 151 (holding that the trial court correctly denied the petitioner's motion for discovery because discovery is not authorized in a post-conviction proceeding); *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983) (stating that the purpose of the post-conviction proceedings is "to provide a forum for known grievances, not to provide an opportunity to research for grievances.").

¹⁸² See ABA, RECOMMENDATION 102D, 2010 Midyear Mtg. (adopted Feb. 8–9, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102D.authcheckdam.pdf.

¹⁸³ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁸⁴ See, e.g., *Bussell*, 226 S.W.3d at 99–103 (affirming the post-conviction trial court's finding of *Brady* violations where the post-conviction circuit court held an evidentiary hearing on alleged *Brady* violations and ineffective assistance of counsel claims that lasted nine days over the course of a year in which sixty-four witnesses were called to testify).

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is black. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving black defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the U.S. Supreme Court held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systemic racial disparity in the death penalty's implementation.

The pattern of racial disparity reflected in *McCleskey* persists today in many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty, ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims, and discriminatory use of peremptory challenges to obtain all-white or largely-white juries.

There is no dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that society identify the various ways in which race infects the administration of the death penalty and devise solutions to eliminate discriminatory practices.

¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

The issue of racial and ethnic discrimination in the administration of capital punishment was brought to the forefront of the death penalty debate by the U.S. Supreme Court's decision in *McCleskey v. Kemp*.² Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.³ The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.⁴

The 1987 U.S. Supreme Court's decision in *McCleskey* invited legislatures to develop remedies for eliminating race from the capital sentencing process.⁵ In 1992, five years after *McCleskey*, the Kentucky General Assembly commissioned Kentucky Professors Thomas Kiel and Gennaro Vito to conduct a study of racial discrimination within the Commonwealth's capital sentencing system.⁶ Six years later, in 1998, the Kentucky General Assembly adopted the nation's first Racial Justice Act.⁷

In Kentucky, the issue of racial discrimination within the criminal justice system had come to the forefront prior to *McCleskey*. In 1987, the U.S. Supreme Court ruled on a criminal case from Jefferson County, Kentucky, in which attorneys for an African-American defendant challenged the Commonwealth's Attorney's use of peremptory challenges to strike all four potential African-American jurors, resulting in a jury composed of only white persons.⁸ In *Batson v. Kentucky*, the U.S. Supreme Court held that a defendant may make a prima facie showing of purposeful racial discrimination in jury selection by relying solely on the facts concerning jury selection in his/her case.⁹ The *Batson* Court created a three-step process to determine whether

² *Id.*

³ *Id.* at 291–92. See also U.S. Gen. Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, Report to Senate and House Committees on the Judiciary, Appendix I (1990) (citing Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. CRIM. L. & CRIMINOLOGY 483 (1988)).

⁴ *Id.* at 297.

⁵ *McCleskey v. Kemp*, 481 U.S. 279, 318 (1987).

⁶ Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. KY. L. REV. 273, 276 (2010).

⁷ See KY. REV. STAT. ANN. §§ 532.300–309 (West 1998).

⁸ *Batson v. Kentucky*, 476 U.S. 79, 83 (1986). The defendant was indicted for second-degree burglary and receipt of stolen goods. *Id.* at 82.

⁹ *Id.* at 83, *overruling Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* had required a defendant to prove that the peremptory challenge system, on the whole, was discriminatory. *Swain*, 380 U.S. at 227–28. Notably, a 1975 *Kentucky Prosecutor's Handbook* promoted use of peremptory strikes against racial and ethnic minority jurors, “particularly potential jurors who were of ethnic or national background similar to that of the defendant who was on trial.” Gerald Neal, *Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act: A Symbol; A Statement of Legal Principle; and A Commitment to Systemic Fundamental Fairness*, 26 ADVOCATE 9, Mar. 2004, at 21 (“The *Kentucky Prosecutor's Handbook* (1975) issued by the Office of the Kentucky Attorney General, Prosecutor's Assistance Division counseled in favor of excluding minorities as jurors”); Susan K. Balliet & Bruce P. Hackett, *Litigating Race in Voir Dire*, 30 ADVOCATE 3, May 2008, at 42 (noting that the defendant “had pointed out that [the] prosecutor was purposefully following a manual prescribing peremptory removal of all black jurors”).

peremptory challenges were properly used or were instead based on racial discrimination: (1) the defendant first produces prima facie evidence of the prosecutor's purposeful discrimination, (2) the prosecutor defends by demonstrating a neutral reason for the use of a peremptory challenge, and (3) the defendant proves purposeful discrimination.¹⁰ Under *Batson*, prospective jurors only may be removed on race neutral grounds.¹¹

A. Empirical Research on Race and Kentucky's Administration of the Death Penalty

Prior to the Kentucky General Assembly's commission of a study on race and the death penalty in 1992, Professors Thomas Kiel and Gennaro Vito already had conducted a series of assessments on the effect of race on Kentucky's death penalty administration.¹² The first study, completed in 1988, assessed the effectiveness of Kentucky's capital sentencing procedures in curbing both arbitrariness and intentional and unintentional discrimination, first examining prosecutorial decisions to charge defendants with capital crimes and then examining jury decisions to impose the death penalty.¹³ The analysis encompassed a pool of 458 Kentucky cases where a defendant was indicted for murder and sentenced between December 22, 1976 and October 1, 1986, and where there was at least one aggravating factor present necessary to make the case death-eligible.¹⁴ Controlling for variables regarding the seriousness of the offense and the victims' gender, the study found significant racial disparities in the post-*Gregg* prosecutorial decisions to charge a defendant with a capital crime, namely, that prosecutors were significantly more likely to charge a defendant with a capital crime if the case involved a black offender killing a white victim.¹⁵

A year later, Keil and Vito again looked at racial disparities in Kentucky's death penalty administration. This time, they applied the Barnett scale,¹⁶ a classification system for homicides

¹⁰ *Batson*, 476 U.S. at 93–94.

¹¹ *Id.*

¹² See, e.g., Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-*Gregg* Period*, 79 J. CRIM. L. & CRIMINOLOGY 483 (1988) [hereinafter Keil & Vito I]; Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976–1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17 (1995). Both professors have published a number of additional articles and assessments relating to race and the death penalty in Kentucky. See, e.g., Gennaro F. Vito et al., *Kentuckians' Changes in Attitudes Toward Death Penalty*, 12 JUST. PROF. 123 (1999); Thomas J. Keil & Gennaro F. Vito, *Factors Influencing the Use of the "Truth in Sentencing" Law in Kentucky Murder Cases*, 20 AM. J. CRIM. JUST. 105 (1997).

¹³ Keil & Vito I, *supra* note 12, at 494.

¹⁴ *Id.* at 495 (noting that four eligible cases were excluded due to lack of complete variables involved in the study).

¹⁵ Keil & Vito I, *supra* note 12, at 502. Of the 140 capital-eligible black offenders, 33.5% had white victims. *Id.* at 498. Of the thirty-three black offenders tried for a capital offense, 63.6% had white victims. *Id.* Seven of the eight black offenders who received a death sentence (87.5%) had white victims. *Id.* Only 12.9% of black offenders who killed black victims faced a death qualified jury. *Id.* at 498–99. Only 8.3% of black offenders who killed black victims received a death sentence. *Id.* at 499. Although the study failed to find a similar black offender/white victim impact when analyzing jury decisions to impose a death sentence among death-eligible offenders—that is, “[o]nce a person faces a death qualified jury, factors other than race produce the final disposition”—Keil and Vito cautioned that “[t]his finding does not mitigate the evidence of racial effects, because the combination of the race of the victim and the race of the offender has significant consequences in the determination of who faces a death qualified jury.” *Id.* at 503.

¹⁶ Professor Arnold Barnett developed a scale classifying homicides into eighteen different categories based on measures of three elements: the certainty that the defendant was a deliberate killer, whether the victim was a stranger

based on degree of seriousness, to determine whether the racially disparate results from the earlier study were due to those murders being more serious in nature or whether the results indicated racial bias in prosecutor and jury decision-making.¹⁷ Again, black offenders who killed white victims were significantly more likely to be charged by a prosecutor with a capital crime than any other racial combination.¹⁸ In this study, Keil and Vito also found that black offenders who killed white victims were more likely to be sentenced to death by a jury.¹⁹ The results indicated that the degree of “heinousness” of the murder failed to explain the disparities.²⁰

In 1990, the first study from 1988 was expanded to control for additional variables, such as the prior criminal record of the accused and whether the victim and offender were strangers at the time of the murder.²¹ While the earlier study compared only blacks who killed whites with all other offenders, this study “ma[de] more detailed comparisons across other racial combinations.”²² Additionally, while the initial study analyzed the prosecutor’s decision to seek the death penalty and the jury’s decision to impose the death penalty as “discrete steps in the capital sentencing process,” the 1990 assessment examined the effect of a prosecutor’s decision to seek death on juror decision-making to determine the likelihood that defendant would receive a death sentence once the prosecution decided to proceed capitally.²³ Once again, the findings indicated that both prosecutors and jurors considered cases involving a black offender and white victim as the most serious type of homicide,²⁴ followed by white offender/white victim homicides, and then black offender/black victim homicides.²⁵ The study also found that the risk of receiving a death sentence was significantly higher for black offenders only when the victim was white, and not for black offenders as a whole.²⁶ Notably, the study found that, as of 1986, no white offender who killed a black victim had ever been charged with a capital crime in Kentucky.²⁷

to the offender, and the heinousness of the killing. *See* Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985). Because determining these elements may rely on case summaries “originat[ing] from the descriptions of [] criminal justice officials” whose “language, descriptions, and judgments” may have been—subconsciously or otherwise—influenced by factors related to race, critics have argued that the Barnett scale may obscure racial disparities in sentencing. Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511, 514 n.1 (1989) [hereinafter Keil & Vito II].

¹⁷ Keil & Vito II, *supra* note 16, at 516. Keil and Vito applied the Barnett scale to Kentucky capital sentencing data to determine whether the measure of homicide severity provided a legitimate explanation for racial disparities in capital sentencing in Kentucky. *Id.*

¹⁸ *Id.* at 520.

¹⁹ *Id.* at 523.

²⁰ *Id.* at 526.

²¹ Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, 7 JUST. Q. 189, 193 (1990) [hereinafter Keil & Vito III]. Comparatively, the study by David Baldus, Charles Pulaski, and George Woodworth that “served as the basis for” the claims alleged in *McCleskey* controlled for over 200 variables. Keil & Vito II, *supra* note 16, at 513.

²² Keil & Vito III, *supra* note 21, at 193.

²³ *Id.*

²⁴ Keil & Vito III, *supra* note 21, at 197, 200.

²⁵ Keil & Vito III, *supra* note 21, at 197.

²⁶ Keil & Vito III, *supra* note 21, at 205.

²⁷ Keil & Vito III, *supra* note 21, at 197.

A 1991 investigation by Keil and Vito of whether race affected prosecutors' evaluation of the seriousness of a murder revealed that, while controlling for other factors, the race of the victim and defendant, especially where the offender is black and the victim is white, was directly related to prosecutors' evaluation of the seriousness of the homicide.²⁸ In other words, when a homicide met the legal requirements to be death-eligible, prosecutors considered the offender/victim racial makeup in assessing the seriousness of the murder and determining whether to pursue the death penalty.²⁹

In 1992, the Kentucky General Assembly passed Senate Bill 8 requiring the Kentucky Justice Cabinet and the Kentucky Department of Public Advocacy (DPA) to conduct a study to determine if racial bias played a role in death sentencing in Kentucky capital cases and commissioned Keil and Vito to conduct an additional survey.³⁰ Completed in 1993, the study sought to re-examine the effect of the race of the victim on the likelihood that an accused murderer would be charged with a capital crime and the likelihood that such an offender would be sentenced to death in Kentucky.³¹ The analysis encompassed a pool of 577 Kentucky cases between December 22, 1976 and December 31, 1991, where there was a person "charged and indicted, convicted, and sentenced" by a jury "for murder or a lesser offense," in which at least one aggravating circumstance was present in order to make the case death-eligible, and for which there was complete data on the predictors that measured aggravating circumstances.³² The study controlled for legally relevant variables, including whether the murder occurred during the course of a felony, whether there were multiple victims killed, whether the accused killed in order to "silence" the victim, whether the offender had at least one previous conviction for a violent crime, whether there was more than one aggravator present, and whether the victim and offender were strangers.³³

This study's findings were consistent with Keil and Vito's previous work on race and Kentucky's capital punishment system.³⁴ Although the "study could not determine where the discrimination occurred or who was responsible," nor whether there was any geographic effect, the "research evidence indicated that racial bias did exist in the capital sentencing process."³⁵ The study revealed that whether the race of the victim affected sentencing depended on whether the offender was black or white. Specifically, black offenders who killed white victims were 1.5 times more likely to receive the death penalty than black offenders who killed non-white victims, but whites who killed white victims were no more likely to receive the death penalty than white offenders who killed non-white victims.³⁶ The study also found that white offenders had to

²⁸ Thomas J. Keil & Gennaro F. Vito, *Kentucky Prosecutors' Decision to Seek the Death Penalty: A LISREL Model*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 53, 65 (Robert M. Bohm ed., 1991).

²⁹ *Id.* at 66.

³⁰ S.B. 8, 1992 REG. SESS., GEN. ASS. (Ky.); Neal, *supra* note 9, at 13.

³¹ Thomas H. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 17 *ADVOCATE* 5, Apr. 1995, at 5 [hereinafter Keil & Vito IV]. This study also was published in the *American Journal of Criminal Justice*. Thomas H. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 *AM. J. CRIM. JUST.* 17 (1995).

³² Keil & Vito IV, *supra* note, at 6-7.

³³ Keil & Vito IV, *supra* note 31, at 7.

³⁴ See Keil & Vito IV, *supra* note 31, at 8.

³⁵ Vito, *supra* note 6, at 281 (discussing the author's and Keil's 1995 study).

³⁶ Keil & Vito IV, *supra* note 31, at 9.

commit a more aggravated offense (i.e., multiple aggravating factors) than black offenders before a prosecutor decided to seek the death penalty, and that black offenders who killed white victims were seventy percent more likely to be sentenced to death by a jury than black offenders who killed black victims.³⁷

B. *The Kentucky Racial Justice Act*

In 1998, Kentucky State Senator Gerald Neal sponsored the Kentucky Racial Justice Act (KRJA) in response to the research findings by Professors Keil and Vito.³⁸ “[A]fter two hours of vigorous debate,” the KRJA passed the Senate by a 22–12 vote on February 5, 1998.³⁹ Four days later, an identical bill, sponsored by Representative Jesse Crenshaw, was introduced in the House.⁴⁰ The legislation passed the House on March 30, 1998 by a 70–23 vote⁴¹ and the KRJA was signed into law by Governor Paul Patton on May 1, 1998, becoming the nation’s first racial justice act.⁴²

Effective July 15, 1998,⁴³ the KRJA provides that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race.”⁴⁴ Under the KRJA, a capital defendant must establish that race was a “significant factor” in the prosecutor’s decision to seek the death penalty by presenting evidence, including “statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently [] [u]pon persons of one race than upon persons of another race; or [] [a]s punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.”⁴⁵ At a pretrial hearing, the defendant must prove by clear and convincing evidence that that prosecutor’s decision to seek the death penalty was based on race, and the Commonwealth “may offer evidence in rebuttal.”⁴⁶ The trial court is required to eliminate the death penalty as a sentencing option if it “finds that race was the basis of the decision to seek the death sentence.”⁴⁷

C. *Kentucky’s Evaluations of Race and the Criminal Justice System*

³⁷ *Id.* at 9–10.

³⁸ Neal, *supra* note 9, at 13–14.

³⁹ *Id.* at 13–15. In 1996, Senator Neal had unsuccessfully introduced a version of the KRJA. Neal, *supra* note 9, at 14–15. In 1996, the legislation eventually passed the House Judiciary Committee, after negotiating the deletion of the provision making the bill apply retroactively. *Id.* (noting that Commonwealth attorneys, in opposition to the bill, attempted to derail the passage of the legislation by introducing thirteen House amendments to the bill, two of which passed); Alex Lesman, Note and Comment, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and The New Jersey Supreme Court’s Proportionality Review Project*, 13 J.L. & POL’Y 359, 376 (2005). *See also* S.B. 132, 1996 Gen. Assemb., Reg. Sess. (Ky. 1996). However, despite the extensive negotiations, the 1996 Senate Bill 132 was ultimately defeated on the Senate floor by an 18-16 vote. Neal, *supra* note 9, at 14.

⁴⁰ Neal, *supra* note 9, at 14.

⁴¹ *Id.* at 15.

⁴² KY. REV. STAT. ANN. §§ 532.300–309 (West 2011); Arnold, *supra* note 72, at 102.

⁴³ KY. REV. STAT. ANN. § 532.305 (West 2011) (“[The KRJA] shall not apply to sentences imposed prior to July 15, 1998.”).

⁴⁴ KY. REV. STAT. ANN. § 532.300(1) (West 2011). *See also* KY. REV. STAT. ANN. § 532.309 (West 2011) (noting that “KRS 532.300 to 532.309 shall be cited as the Kentucky Racial Justice Act”).

⁴⁵ KY. REV. STAT. ANN. § 532.300(3)–(4) (West 2011).

⁴⁶ KY. REV. STAT. ANN. § 532.300(4)–(5) (West 2011).

⁴⁷ KY. REV. STAT. ANN. § 532.300(4) (West 2011).

Since *Batson* and *McCleskey*, Kentucky has undertaken a number of initiatives to investigate and address racial disparities and discrimination in the Commonwealth's criminal justice system. For example, in 1992 then-Kentucky Supreme Court Chief Justice Robert Stevens established the Kentucky Racial Bias Task Force that investigated, over a number of years, the perceptions of racial bias in the court system of people convicted of felony offenses, including small claims plaintiffs, and domestic violence respondents.⁴⁸ Ultimately, the Task Force released a report with recommendations in 1997.⁴⁹ In 2001, former Kentucky Supreme Court Chief Joseph Lambert created the Jefferson County Commission on Racial Fairness to examine racial disparities within the criminal justice system in Jefferson County.⁵⁰ Among other investigations, the Commission examined sentencing disparities in misdemeanor and felony convictions based on race,⁵¹ racial disparities in pretrial release rates,⁵² and the racial composition of the county judiciary.⁵³

For further discussion about Kentucky's investigations and evaluations on the impact of racial considerations in the criminal justice system, see Recommendation #1.

⁴⁸ DARREN WARNER, DOES RACE MATTER?: EXAMINING THE PERCEPTIONS OF COURT-USERS ON THE FAIRNESS OF THE KENTUCKY COURTS (1997); Neal, *supra* note 9, at 21 (quoting REPORT OF THE KY. RACIAL BIAS TASK FORCE, *supra* note 81, at 13).

⁴⁹ *Id.*

⁵⁰ Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1. The Jefferson County Commission on Racial Fairness continues to investigate and advocate against racial disparities in the county's court system. *See, e.g.*, Press Release, *Fairness Commission Calls for Leaders to Appoint Qualified Minorities to Kentucky Judgeships*, Ky. Ct. of Justice (Mar. 18, 2009), available at <http://migration.kentucky.gov/newsroom/kycourts/PR03182009A.htm> (last visited Nov. 16, 2011) (calling for leaders to appoint qualified minorities to Kentucky judgeships).

⁵¹ Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1.

⁵² *Latest Kentucky News*, AP ALERT, June 20, 2006.

⁵³ Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1.

II. ANALYSIS

A. 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.

The Commonwealth of Kentucky has undertaken initiatives to investigate and evaluate the impact of racial discrimination in its criminal justice system, including commissioning in 1992 an analysis of the effect of race on capital sentencing.⁵⁴ Kentucky also has developed strategies for eliminating racial discrimination in the court system, and specifically in capital cases, such as the adoption of the Kentucky Racial Justice Act (KRJA) in 1998.⁵⁵

Empirical Evaluations of Racial Bias in Kentucky's Capital Sentencing Scheme

From 1988 to 1995, two University of Louisville professors, Thomas J. Keil and Gennaro F. Vito, conducted several studies investigating racial disparities within Kentucky's death penalty system.⁵⁶ The first two studies identified racial disparities, including a significantly higher likelihood that a prosecutor will proceed capitally if the case involved a black offender and a white victim.⁵⁷ The second study also found that black offenders who killed white victims were more likely to be sentenced to death by a jury.⁵⁸ In 1990, their examination of race and the death penalty was expanded to control for additional variables and continued to illustrate that black offenders who kill white victims are more likely to receive the death penalty.⁵⁹ This third study showed that both prosecutors and juries consider a murder involving a black offender and white victim as the most serious type of homicide, followed by white offender/white victim homicides, and then black offender/black victim homicides.⁶⁰ The study also found that the risk of receiving a death sentence was significantly higher for black offenders only when the victim was white, and not for black offenders as a whole.⁶¹ Homicides in which white victims were killed were viewed as the most serious.⁶²

Finally, in 1992 the Kentucky General Assembly commissioned Keil and Vito to study "the effect of race of the victim on the probability that an accused murderer is charged with a capital

⁵⁴ Vito, *supra* note 6, at 276 ("Our study was commissioned by the 1992 Kentucky General Assembly.").

⁵⁵ See KY. REV. STAT. ANN. §§ 532.300–309 (West 2011).

⁵⁶ See, e.g., Keil & Vito I, *supra* note 12; Keil & Vito II, *supra* note 16; Keil & Vito IV, *supra* note 31. See also Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice,"* 87 J. CRIM. L. & CRIMINOLOGY 130, 238 n.418 (1996) (listing the extensive research on race and Kentucky's capital punishment system); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of Empirical Evidence with Special Emphasis on Post-1990 Research*, 39 CRIM. L. BULL. 194, 213 (2003) (noting that in post-Furman studies in Kentucky researchers documented that black defendants whose victims were white were at particular risk of more punitive treatment). For a discussion on Professors Keil and Vito's empirical studies, see *supra* notes 12–37 and accompanying text.

⁵⁷ Keil & Vito I, *supra* note 12, at 502; Keil & Vito II, *supra* note 16, at 520.

⁵⁸ Keil & Vito II, *supra* note 16, at 523.

⁵⁹ Keil & Vito III, *supra* note 21, at 204.

⁶⁰ *Id.* at 197, 200.

⁶¹ *Id.* at 205.

⁶² *Id.*

crime and sentenced to death in Kentucky.”⁶³ Since the death penalty was reinstated in 1976 until the time Keil and Vito undertook the investigation in 1992, forty-three death sentences had been imposed in Kentucky.⁶⁴ In only two of these cases was the victim black (4.7%), and the remaining forty-one cases (95.3%) had white victims.⁶⁵ Controlling for a number of legally relevant factors, the study found race still persisted as a factor in Kentucky capital sentencing.⁶⁶ Specifically, “blacks accused of killing whites had a higher than average probability of being charged with a capital crime (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders.”⁶⁷ Capital charges were most likely sought against blacks who killed whites (45% of these cases), followed by whites who killed whites (28% of these cases), and whites who killed blacks (17% of these cases).⁶⁸ Keil and Vito also found that none of the whites who killed blacks actually received a death sentence, while blacks who killed whites “had the highest percentage of cases receiving a death sentence from the jury (12% [of these cases]).”⁶⁹ Keil and Vito suggested several reasons why prosecutors were more inclined to seek the death penalty against a black defendant, “including ease of conviction, . . . political and/or media pressure, or the greater social visibility of cases where blacks kill whites.”⁷⁰

Based on their research, Keil and Vito ultimately concluded that

[w]hen the entire body of potentially capital cases are considered, race clearly emerges as a crucial factor in capital sentencing in Kentucky. It is a factor that cannot be accounted for by its interrelationship with other legally relevant variables. Kentucky’s ‘guided discretion’ system of capital sentencing has failed to eliminate race as a factor in this process Kentucky’s system of capital sentencing is fraught with discrimination that defies identification, elimination or control.⁷¹

Enactment of Kentucky’s Racial Justice Act

Kentucky legislators responded to Keil and Vito’s findings by proposing the enactment of a racial justice act, eventually adopted in 1998.⁷² The KRJA was the first of two such acts to have

⁶³ Keil & Vito IV, *supra* note 31, at 5.

⁶⁴ *Id.*

⁶⁵ *Id.* at 5–15; *see also* Email Interview by Sarah Turberville with Gennaro F. Vito, Professor, Univ. of Louisville (July 8, 2011) (on file with author).

⁶⁶ Keil & Vito IV, *supra* note 31, at 7. The Keil and Vito study commissioned by the Kentucky legislature controlled for the following factors: (1) whether the murder occurred in conjunction with the commission of a felony; (2) whether the murder involved multiple victims; (3) whether the accused killed in order to silence the victim; (4) whether the offender had a prior criminal history (i.e., had at least one previous conviction for a violent crime); (5) whether there was more than one statutory aggravator present; and (6) whether the victim and offender were strangers. *Id.*

⁶⁷ *Id.* at 5.

⁶⁸ *Id.* at 8 (in Table 2, and for each “Race of Offender-Race of Victim” row, summing the percentages from columns titled “Capital Charges” and “Death Sentence”).

⁶⁹ *Id.* (emphasis omitted).

⁷⁰ Keil & Vito IV, *supra* note 31, at 12.

⁷¹ *Id.* at 13.

⁷² *See* KY. REV. STAT. ANN. §§ 532.300–309 (West 2011); Vito, *supra* note 6, at 276–77 (“In response to the study, Kentucky Senator Gerald Neal of Louisville and Representative Jesse Crenshaw of Lexington sponsored the Kentucky Racial Justice Act”); Neal, *supra* note 9, at 13–14 (noting that attempts to pass the KRJA failed in the 1994 and 1996 Kentucky legislative sessions); Justin R. Arnold, Note, *Race and the Death Penalty After*

been adopted by any state⁷³ and provides that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race.”⁷⁴ The KRJA permits a capital defendant to introduce evidence, including statistical evidence, of racial discrimination in the prosecutor’s decision to seek the death penalty.⁷⁵ If successful, the KRJA requires the trial court to remove the death penalty as a sentencing option.⁷⁶ For further discussion of the KRJA, see Recommendations #4 and #5.⁷⁷

Senator Neal’s Survey on the KRJA

In September 2002, State Senator Gerald Neal conducted a survey of Kentucky’s public defenders to investigate the effect of the 1998 KRJA.⁷⁸ When asked to describe the implementation of the KRJA, sixty-four public defenders responded, four of whom said they had a case involving the KRJA and eight who noted that they were aware of another attorney raising KRJA provisions.⁷⁹ The survey showed mixed reviews of the KRJA. Many responders applauded the symbolic meaning of the KRJA while others noted an unintended “negative” consequence of its adoption: “[T]he essential effect is that prosecutors have adopted policies of pursuing death in every eligible case, rather than making a case by case determination” in order to avoid a potential challenge under the KRJA.⁸⁰

Other Initiatives Investigating Racial Disparities in Kentucky’s Criminal Justice System

In addition to the Keil and Vito studies, the Commonwealth of Kentucky has undertaken various other initiatives that seek to investigate and evaluate the impact of and/or strive to eliminate racial discrimination in the criminal justice system. However, only a few of these initiatives have occurred since the 1998 adoption of the KRJA, and none has fully investigated racial discrimination with respect to the Commonwealth’s entire criminal justice or death penalty system.

Kentucky Racial Bias Task Force

McCleskey: *A Case Study of Kentucky’s Racial Justice Act*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 93, 102 (2005). The enactment of the KRJA by the Kentucky General Assembly occurred after several failed attempts by the U.S. Congress to enact similar legislation. *Id.* at 95–98. “The passage of the Racial Justice Act in Kentucky was a six-year effort, beginning with the commissioning of the study of racial bias in the capital sentencing process in 1992” Jim Wayne, *Racial Bias in Capital Sentencing*, 180 AM. 11, 12 Jan. 2, 1999.

⁷³ Since then, North Carolina has adopted another version of a racial justice act. For a comparison of the two, see Recommendations #4 and #5, *infra*.

⁷⁴ KY. REV. STAT. ANN. § 532.300 (West 2011).

⁷⁵ KY. REV. STAT. ANN. § 532.300(3)–(4) (West 2011)

⁷⁶ *Id.*

⁷⁷ See Recommendations #4, #5, and #10, *infra*; see also Factual Discussion, *supra*.

⁷⁸ Neal, *supra* note 9, at 15–19.

⁷⁹ *Id.* at 15.

⁸⁰ *Id.* at 16; see also *id.* at 16–19 (listing other defenders’ responses, which noted prosecutors’ practices of charging death in every eligible case or more often than before the adoption of the KRJA); Vito, *supra* note 6, at 279 (“One noted negative effect of the [K]RJA is that prosecutors have adopted policies to seek the death penalty in every eligible case, rather than making this decision on a case-by-case basis. This effectively destroys all bias.”). Senator Neal also reported that, in his survey, “[m]any prosecutors have said that the solution to complying with the [KRJA] is to seek death in every case that can be prosecuted as a capital cases. Many have followed that promise but others have not.” Neal, *supra* note 9, at 20.

In 1997, the Kentucky Racial Bias Task Force (Task Force), initially established in 1992 by then-Kentucky Supreme Court Chief Justice Robert F. Stephens, and the Administrative Office of the Courts (AOC), issued a report.⁸¹ The study surveyed 10,000 people involved in misdemeanor, domestic violence, and small-claims cases to determine whether court-users “perceive racial bias among judges, prosecutors, defense lawyers[,] and other court personnel.”⁸² The report concluded that, “[i]n the final analysis, the social problem of racial disparity continues to influence and even cloud the judiciary.”⁸³ The Task Force also surveyed prison inmates about racial bias in the court system and concluded that “Kentucky courts need more minorities [on] their staffs to make the judicial system more sensitive to racial issues,” and recommended that the courts provide “racial sensitivity training for all court employees, including attorneys.”⁸⁴ Additionally, the Task Force recommended that the Commonwealth implement a system of “continuing assessment of potential racial bias in the courts.”⁸⁵

Legislation Effecting Racial Discrimination in Jury Composition

Until 1990, Commonwealth jurors were selected solely from voter registration lists by jury commissioners,⁸⁶ and as a result, “throughout most of [Kentucky’s] history[,] racial minorities and women have been functionally excluded from jury service.”⁸⁷ During the jury commissioner system, capital defense attorneys challenged the composition of juries, alleging that women, blacks, and young adults were “substantially under-represented.”⁸⁸ In response, in 1991 the Kentucky General Assembly reformatted its jury selection process and designated the AOC to annually obtain and update lists of prospective jurors to consist of voters and licensed drivers.⁸⁹ In 2002, the Commonwealth added persons filing tax returns in Kentucky to the master list of prospective jurors.⁹⁰

⁸¹ DARREN WARNER, DOES RACE MATTER?: EXAMINING THE PERCEPTIONS OF COURT-USERS ON THE FAIRNESS OF THE KENTUCKY COURTS (1997).

⁸² Brenda Rios, *State Will Ask 10,000 If Courts Racially Biased*, LEXINGTON HERALD-LEADER, Dec. 28, 1996, at A1. The study was federally funded by the State Justice Institute, an organization providing funding to courts nationwide for conducting civic projects. *Id.* (noting that Kentucky’s Racial Bias Task Force examined other state studies “to decide on the form their survey would take”).

⁸³ Neal, *supra* note 9, at 21 (quoting REPORT OF THE KY. RACIAL BIAS TASK FORCE, *supra* note 81, at 13) (internal quotations omitted).

⁸⁴ *Task Force Says Courts Need More Minorities*, LEXINGTON HERALD-LEADER, Sept. 12, 1997, at B6.

⁸⁵ *Id.*

⁸⁶ KY. REV. STAT. ANN. § 29A.040 (West 1990); H.B. 349, 1990 Gen. Assemb., Reg. Sess. (Ky. 1990). Prior to 1990, KRS 29A.040(1) stated:

All voter registration lists shall constitute a master list of prospective jurors. Where possible, the jury commission shall acquire copies of these lists from the official having custody of the required lists. The jury commission shall consult the master list in the manner specified by KRS 29A.050 in the selection of prospective jurors.

Id.

⁸⁷ Tim Arnold et al., *Challenging the Venire*, 30 ADVOCATE 35, May 2008, at 35 (stating that Kentucky’s system of jury commissioners was very similar to a system the U.S. Supreme Court found unconstitutionally discriminatory in *Castaneda v. Partida*, 430 U.S. 482 (1977)).

⁸⁸ *Id.*

⁸⁹ KY. REV. STAT. ANN. § 29A.040 (West 1990); Arnold, *supra* note 87, at 35; Tim Arnold & Gail Robinson, *Jury Pool Issues*, 26 ADVOCATE 3, May 2004, at 10–15 (discussing problems in obtaining a racially diverse jury and suggesting ways defense counsel can challenge the system to obtain a jury representing a “fair cross section of the community”).

⁹⁰ See KY. REV. STAT. ANN. § 29A.040 (West 2011); H.B. 781, 2002 Gen. Assemb., Reg. Sess. (Ky. 2002).

Jefferson County Commission on Racial Fairness

During his tenure, former Kentucky Supreme Court Chief Justice Joseph E. Lambert undertook a number of examinations to address racial discrimination in the Commonwealth's criminal justice system.⁹¹ In 2001, Justice Lambert created the Jefferson County Commission on Racial Fairness (Commission) to study and address racial disparities within Jefferson County.⁹² The Commission was appointed after activists in 2000 condemned the sentencing disparities demonstrated by two high-profile cases in Jefferson County.⁹³ In one case, a fifteen-year-old African-American had shot his brother in a fight over a video game, was convicted of wanton murder and sentenced to twenty-two years in prison, and initially denied probation.⁹⁴ In the other case, a nineteen-year-old white female pled guilty and was given shock probation after receiving a ten-year sentence for manslaughter for killing two people in a drunk-driving wreck.⁹⁵ Consequently, the Commission examined sentencing differences for misdemeanor and felony charges based on race,⁹⁶ racial disparities between pretrial release rates,⁹⁷ and the composition of the county judiciary.⁹⁸

In 2003, the Commission undertook another study of sentencing in shoplifting, drug trafficking, and possession cases and found that African-Americans were seventy-one percent more likely to be sent to jail or prison for cocaine possession than other races and 168 percent more likely to be sent to jail or prison for possession of drug paraphernalia charges.⁹⁹ In June 2006, the Commission conducted a study including judges, attorneys, and activists and found that "blacks are more likely than whites to be held in jail until their trials," although they suggested this discrepancy may be due to income and community ties rather than racial bias.¹⁰⁰ The Commission ultimately recommended that Jefferson County "look at pretrial release so that blacks are treated fairly."¹⁰¹ However, we are unaware of the jurisdiction undertaking any related research since this recommendation. In December 2008, the Commission examined the

⁹¹ For example, in 2005, Justice Lambert, speaking at an annual meeting of circuit court judges, "challenged the judges to eliminate bias based on race and other characteristics such as religion, sexual orientation, gender and ethnicity." Editorial, *Equality in the Courtroom*, CINCINNATI-KY. POST, Oct. 19, 2005, at A14.

⁹² Justice Lambert repeatedly "encouraged judges and lawyers to refrain from racially discriminatory practices while conducting business before the Kentucky Court of Justice." Frankie Gamber, *Louisville NAACP Rallies to Get More African Americans on Juries*, NAACP CRISIS, May 1, 2006, at 58; Editorial, *Equality in the Courtroom*, CINCINNATI-KY. POST, Oct. 19, 2005, at A14 (discussing Justice Lambert's call "for a renewed focus on racial fairness in the courtroom" and recent initiatives, such as the Office of Minority Affairs, designed to implement this ideal); Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1. See also Keri E. Hieneman, *Women in the Judiciary: Kentucky's Need for Change*, 42 BRANDEIS L.J. 447 (2004) (discussing the few women in the Kentucky judiciary system).

⁹³ Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Latest Kentucky News*, AP ALERT, June 20, 2006.

⁹⁸ Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1.

⁹⁹ *Id.*

¹⁰⁰ *Latest Kentucky News*, AP ALERT, June 20, 2006.

¹⁰¹ *Id.*

racial composition of the Jefferson County judiciary¹⁰² and adopted a resolution noting that, as of January 2009, there were only two non-white sitting trial court judges, both of whom were retiring and transitioning to Senior Status.¹⁰³ All of the remaining judges in the County's forty trial courts were white.¹⁰⁴ The Resolution ultimately called "for a judiciary that represents the racial diversity of our population."¹⁰⁵

In 2005–06, the Commission, in conjunction with the Louisville chapter of the NAACP, addressed the issue of the composition of Kentucky's jury pools. Judges, attorneys, and activists from the Commission worked with scholars and activists from the NAACP to address racial disparities in the composition of the jury pools in Kentucky cases, ultimately recommending to the Kentucky Court system various remedial and preventative strategies to address the disparities.¹⁰⁶ The investigation found that there continued to be a "low representation of African[-]Americans on county juries," and made several recommendations to the AOC with the goal of increasing African-American jury participation, including increasing pay, shortening jury service, and adopting a public relations campaign.¹⁰⁷ Similarly, the Commission suggested that Jefferson County study the county's "pretrial release so that blacks are treated fairly,"¹⁰⁸ which the AOC's Department of Pretrial Services released in 2011.¹⁰⁹

Kentucky Court of Justice Office of Minority Affairs

Former Chief Justice Lambert also created the Office of Minority Affairs (OMA) to combat racial discrimination within the criminal justice system. For example, OMA's mission is "to ensure that court system policies and procedures do not discriminate based on race, creed, religion, color, gender, sexual orientation, age, disability[,] or national origin."¹¹⁰ The OMA also educates the public and groups within the Commonwealth on "the importance of participating in jury service and recruiting minorities to the legal profession."¹¹¹ The OMA initiatives include the Minority Speakers Bureau, which educates judges and other court personnel on issues affecting minorities, the Minority Law Clerk Recruitment Program, which

¹⁰² Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1 (noting that as of 2003, only one circuit judge and two district judges in Jefferson County were African American).

¹⁰³ RESOLUTION, COMM'N ON RACIAL FAIRNESS IN THE COURTS, Jan. 23, 2009, *available at* <http://migration.kentucky.gov/NR/rdonlyres/54878A2B-3013-4688-A40E-825974475005/184178/RacialFairnessCommissionResolution12309.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Frankie Gamber, *Louisville NAACP Rallies to Get More African Americans on Juries*, CRISIS, May 1, 2006, at 56.

¹⁰⁷ *Id.*

¹⁰⁸ *Latest news from Kentucky*, ASSOCIATED PRESS, June 20, 2006.

¹⁰⁹ CLE Materials for Pretrial Release in Kentucky: Challenges and Opportunities, Where Are We Now and What is the Future?, Lexington, Ky., June 15, 2011 (on file with author) (including a copy of the AMENDED EXECUTIVE SUMMARY: UNIFORM SCHEDULE OF BAIL PILOT PROJECT REPORT FOR 2010 YEAR END REPORT, FINDINGS AND RECOMMENDATIONS) (examining data from the Pretrial Release Information Management (PRIM) system and making recommendations based on all 37,573 arrests between January 1, 2010 through December 31, 2010, in which 22,560 defendants obtained some form of pretrial release (sixty percent)).

¹¹⁰ *Office of Minority Affairs*, ADMIN. OFFICE OF THE CTS., KY. CT. OF JUSTICE, <http://courts.ky.gov/aoc/personnel/minorityaffairs/default.htm> (last visited May 5, 2011).

¹¹¹ *Id.* (noting that it has addressed entities including the Kentucky Chapter of the NAACP, Justice Resource Center, local chapters of the Urban League, and minority chapters of the Kentucky Bar Association).

encourages minority students to apply for the clerkships, and civil engagement, which provides community outreach “to educate the public about the courts and foster partnerships among the courts and communities.”¹¹² Other initiatives include a minority recruitment program, which promotes diversity in the legal profession by offering internships and job opportunities to minorities, and a mentorship program, which pair minority law students with law school placement offices and KBA members.¹¹³

Other Commonwealth Initiatives

Other entities, including newspapers in the Commonwealth, have investigated racial discrimination in the court system and recommended potential remedies. For example, in 2005, the Louisville *Courier-Journal* conducted a study of Jefferson County jury composition, finding that “[p]eople who live in predominantly African-American areas are less likely to serve on juries than those who live in mostly white areas.”¹¹⁴ The *Courier-Journal* suggested that this may occur because (a) prosecutors and defense attorneys may exclude black jurors in criminal cases, (b) many blacks distrust the criminal justice system and are less likely to report for jury duty, and (c) blacks cannot afford to serve as jurors because jury pay is so low.¹¹⁵ Additionally, a 2005 editorial noted various “allegations of discrimination and bias” against the Commonwealth’s court system, including “[c]harges against the Jefferson County court system [that] were serious enough to warrant an investigation in 2001, . . . an investigation that partially validated the charges.”¹¹⁶ The editorial recommended that “periodic studies of sentencing and the like should be done by the courts themselves on their own volition.”¹¹⁷

The Kentucky Bar Association’s (KBA) Diversity in the Profession Committee also addresses issues pertaining to minorities in the legal profession, but there is no specific entity within the KBA that addresses racial disparities within Kentucky’s criminal justice system.¹¹⁸ However, in 2008, 2009, and 2010, the KBA held continuing legal education (CLE) courses during its annual convention on race and the death penalty, and it held a CLE course in 2011 on the racial disparities within the Commonwealth’s pretrial release practices.¹¹⁹

Conclusion

The extensive evaluations conducted by Professors Keil and Vito and Kentucky’s subsequent adoption of the KRJA, represent a significant achievement in the fight against racial discrimination in the Commonwealth’s criminal justice system. As Recommendation #1 suggests, both the Commonwealth and independent entities within Kentucky have initiated

¹¹² *Id.*

¹¹³ Telephone Interview by Paula Shapiro with Priscilla Johnson, Minority Affairs Officer, Ky. Court of Justice Office of Minority Affairs (May 20, 2011) (on file with author).

¹¹⁴ Jason Riley, *Jury Not of Their Peers: Blacks Being Excluded from Louisville Juries*, COURIER-J. (Louisville, Ky.), Nov. 6, 2005, at A1 (analyzing 34,000 residents summoned for jury duty over the period of twelve months).

¹¹⁵ *Id.*

¹¹⁶ Editorial, *Equality in the Courtroom*, CINCINNATI-KY. POST, Oct. 19, 2005, at A14.

¹¹⁷ *Id.*

¹¹⁸ Telephone Interview by Paula Shapiro with John Meyer, Executive Dir., Ky. Bar Ass’n (June 3, 2011) (on file with author).

¹¹⁹ *Id.*; see also *supra* note 109.

investigations into the impact of racial discrimination in the criminal justice system. However, since the adoption of the KRJA, Kentucky has not made any effort to investigate the continued presence of racial discrimination within the Commonwealth's criminal justice system. Therefore, the Commonwealth of Kentucky only partially complies with Recommendation #1.

The Kentucky Death Penalty Assessment Team applauds the work that has been conducted by various Commonwealth entities investigating racial discrimination within the criminal justice system. The Assessment Team recommends that the Commonwealth thoroughly reexamine the impact of racial discrimination in capital sentencing since the adoption of the KRJA in 1998 to determine what effect, if any, the KRJA has had on ameliorating racial discrimination in capital cases.

B. 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 (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This 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.

To the best of our knowledge, no jurisdiction or entity within the Commonwealth collects and maintains the data as prescribed by Recommendation #2.

However, pursuant to KRS 532.075(1), in a case where the death penalty has been imposed, the Commonwealth requires the circuit court clerk to collect and transmit to the Kentucky Supreme Court for review the entire trial record and transcript, a notice prepared by the clerk, and a report prepared by the trial judge.¹²⁰ The "trial judge report," which is in the form of a standard questionnaire prepared by the Kentucky Supreme Court, must be filled out by the trial court judge in every case where the death penalty is imposed.¹²¹ The trial judge reports are filed and maintained by the AOC in any case in which a death sentence is imposed.¹²² However, we were unable to obtain a copy of a blank or completed form to determine what information is included

¹²⁰ KY. REV. STAT. ANN. § 532.075(1) (West 2011) (requiring the transmittal to occur within ten days after receiving the transcript). The notice prepared by the clerk includes the "title docket number of the case, the name of the defendant and the name and address of the attorney, a narrative statement of the judgment, the offense, and the punishment prescribed." *Id.* This provision of the KRS applies only to cases in which the death penalty was imposed, not to cases in which the death penalty was sought or could have been sought.

¹²¹ *Id.*

¹²² KY. REV. STAT. ANN. § 532.075(1) (West 2011); Telephone Interview by Paula Shapiro with Susan Clary, Clerk and General Counsel, Ky. Supreme Court (Apr. 27, 2011) (on file with author). *See also* Ex Parte Farley, 570 S.W.2d 617, 627 (Ky. 1978) (holding that materials collected and maintained pursuant to KRS 532.075 are available to the public only after the Court has "the occasion and opportunity to examine and consider them ourselves. Until then, they are in the same category as any other source of knowledge or information," meaning that the records are kept confidential by the Kentucky Supreme Court). *See also* Email from Leigh Anne Hiatt to Gennaro F. Vito, Professor, Univ. of Louisville (June 6, 2011) (on file with author) ("Currently, we can only track those cases where the death penalty has been imposed. This data is reliable as of July 1, 1995, and forward."); KY. REV. STAT. ANN. § 532.075(6)(a) (West 2011).

in the trial judge report, nor were we able to determine if the trial judge reports are on file with the AOC for every case in which a death sentence was imposed.

Furthermore, the AOC does not maintain data on cases where the prosecutor has given notice of intent to seek the death penalty, and the Kentucky Assessment Team is unaware of any entity, within the Kentucky court system or otherwise, that keeps track of this information.¹²³ Various other state agencies possess data relevant to the requirements of this Recommendation.¹²⁴ However, no entity within the Commonwealth currently collects and maintains the information included in this Recommendation, systematically or on an ad hoc basis, with respect to every stage of the capital process.

Based on this information, the Commonwealth is not in compliance with Recommendation #2.

Without a statewide entity that collects data on all death-eligible cases in the Commonwealth, Kentucky cannot guarantee that its system ensures proportionality in charging or sentencing, nor can it determine the extent of racial or geographic bias in its capital system. From a practical

¹²³ Email from Leigh Anne Hiatt to Gennaro F. Vito, Professor, Univ. of Louisville (June 6, 2011) (on file with author) (“The Kentucky Court of Justice case management system does not have a code to capture if or when a motion to proceed capital or a motion to seek the death penalty is filed.”). However, KRS 532.075(6) does require the AOC “[t]o accumulate the records of all felony offenses in which the death penalty was imposed after January 1, 1970, or such earlier date as the court may deem appropriate” and “[t]o compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.” KY. REV. STAT. ANN. § 532.075(6)(a), (c) (West 2011).

¹²⁴ The AOC is the entity responsible for collecting the trial judge reports. KY. REV. STAT. ANN. § 532.075(1) (West 2011). For their study on the effect of race on capital charging and sentencing decisions, Professors Keil and Vito relied upon a computerized list compiled by the AOC that listed offenders indicted for murder. Keil & Vito I, *supra* note 12, at 496. The Kentucky Department of Public Advocacy and the Louisville Jefferson County Public Defender Corporation have maintained some data on capital cases, but there is no systematic collection of data either required or conducted of which the Assessment Team is aware. Interview by Sarah Turberville and Paula Shapiro with the Dep’t of Public Advocacy (DPA) (Oct. 12, 2010) (on file with author); Interview by Sarah Turberville and Paula Shapiro with Daniel T. Goyette, Chief Public Defender, Louisville-Jefferson County Public Defender Corporation (Oct. 12, 2010) (on file with author). DPA has previously provided Professors Keil and Vito with a list of cases where a death-qualified jury was used. Keil & Vito I, *supra* note 12, at 495–96. The Kentucky Department of Corrections (DOC) also maintains presentence investigation reports (PSI), which include the race of the defendant and information about the offense and the offender’s prior criminal history, among other information. KY. REV. STAT. ANN. § 532.050 (West 2011); Presentence/Postsentence Investigation Report, Div. of Probation & Parole, Ky. Dep’t of Corr. (on file with author). For their 1988 study, Professors Keil and Vito relied on the Kentucky Corrections Cabinet (now the Kentucky DOC) PSIs as their primary source of data. Keil & Vito I, *supra* note 12, at 495. The DOC’s Offender Management System (OMS), the case management program by which the DOC maintains their records on all offenders, also may include information relevant to this Recommendation. However, OMS is not available to the public and we were unable to confirm what specific information is included in the system. Telephone Interview by Paula Shapiro with Cyndi Heddleston, Program Adm’r, Ky. Dep’t of Corr. (June 6, 2011) (on file with author). The DOC also maintains an updated list of all inmates on death row, which includes the inmate’s date of birth, sentencing date, and some information about the circumstances of the crime. *Profiles of Kentucky Death Row Inmates*, KY. DEP’T OF CORR., <http://www.corrections.ky.gov/inmateinfo/deathrow.htm> (last visited May 24, 2011). Separately, the DOC’s Offender Online Lookup System provides information on death row and other inmates, including their name, age, race, and gender. *See Offender Online Lookup System*, KY. DEP’T OF CORR., <http://apps.corrections.ky.gov/KOOL/ioffsrch.asp> (last visited May 27, 2011). These profiles do not, however, include information about the race of the victim, aggravating or mitigating circumstances, or the nature and strength of the evidence in each inmate’s case.

standpoint, the 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 and efficiently.

Therefore, the Kentucky Assessment Team recommends that the Commonwealth establish a statewide clearinghouse to collect data on all death-eligible cases, at all stages of a capital case, 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. In turn, this data should be made available to the Kentucky Supreme Court for use in conducting meaningful proportionality review¹²⁵ and to prosecutors for use in making charging decisions and setting charging guidelines.

C. 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.

As mentioned in the Factual Discussion, Professors Keil and Vito conducted several studies of the effect of race on capital decision-making in Kentucky and were later commissioned by the Commonwealth to undertake an additional examination of the impact of racial discrimination on the administration of the death penalty.¹²⁶ In 1998, the KRJA was enacted in response to Professors Keil and Vito's findings.

However, since the adoption of the KRJA Kentucky has failed to conduct any systematic evaluation of the utility and effectiveness of the Act in ferreting out racial discrimination in its system of capital sentencing.¹²⁷ Therefore, the Commonwealth of Kentucky only partially complies with Recommendation #3.

In 2010, Professor Vito concluded that Kentucky has “a problem in the cases where black defendants were charged with the capital murder of white victims,” and suggested that the Commonwealth should undertake an additional study of the system.¹²⁸ Specifically, he noted that the Kentucky Supreme Court should “focus its [mandatory proportionality] review on this class of cases—capital convictions where blacks were charged with killing whites.”¹²⁹ “Taken

¹²⁵ KY. REV. STAT. ANN. § 532.075(3) (West 2011). The Kentucky Supreme Court will review every death sentence to determine whether (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or judge's finding of statutory aggravating circumstance(s); and (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

¹²⁶ See Factual Discussion, *supra* notes 12–37 and accompanying text; Vito, *supra* note 6, at 276.

¹²⁷ See Recommendation #1, *supra* notes 54–119 and accompanying text; Recommendation #4, *infra* notes 146–159 and accompanying text.

¹²⁸ Vito, *supra* note 6, at 285.

¹²⁹ *Id.* (“What happened in the process of these cases in terms of the provision of super due process—particularly the conduct of the entire trial process? This information could thus allow the court to concentrate their time and

together,” Professor Vito explained, “the Kentucky Racial Justice Act and a comparative proportionality review process informed by statistical analysis have the potential to eliminate the impact of racial bias in the capital sentencing process.”¹³⁰ However, to the best of the Kentucky Assessment Team’s knowledge, no entity within the Commonwealth has taken any follow-up steps on this recommendation.

Given that the KRJA was enacted over a decade ago, and most studies preceding its enactment were developed over two decades ago, it is imperative that the Commonwealth conduct a new study to determine whether race is a factor in any aspect of Kentucky’s administration of the death penalty since 1998. In order to achieve this, Kentucky must, as described in Recommendation #2, collect 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 (regardless of whether the case is charged, prosecuted, or disposed of as a capital case).

D. 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.

Kentucky jurisdictions have developed remedial and preventative strategies to address racial discrimination found within the administration of the death penalty, in collaboration with legal scholars, experts, and practitioners.

The Kentucky Racial Justice Act (KRJA)

In 1998, the Kentucky General Assembly enacted the KRJA in response to the findings of Professors Keil and Vito’s research on the effect of race on the Commonwealth’s administration of the death penalty, as discussed in Recommendation #1.¹³¹ Until 2009, when North Carolina adopted its own racial justice act, Kentucky was the only capital jurisdiction in the U.S. to have adopted legislation to address identified patterns of racial discrimination in capital sentencing.¹³²

resources on a class of cases that was identified by research to be the source of the problem. Such an approach would be similar to examining ‘hot spots’ of crime by the police. It is important to address the issue of racial bias in such a manner. It affects not only the quality of our courts but also the promotion of respect for the law in general.”).

¹³⁰ *Id.*

¹³¹ Arnold, *supra* note 72, at 101–02 (noting that the Kentucky General Assembly first considered a state version of the KRJA in 1994 “[i]n response to the findings of Professors Keil and Vito”); KY. REV. STAT. ANN. §§ 532.300–.309 (West 2011); *see* Recommendation #1, *supra* notes 39–42 and accompanying text.

¹³² N.C. GEN. STAT. ANN. § 15A-2010 (2011); *see also* S.B. 461, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009) (“No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.”), *available at* <http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S461v6.pdf>. Kentucky Assessment Team co-chair Michael Mannheimer also has authored an article comparing the Kentucky and North Carolina racial justice acts. *See* Michael J. Zydney Mannheimer, *Kentucky Racial Justice Act: Workable Remedy or Window Dressing?*, LEX LOCI, Dec. 2009, at 18–19.

Limitations of the KRJA

The KRJA was designed to remedy racial discrimination by eliminating the death penalty as a sentencing option when prosecutors base charging decisions on the race of the victim or defendant in a given case.¹³³ However, the KRJA has a number of limitations restricting its effectiveness at remedying racial discrimination in the Commonwealth's capital sentencing process. Most notably, the KRJA applies only to pretrial capital proceedings and to death sentences imposed after July 14, 1998.¹³⁴ As a result, an inmate is not permitted to use the KRJA to raise a valid claim that racial discrimination affected the capital proceeding if evidence of that discrimination comes to light *after* the capital trial.¹³⁵ Unlike the North Carolina Racial Justice Act, adopted in 2009, Kentucky's procedures do not permit retroactive application of the statute to cases in which the capital trial occurred prior to enactment of the KRJA, nor does it permit use of the KRJA on appeal or during post-conviction proceedings.¹³⁶ In order to effectively combat racial discrimination, claims under the KRJA should be permitted to be raised *during any stage of the capital proceedings*.¹³⁷

Furthermore, the KRJA only applies to a prosecutor's decision "to *seek* a death sentence" and it does not prohibit, nor does it address, death sentences *imposed* as a result of racial discrimination occurring during any stage of capital proceedings, including the jury's decision at sentencing.¹³⁸ By contrast, North Carolina's Racial Justice Act provides that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."¹³⁹ The North Carolina law thereby permits capital defendants *and*

¹³³ KY. REV. STAT. ANN. §§ 532.300–.309 (West 2011); *see supra* note 131 and accompanying text.

¹³⁴ KY. REV. STAT. ANN. § 532.305 (West 2011); *see generally* Neal, *supra* note 9 (discussing the KRJA adoption process by the Kentucky General Assembly). Earlier versions of the KRJA applied retroactively, although ultimately this protection was dropped during the Kentucky General Assembly's consideration of the bill. *See* Neal, *supra* note 9, at 14 ("[A precursor bill to the KRJA] gained three more votes [in the Kentucky House of Representatives] after deletion of provisions making the bill applicable to those currently on Death Row.").

¹³⁵ KY. REV. STAT. ANN. § 532.300(4) (West 2011). *See* Epperson v. Commonwealth, 197 S.W.3d 46, 63 (Ky. 2006) (noting that the defense "conceded that an argument about racial discrimination with respect to capital sentencing was not the subject of a pretrial motion or any evidence prior to trial as now required by the Kentucky Racial Justice Act, KRS 532.300").

¹³⁶ KY. REV. STAT. ANN. §§ 532.300, 532.305 (West 2011). In 2009, North Carolina became the second state to adopt a racial justice act, which corrected many of the shortcomings of the KRJA, including applying the protections of the Act retroactively and providing use of the Act's provisions during post-conviction proceedings. S.B. 461, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009) ("No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought *or obtained* on the basis of race." (emphasis added)), *available at* <http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S461v6.pdf>. *See also* Vito, *supra* note 6, at 277–78 ("The one difference is that the Kentucky law authorizes only a pre-trial claim that race was the basis of the decision to seek the death penalty, while the proposed Federal legislation also permitted a legal challenge to discrimination at the sentencing stage.").

¹³⁷ *Compare* KY. REV. STAT. ANN. § 532.305 (West 2011) ("[The KRJA] shall not apply to sentences imposed prior to [the effective date of the KRJA].") *with* N.C. GEN. STAT. § 15A-2012 ("This act is effective when it becomes law and applies retroactively. For persons under a death sentence imposed before the effective date of this act, motions under this act shall be filed within one year of the effective date of this act . . .").

¹³⁸ KY. REV. STAT. ANN. § 532.300(2) (West 2011) (emphasis added); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2116 n.380 (2010); Vito, *supra* note 6, at 278 (discussing versions of a racial justice act proposed in the U.S. Congress).

¹³⁹ N.C. GEN. STAT. § 15A-2010 (2011).

death row inmates to obtain relief by proving that racial discrimination influenced a prosecutor's decision to seek the death penalty or a jury's decision to impose a death sentence.¹⁴⁰

The KRJA also limits evidence that may be presented to prove a claim under the Act to that which relates to the prosecutor's decision to seek a death sentence.¹⁴¹ The Act also requires a Kentucky capital defendant to "state with particularity how the evidence supports a claim that racial considerations played a significant part in decision to seek a death sentence *in his or her case*."¹⁴² However, another provision of the Act states that a defendant may prevail under the KRJA by establishing that "race was a significant factor in decisions to seek the sentence of death *in the Commonwealth*."¹⁴³ It is unclear how these provisions interact with one another. In contrast, the North Carolina Racial Justice Act permits statistical evidence establishing "that race was a significant factor" in prosecutors' charging decisions "in the county, the prosecutorial district, the judicial division, or the State."¹⁴⁴ Furthermore, the KRJA imposes a high burden on the defendant to prove racial discrimination by "clear and convincing evidence."¹⁴⁵

Application of the KRJA

Since its enactment in 1998, it appears that application of KRJA has been very limited. We uncovered only a single instance in which a trial court was forced to rule on whether to exclude the death penalty as a sentencing option after having held a hearing where the defense presented evidence to demonstrate racial discrimination and the prosecution presented evidence in rebuttal, as prescribed by the KRJA.¹⁴⁶ However, according to Kentucky State Senator Gerald Neal, who surveyed all Kentucky public defenders in 2003 to determine how the RJA had been

¹⁴⁰ N.C. GEN. STAT. § 15A-2010 (2011). The effect of the Kentucky statute is to limit the impact of its legislation to prosecutor's charging decisions while the North Carolina Racial Justice Act clearly covers decisions by the jury to impose the sentence as well. Kotch & Mosteller, *supra* note 138, at 2117-18 & 2117 n.381 ("Earlier versions of the North Carolina Racial Justice Act introduced in the North Carolina House of Representatives bore strong resemblance to the Kentucky statute, and thus changes in the legislation before enactment to modify those provisions that limited its effectiveness are significant indicators of legislative intent. H.B. 1291, which was introduced in 2007 but not adopted, tracked the major provisions of the Kentucky act and contained the major limitations . . ."); *id.* at 2037 n.15 (noting the substantial differences between the two racial justice acts). *See also* Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 242 (2007) ("The Kentucky Racial Justice Act is weaker than the federal RJA, which had a less burdensome standard of proof for defendants and which sought to address discrimination by prosecutors and juries.").

¹⁴¹ KY. REV. STAT. ANN. § 532.300(3) (West 2011) ("Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence . . ."). Comparatively, the North Carolina Racial Justice Act explicitly permits "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both . . ." N.C. GEN. STAT. § 15A-2011(b) (2011).

¹⁴² KY. REV. STAT. ANN. § 532.300(5) (West 2011) (emphasis added); *see also* Kotch & Mosteller, *supra* note 138, at 2118 ("[C]ompared to the Kentucky statute, the North Carolina RJA imposes a particularity requirement regarding proof as to the four relevant geographical areas and not the individual defendant's case.").

¹⁴³ KY. REV. STAT. ANN. § 532.300(2) (West 2011).

¹⁴⁴ N.C. GEN. STAT. § 15A-2011(a) (2011).

¹⁴⁵ *See* Recommendation #5, *supra* note 169 and accompanying text.

¹⁴⁶ Neal, *supra* note 9, at 16 ("In another case, a hearing was held, statistics considered, [and] motion to exclude death as a possible punishment was overruled."). However, the Assessment Team is aware of at least three cases uncovered by Senator Neal's survey on the application of the KRJA where the defense filed a motion for discovery under the KRJA motion requesting prosecutors' charging history of potential death penalty cases. *Id.* at 15-16.

implemented, only four reported that they “had a case that involved the [KRJA] provisions.”¹⁴⁷ Furthermore, we are aware of only one case where the Kentucky Supreme Court briefly considered and dismissed a death row inmate’s claim under the KRJA on appeal, noting that the inmate had failed to raise the claim at trial as required under the Act.¹⁴⁸

We are aware of one capital case out of Barren County, Kentucky, in which the KRJA was used to support expanded voir dire at a capital trial. In this case, in which a black defendant was charged with kidnapping and killing his former white girlfriend, the Commonwealth notified the defendant of its decision to seek the death penalty and subsequently moved for “severely limited individual voir dire.”¹⁴⁹ The defense filed a motion which contained a lengthy discussion of Kentucky’s history of racial discrimination and subsequent adoption of the KRJA and then requested several remedies, including expanded voir dire that would address the issue of racial discrimination and the issuance of an order directing the Commonwealth to disclose the race of the defendant in all death-eligible murder cases at the time his case arose.¹⁵⁰ While the trial court refused to exclude death as a possible sentence, the judge permitted expanded voir dire.¹⁵¹

Some death row inmates also have raised unsuccessfully the Commonwealth’s adoption of the KRJA to support their assertion that the death penalty had been applied in violation of the Eighth Amendment in their case.¹⁵²

Finally, a possible unintended consequence of the KRJA is that some prosecutors may no longer exercise discretion when determining whether to seek the death penalty against a capital-eligible

¹⁴⁷ Neal, *supra* note 9, at 15 (noting that sixty-four defenders responded). Senator Neal was an early sponsor of the KRJA in the Kentucky General Assembly. Vito, *supra* note 6, at 276–77.

¹⁴⁸ See *Epperson*, 197 S.W.3d at 63 (noting that the defense “conceded that an argument about racial discrimination with respect to capital sentencing was not the subject of a pretrial motion or any evidence prior to trial as now required by the Kentucky Racial Justice Act, KRS 532.300”).

¹⁴⁹ Robert Sexton, *Capital Trial of African American in Barren County Results in Life Without Parole Sentence*, 25 J. CRIM. JUST. EDUC. RES. 14, 14 (2003).

¹⁵⁰ Sexton, *supra* note 149, at 14; Vito, *supra* note 6, at 280 (text accompanying note 83). A request for a change in venue had previously been denied. Sexton, *supra* note 149, at 14. For the full text of the KRJA brief filed in this case, see the Sexton article. Sexton, *supra* note 149.

¹⁵¹ Sexton, *supra* note 149, at 14 (noting that “the Judge appeared to counsel to be somewhat irritated that the [KRJA] motion had been filed”); *Id.* at 23 (noting that recently in the same “judicial circuit, the Commonwealth offered a white defendant a 15 year sentence for killing his girlfriend); Vito, *supra* note 6, at 280 (discussing the Wood case and noting that the KRJA provided “the defense a method to prevent the potential of racial bias in a capital case while it is being conducted rather than upon appeal”); KY. R. CRIM. P. 9.38 (rule governing voir dire). After finding the defendant guilty of murder and capital kidnapping, the jury sentenced the defendant to life without parole. Sexton, *supra* note 149, at 14.

¹⁵² See, e.g., Brief for Appellant, *Hunt v. Commonwealth*, 2007 WL 5884650, *133 (Ky. Oct 19, 2007) (citing the KRJA and related research on racial discrimination as evidence the death penalty is applied unconstitutionally, arbitrarily, and capriciously in Kentucky); Brief for Appellant, *Furnish v. Commonwealth*, 2005 WL 5793592 (Ky. Nov 14, 2005) (same). The Commonwealth also has asserted, in its reply brief in capital cases, that the KRJA cannot be raised on appeal because the petitioner failed to raise it before the capital trial. See, e.g., Brief for Appellee-Commonwealth, *Meece v. Commonwealth*, 2008 WL 5783744 (Ky. Oct 06, 2008); Brief for Appellee-Commonwealth, *Brown v. Commonwealth*, 2008 WL 6013720 (Ky. May 30, 2008); Brief for Appellee-Commonwealth, *Bunt [sic] v. Commonwealth*, 2008 WL 5433065 (Ky. Apr 21, 2008). In each of these cases, the Kentucky Supreme Court did not address the petitioners’ allegation that adoption of the KRJA evidenced arbitrary application of the death penalty in Kentucky, nor did the Court address the Commonwealth’s assertion that any claim under the KRJA must be made before trial or it will be deemed to have been waived.

defendant.¹⁵³ Instead, a prosecutor may seek the death penalty against every capital-eligible defendant in order to avoid litigation under the KRJA.¹⁵⁴ In a 2004 article, Kentucky State Senator Neal suggested that, similar to the *Batson* obligation for prosecutors to provide race neutral reasons for excusing a black juror, “courts should also require prosecutors to reveal what policies they have concerning seeking to prosecute a case as capital. This would require prosecutors to adopt race neutral policies that do not currently exist.”¹⁵⁵

Post-KRJA Strategies to Address Racial Discrimination

Since the adoption of the KRJA, Kentucky has sought to address racial disparities or racial discrimination within the general criminal justice system.¹⁵⁶ However, it has taken only limited steps to develop additional remedial and preventative strategies to address racial discrimination in the Commonwealth’s death penalty administration. For example, in 2001, the Kentucky Criminal Justice Council’s Capital Committee unanimously recommended that a comprehensive statewide study be conducted addressing a number of problems within the Kentucky death penalty scheme.¹⁵⁷ Specifically, the Council approved a recommendation that the study address, among other things, “[p]rosecutor discretion in seeking the death penalty; adaptation of federal guidelines or procedures in other states; [and an] independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/level of culpability. . . .”¹⁵⁸ To date, Kentucky has not provided funding for this proposal and no Kentucky entity has undertaken it otherwise.¹⁵⁹

Conclusion

The Kentucky Death Penalty Assessment Team applauds the Commonwealth for becoming the first state to adopt a Racial Justice Act, providing a mechanism for ensuring that no person is put to death in accordance with a death sentence sought as a result of the race of the defendant or victim, and permitting the introduction of statistical evidence as proof. However, because the Commonwealth has not examined the effectiveness of the KRJA at remedying and preventing

¹⁵³ Neal, *supra* note 9, at 16–20; Vito, *supra* note 6, at 279–80.

¹⁵⁴ Neal, *supra* note 9, at 16–20; Vito, *supra* note 6, at 279–80.

¹⁵⁵ Neal, *supra* note 9, at 21 (noting that such policies didn’t exist as of 2004). *See also id.* at 21 (noting that the “*Kentucky Prosecutor’s Handbook* (1975) issued by the Office of the Attorney General, Prosecutor’s Assistance Division counseled in favor of excluding minorities as jurors, particularly potential jurors who were of ethnic or national background similar to that of the defendant who was on trial.”).

¹⁵⁶ Additional examples of the Commonwealth identifying and then remedying patterns of racial discrimination, such as the 1990 and 2002 changes in Kentucky’s juror selection process, are addressed in Recommendation #1. *See* Recommendation #1, *supra* notes 86–90 and accompanying text.

¹⁵⁷ Neal, *supra* note 9, at 12. The Criminal Justice Council’s mission was to “provide the Governor and the Kentucky General Assembly with recommendations to guide decision making and policy development on issues involving the courts, law enforcement and corrections and through research, planning and evaluation, to reduce crime and improve the fair administration of justice in the Commonwealth of Kentucky.” KY. CRIMINAL JUSTICE COUNCIL, <http://www.kcjc.state.ky.us/> (last visited June 6, 2011).

¹⁵⁸ KY. CRIMINAL JUSTICE COUNCIL, AN INTERIM REPORT: ACTIVITIES, FINDINGS AND RECOMMENDATIONS 11 (2001), *available at* <http://justice.ky.gov/NR/rdonlyres/551D1B62-8FCC-4144-A848-91600BE6C03C/0/2001interimreport.pdf>. *See also* Neal, *supra* note 9, at 12–13.

¹⁵⁹ Neal, *supra* note 9, at 13; KY. CRIMINAL JUSTICE COUNCIL, <http://www.kcjc.state.ky.us/> (last visited May 26, 2011). The Council’s website has not been updated since 2002. *Id.*

racial discrimination in death penalty cases, we are unable to determine whether Kentucky is in compliance with Recommendation #4.

In consultation with legal scholars, practitioners, and other appropriate experts—particularly those who have extensive experience examining the effect of race on capital sentencing in Kentucky—the Commonwealth should develop appropriate amendments to the KRJA so that the Act serves as an effective tool to address racial bias or any patterns of racial discrimination in the administration of the death penalty. At a minimum, to address the apparent limitations of the Racial Justice Act described throughout this Recommendation, the KRJA should be revised

- to permit capital defendants and death row inmates to raise not only a claim of racial discrimination in the prosecutor’s decision to seek the death penalty, but also in the imposition of the death penalty;
- to permit a person under a sentence of death to raise an allegation of racial discrimination at any stage of the capital proceedings, including on appeal or during post-conviction proceedings;¹⁶⁰
- to clarify that a capital defendant or death row inmate can prevail under the KRJA if s/he is able to state how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence or impose a death sentence in the county, the judicial district, or the Commonwealth;¹⁶¹ and
- to be made retroactive and available to inmates who were sentenced to death prior to its enactment.¹⁶²

E. 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.¹⁶³ To enforce such a 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 such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

¹⁶⁰ The Kentucky General Assembly has adopted legislation particular to other aspects of capital cases to permit relief at any stage of the proceedings. For example, Kentucky’s DNA statutes permit death row inmates to request testing during pre-trial proceedings and permits all death row inmates to file a post-conviction petition for DNA testing and analysis at any time. KY. REV. STAT. ANN. §§ 422.287 (pre-trial testing of DNA evidence), 422.285 (West 2011) (post-conviction DNA testing for death row inmates).

¹⁶¹ KRS 532.300(4) currently requires the capital defendant to “state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case.” KY. REV. STAT. ANN. § 532.300(4) (West 2011).

¹⁶² In 1992, “100% of the 33 inmates on Kentucky’s death row were there for murdering a white victim. None were there for the murder of a black victim, despite the fact that there had been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated.” Arnold, *supra* note 72, at 99.

¹⁶³ The Kentucky Assessment Team notes that none of the Recommendations contained in this Chapter should be interpreted to prohibit admission of evidence that the jury is properly allowed to consider under law in reaching a verdict or recommending a sentence. *See generally* KY. REV. STAT. ANN. § 532.025(2) (West 2011).

The KRJA states that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race.”¹⁶⁴ Under the KRJA, a capital defendant may raise a claim prior to trial alleging that the race of the defendant or race of the victim “was a significant factor” in the prosecutor’s decision to seek the death penalty in the defendant’s case.¹⁶⁵ In response, the Commonwealth may offer evidence in rebuttal of the claims or evidence presented by the defendant.¹⁶⁶ If the court determines that the defendant has proven, by clear and convincing evidence, that race was the basis of, or a significant factor in, the prosecutor’s decision to seek the death penalty, the court must order that a death sentence not be sought in that particular case.¹⁶⁷

As described in Recommendation #4, the KRJA falls short of providing an adequate remedy to racial discrimination in capital cases, in part because it applies only to the decision to seek the death penalty and not to the decision to impose the death penalty, in contravention of this Recommendation.¹⁶⁸ Furthermore, Kentucky requires KRJA claims to be proved “by clear and convincing evidence,” rather than permitting defendants to demonstrate a prima facie case of racial discrimination through the preponderance of the evidence standard.¹⁶⁹ Similarly, while the KRJA burdens capital defendants with a higher burden of proof than described by this Recommendation, the KRJA permits the Commonwealth’s Attorney to rebut a claim through any evidence, rather than requiring the Commonwealth’s rebuttal to be by substantial evidence.¹⁷⁰

Because the KRJA does not fully address valid allegations of racial discrimination in the Commonwealth as expressed in this Recommendation, it is in partial compliance with Recommendation #5.

F. 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.

¹⁶⁴ KY. REV. STAT. ANN. § 532.300(1) (West 2011).

¹⁶⁵ KY. REV. STAT. ANN. § 532.300(2) (West 2011). The capital defendant is permitted to introduce “statistical evidence or other evidence, or both” to show “that death sentences were sought significantly more frequently: (a) [u]pon persons of one race than upon persons of another race; or (b) [a]s punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.” KY. REV. STAT. ANN. § 532.300(3) (West 2011). The circuit court will then schedule a hearing on the issue and prescribe a time for the submission of evidence by both parties. KY. REV. STAT. ANN. § 532.300(4) (West 2011).

¹⁶⁶ KY. REV. STAT. ANN. § 532.300(5) (West 2011).

¹⁶⁷ KY. REV. STAT. ANN. § 532.300(2), (4)–(5) (West 2011).

¹⁶⁸ See *supra* text accompanying notes 133–144.

¹⁶⁹ KY. REV. STAT. ANN. § 352.300(5) (West 2011). The North Carolina Racial Justice Act requires the defendant to prove a claim by a preponderance of evidence. See N.C. GEN. STAT. §15A-2011(c); Kotch & Mosteller, *supra* note 138, at 2117 n.381 (comparing the Kentucky and North Carolina Racial Justice Acts); Neal, *supra* note 9, at 14 (noting the high threshold defendants must meet to prove that race influenced the Commonwealth’s decision to seek the death penalty).

¹⁷⁰ KY. REV. STAT. ANN. § 352.300(5) (West 2011).

While the Office of Minority Affairs (OMA), as discussed in Recommendation #1, “acts in an advisory role to ensure that court system policies and procedures do not discriminate based on race,”¹⁷¹ the Kentucky Assessment Team did not uncover any Commonwealth entity or program, applicable to the criminal justice system, stressing that race should not be a factor in any aspect of death penalty administration.¹⁷² Nonetheless, some Commonwealth entities provide at least some education on racial and ethnic discrimination issues within the criminal justice system.¹⁷³

For example, since 2001, Kentucky law enforcement officers must complete, along with basic and annual in-service training requirements,¹⁷⁴ an approved training on the Commonwealth’s prohibition on racial profiling.¹⁷⁵ Pursuant to this training requirement, the Kentucky Law Enforcement Council has promulgated a model policy which also provides that officers who conduct racial profiling are subject to their law enforcement agency’s “disciplinary procedures, which shall be consistent with other penalties imposed for similar officer misconduct.”¹⁷⁶ In addition, a number of law enforcement certification bodies recommend or require that law enforcement agencies adopt policies on racial sensitivity. For example, the Kentucky Association of Chiefs of Police (KACP) Accreditation Program requires accredited law enforcement agencies to adopt specific policies against racial profiling, pursuant to KRS

¹⁷¹ *Office of Minority Affairs*, ADMIN. OFFICE OF THE CTS., KY. CT. OF JUSTICE, <http://courts.ky.gov/aoc/personnel/minorityaffairs/default.htm> (last visited Nov. 21, 2011).

¹⁷² *See, e.g.*, Interview with Priscilla Johnson, *supra* note 113 (stating that the OMA does not have any program focused on educating the Commonwealth’s citizens or other actors within criminal justice system that race should not be a factor in any aspect of the death penalty’s administration).

¹⁷³ For example, in 2001 the Kentucky General Assembly adopted, in response to the Keil and Vito studies, legislation prohibiting racial profiling and requiring the Kentucky Law Enforcement Council (KLEC) to promulgate a model policy for law enforcement agencies, which included a training aspect that applied to all law enforcement officers. Arnold, *supra* note 87, at 10 (noting that the legislation provided Kentuckians with “a much more robust right to litigate racially discriminatory conduct than does the federal constitution”); KY. REV. STAT. ANN. § 15A.195 (West 2011) (“No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person.”).

¹⁷⁴ All Kentucky law enforcement officers are required to complete at least 640 hours of basic training, which, pursuant to KRS 15.334, includes mandatory education on the “[i]dentification and investigation of, responding to, and reporting bias-related crime, victimization, or intimidation that is a result of or reasonably related to race, color, religion, sex, or national origin.” KY. REV. STAT. ANN. § 15.334(1)(d), (4) (West 2011). *See also* KY. REV. STAT. ANN. §§ 15.404(1)(a), 95.955 (West 2011). Active law enforcement officers must also complete forty hours of annual in-service training. KY. REV. STAT. ANN. § 15.404(2)(a) (West 2011).

¹⁷⁵ KY. REV. STAT. ANN. § 15A.195 (West 2011); KY. LAW ENFORCEMENT COUNCIL, MODEL POLICY PROHIBITING RACIAL PROFILING (revised June 28, 2001) (on file with author) (“Such training shall comply with Federal Law, state statutory provisions, case law and other applicable laws, regulations, and established rules.”). While we were unable to determine whether all Kentucky law enforcement agencies have adopted a policy against racial profiling, we note that the Lexington Division of Police has adopted such a policy. *See Hardy v. Commonwealth*, 149 S.W.3d 433, 436 n.11 (Ky. App. Ct. 2004) (citing Lexington-Fayette Urban County Division of Police, Gen. Order 00–2A, Profiling Policy). The DOCJT also provides law enforcement officers a sixteen-hour telecommuter course on “Cultural Awareness,” and which provides “insight into the dynamics of diversity within the [Commonwealth’s] communities . . . [and] the significance of cultural awareness, workplace diversity and review the Americans with Disabilities Act (ADA).” *Cultural Awareness*, KY. DEP’T OF CRIM. JUSTICE TRAINING, http://docjt.ky.gov/2011schedulebook/detail.asp?TRC_ID=9900 (last visited May 18, 2011).

¹⁷⁶ KY. LAW ENFORCEMENT COUNCIL, MODEL POLICY PROHIBITING RACIAL PROFILING (revised June 28, 2001) (on file with author).

15A.195.¹⁷⁷ In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) requires certified law enforcement agencies to establish a written directive that at a minimum prohibits, and requires training on how to avoid, biased-based profiling.¹⁷⁸ CALEA, however, only pertains to certified law enforcement agencies, and only three within the Commonwealth are accredited by CALEA.¹⁷⁹ For more information on Kentucky law enforcement training, see Chapter Three on Law Enforcement

Kentucky does not impose any specialized training requirements for defense attorneys related to racial discrimination in capital cases. However, annual training is provided by the Kentucky Department of Public Advocacy (DPA) and the Louisville Metro Public Defender's Office (Metro Defender) on the "unique issues regarding the [Kentucky] Racial Justice Act."¹⁸⁰ Furthermore, in 2001, Chief Justice Lambert created the Commission on Racial Fairness to undertake a campaign to "eradicate any vestiges of racial discrimination in the courts."¹⁸¹ As a part of this project, DPA initiated in 2008 a "Litigating Race Education Project," in order to educate members of Kentucky's "legal profession about disproportionate minority confinement and how to litigate issues of racial disparity in individual cases."¹⁸² For more information on the campaigns, studies, and actions of the Jefferson County Commission on Racial Fairness, see Recommendations #1 and #3 in this Chapter.

The Commonwealth does not require the Commonwealth's prosecutors to participate in educational programming that emphasizes that race should not be a factor in any aspect of death

¹⁷⁷ KY. ASSOC. OF CHIEFS OF POLICE, ACCREDITATION PROGRAM 57 (Apr. 20, 2009), available at http://www.kypolicechiefs.org/joomla/attachments/095_STANDARDS_2009_April_20_doc (providing a model policy on racial profiling for agencies to adopt); KY. REV. STAT. ANN. § 15A.195 (West 2011). KACP Standard 14.1 also requires "[e]ach officer having responsibility for the enforcement of the criminal laws in general [to] graduate from a basic training program certified by [KLEC] prior to the exercise of such authority. . . ." *Id.* at 33. As of January 2011, seventy-nine out of over 400 Kentucky law enforcement agencies are accredited through the KCAP Accreditation Program. *Accredited Agencies*, KY. ASSOC. OF CHIEFS OF POLICE, <http://www.kypolicechiefs.org> (last visited Nov. 14, 2011) (follow "Accredited Agencies" hyperlink under "Accreditation" drop-down list).

¹⁷⁸ COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at 1.2.9 (5th ed. 2006).

¹⁷⁹ The Lexington Division of Police and the Taylor Mill Police Department are CALEA-accredited law enforcement agencies; the Kentucky Department of Criminal Justice Training is a CALEA-accredited training academy. See *Agency Search*, CALEA ONLINE, <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited May 4, 2011) (use second search function, designating "U.S." and "Kentucky" as search criteria).

¹⁸⁰ Interview with DPA, *supra* note 124; Interview with Daniel T. Goyette, *supra* note 124.

¹⁸¹ KY. DEP'T OF PUB. ADVOCACY, *Justice for All: Litigating Race Issues to Protect Equal Justice in Kentucky*, 30 ADVOCATE 3, May 2008, at 2.

¹⁸² *Id.* at 2 (noting that a special edition of *The Advocate* was partly funded through a grant from the Kentucky Bar Foundation). Issues addressed in this periodical included, "Selective Prosecution," "Using Kentucky Law and the Kentucky Constitution to Challenge Racially Biased Searches and Seizures," "Bias Effecting [sic] Pre-Trial Release," "Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process," "The Cumulative Effects of Racial Disparities in Criminal Proceeding," "Challenging the Venire," "Litigating Race in Voir Dire," "Confronting the Race Issue in Jury Selection" "Preventing Systemic Discrimination and Addressing Bias Against Child/Adolescent Clients in the Juvenile and Adult Justice Systems," and "Race and Immigration Issues," among others. *Id.*

penalty administration.¹⁸³ The Kentucky Prosecutors Institute, an annual training for the Commonwealth’s prosecutors conducted by the Kentucky Prosecutors Advisory Council, includes education on jury selection, pretrial proceedings, and other legal considerations in the prosecution of a death penalty case.¹⁸⁴ However, we were unable to determine whether this training, or any other training provided to Commonwealth prosecutors, emphasizes that race should not be a factor in any aspect of death penalty administration.¹⁸⁵ In addition, the failure of the Commonwealth to adopt remedial and preventative strategies to combat racial discrimination in voir dire evidences the need for educational programs stressing the elimination of racial considerations in death penalty decisions.¹⁸⁶

Finally, judges in Kentucky must participate in continuing education and ethics and professionalism training,¹⁸⁷ although this does not ensure that judges receive education stressing that race should not be a factor in any aspect of the death penalty administration. The Kentucky Code of Judicial Conduct prohibits judges from manifesting bias or prejudice by words or conduct in the performance of their judicial duties.¹⁸⁸ Furthermore, judges may not participate in any extra-judicial activities that may cast doubt on the judge’s capacity to act impartially, including making remarks or jokes demeaning to individuals on the basis of race or national origin, nor may judges hold membership in any organization that practices invidious discrimination on the basis of race or national origin.¹⁸⁹ According to the Kentucky Judicial Conduct Commission (JCC), judicial misconduct such as “[e]xpressions of bias based on race, gender[,] or ethnicity” may lead to disciplinary action.¹⁹⁰ If a judge violates any of these provisions, the JCC may impose sanctions on the offending judge, ranging from a private

¹⁸³ KY. REV. STAT. ANN. § 15.718 (West 2011) (requiring training on “the dynamics of domestic violence, child physical and sexual abuse, rape, effects of crime on adult and child victims, legal remedies for protection, lethality and risk issues, profiles of offenders, model protocols for addressing domestic violence, child abuse, rape, available community resources and victims services, and reporting requirements”).

¹⁸⁴ KY. PROSECUTORS ADVISORY COUNCIL, PROGRAM AGENDA & SCHEDULE (Oct. 29–31, 2009), *available at* <http://www.kyprosecutors.com/intranet/wp-content/uploads/2009/10/Misdemeanor-Packet-for-Printing-Order.pdf>. *See also* Press Release, *Attorney General Stumbo Announces Training for New Prosecutors*, Office of the Attorney General (Sept. 10, 2007), *available at* <http://migration.kentucky.gov/Newsroom/aag/newprosecutortraining.htm> (last visited Nov. 21, 2011) (“Each year’s class trains approximately 40 prosecutors from the state’s Commonwealth’s and County Attorney offices, teaching them about specific state statutes and case law, courtroom procedure and demeanor, and how to present evidence both conventionally and with advanced technology.”).

¹⁸⁵ *See* Chapter Five on Prosecutorial Professionalism.

¹⁸⁶ *Batson*, 476 U.S. at 79. The 1975 *Kentucky Prosecutor’s Handbook*, developed and distributed throughout the Commonwealth by the Kentucky Office of the Attorney General, explicitly instructed Commonwealth attorneys to use peremptory strikes to exclude minorities. Neal, *supra* note 9, at 21.

¹⁸⁷ *See, e.g.*, Press Release, *44 Judges Participate in Orientation Program for New Kentucky Judges*, Ky. Ct. of Justice (Mar. 17, 2010), *available at* <http://migration.kentucky.gov/newsroom/kycourts/03172010JB1.htm> (last visited Nov. 21, 2011). For additional information on the Commonwealth’s judiciary, see Chapter Eleven on Judicial Independence.

¹⁸⁸ KY. SUP. CT. R. 4.300, Canon 3B(5) & cmt. *See also* KY. SUP. CT. R. 4.300, Canon 3B(6) (requiring judges to prohibit lawyers from using language manifesting prejudice or bias), Canon 3C(2) (requiring judges to ensure their staff refrains from manifesting prejudice or bias in the performance of their duties).

¹⁸⁹ KY. REV. STAT. ANN. § 26A.015(2)(a), (e) (West 2011) (listing other reasons a judge must disqualify him/herself); KY. SUP. CT. R. 4.300, Canon 2A, 2E (prohibiting membership in an organization that discriminates based on race, sex, religion, or national origin).

¹⁹⁰ *Types of Judicial Misconduct*, JUDICIAL CONDUCT COMM’N, <http://courts.ky.gov/jcc/#misconduct> (last visited May 24, 2011).

reprimand to removal from office, a recommendation that the judge lose his/her license to practice law, or a referral that the judge to the Kentucky Bar Association (KBA) for discipline.¹⁹¹

Commonwealth Attorneys and defense counsel may be sanctioned by the KBA, which investigates, prosecutes, and sanctions attorneys within the Commonwealth that violate the Kentucky Rules of Professional Conduct (Rules).¹⁹² However, the Rules do not specifically address attorney conduct that manifests racial bias or discrimination and therefore the KBA is not able to impose sanctions for such conduct.

Based on this information, the Commonwealth of Kentucky is in partial compliance with Recommendation #6.

G. 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*.

The Commonwealth of Kentucky has not adopted any law, rules, or standards requiring defense counsel to participate in training to identify and develop racial discrimination claims in capital cases or to identify biased jurors during *voir dire*.

However, DPA requires all staff public defenders, and any private counsel who contract with DPA, to complete comprehensive training before undertaking representation in a death penalty case, which includes training on “the unique issues relating to the [Kentucky] Racial Justice Act” and on jury selection.¹⁹³ DPA also requires contract counsel to have demonstrated skill in several elements of trial advocacy, including jury selection, and requires both staff attorneys and contract counsel, before every capital trial, to complete a case review and/or “a capital *voir dire* workshop where counsel will practice the individual sequestered and, where appropriate, group *voir dire*.”¹⁹⁴ Furthermore, DPA sponsors annual legal education programs for staff attorneys and conflict counsel, including a biennial two-day capital defender training program called the DPA Capital Trial Practice Institute, at which information on the role of race in death penalty

¹⁹¹ KY. CONST. § 121; KY. REV. STAT. ANN. § 34.340 (West 2011); KY. SUP. CT. R. 4.300, Canon 3D, 4.020.

¹⁹² *Office of Bar Counsel Overview*, KY. BAR ASS’N, <http://www.kybar.org/234> (last visited May 18, 2011). When a complaint is filed with the Kentucky Bar Association (KBA) Inquiry Commission, which is appointed by the Kentucky Supreme Court and receives and processes complaints against Kentucky lawyers of professional misconduct, the KBA’s Office of Bar Counsel is responsible for investigating and prosecuting professional misconduct charges from the Inquiry Commission, and finally sanctioning the attorney. *Id.* Additionally, the KRJA punishes prosecutorial misconduct based on racial discrimination in charging decisions by eliminating the death penalty as a potential punishment in a capital-eligible prosecution. KY. REV. STAT. ANN. § 352.300 (West 2011); KY. SUP. CT. R. 3.130(1.1)–(8.4).

¹⁹³ KY. DEP’T OF PUB. ADVOCACY, POLICIES AND PROCEDURES §§ 17.21(II) (requiring DPA staff and contract counsel to be compliant with the National Legal Aid and Defender Association and the *ABA Revised Guidelines for Performance of Counsel in Capital Cases*), 8.04(I)(C)(3) (conflict counsel qualification and training requirements) [hereinafter DPA POLICY]. See generally 26 ADVOCATE 3, May 2004 (providing educational tools and articles for Commonwealth defense attorneys on how to litigate race issues in Kentucky, including during *voir dire*).

¹⁹⁴ DPA POLICY, *supra* note 193, at §§ 8.04(I)(C)(1)(h), 8.04(I)(D)(1)–(2), 17.21(II).

litigation and skills training on the identification of biased jurors during *voir dire* has occurred.¹⁹⁵

The Louisville Metro Public Defender's Office Corporation (Metro Defender) also requires specialized training for staff attorneys and contract counsel in death penalty cases.¹⁹⁶ Metro Defender staff capital defenders are required to participate in regular, on-going multi-disciplinary case reviews and Metro Defender trainings on particular aspects of capital litigation, including litigating the KRJA and jury selection.¹⁹⁷ The Metro Defender also attempts to ensure that contract counsel either have had training on or experience litigating the KRJA and conducting *voir dire*.¹⁹⁸

We were, however, unable to determine the extent to which DPA or the Metro Defender enforce their internal policies.

While public defenders and contract counsel in the Commonwealth may be trained to identify and develop racial discrimination claims in capital cases and to identify biased jurors during *voir dire*, there are no training requirements that apply to all capital defense counsel in the Commonwealth. Thus there is no assurance that such counsel are trained on litigating the KRJA or other issues of racial discrimination that may arise in a capital trial. Based on this information, Kentucky is in partial compliance with Recommendation #7.

H. 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.

Kentucky sample jury instructions do not require judges to explicitly inform jurors that it is improper to permit racial factors to affect their decision-making and that they should report any evidence of racial discrimination in jury deliberations. In addition, we have not identified any criminal or civil case in which a Commonwealth court has instructed a jury on the aspects included in this Recommendation.

¹⁹⁵ See DPA POLICY, *supra* note 193, at §§ 12.21 (requiring attendance “at the first DPA Capital Trial Practice Institute after the attorney . . . joins the [Capital Trial Branch] staff”), 12.04(B) (requiring DPA’s Education & Strategic Planning Branch to conduct a Death Penalty Litigation Persuasion Institute “every other year”) (on file with author); see also DPA POLICY, *supra* note 193, at § 8.04 (requiring contract counsel to attend and fully participate in selected DPA training events, including the Institute and other events as determined by DPA leadership). DPA also provides an annual five and a half day Litigation Persuasion Institute, required of all new public defense attorneys, which includes intensive training on *voir dire*. Faubush, KY. DEP’T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed/fb.htm> (last visited May 9, 2011).

¹⁹⁶ Interview with Daniel T. Goyette, *supra* note 124. LPDC staff attorneys attend LPDC capital training, DPA-sponsored trainings, including its “Capital Practice Institute,” and may be provided the opportunity to attend other national training seminars, if financial resources are available. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Despite the Kentucky Supreme Court’s acknowledgment that a “basic principle of due process is the right to an unbiased decision,”¹⁹⁹ the necessity of the adoption of such jury instructions in Kentucky is clear. For example, potential jurors in a murder case acknowledged seeing “recent news media coverage of racial disparities in the criminal justice system, [and] express[ed] concern that racially biased juries pose a risk to fair trials and that African-American defendants are more exposed to that risk than are non-African-American defendants.”²⁰⁰ Furthermore, in addition to evidence of systemic racial discrimination in the Commonwealth’s criminal justice system,²⁰¹ we are aware of at least one Commonwealth capital-eligible case where the Kentucky Supreme Court overturned the conviction of an African-American defendant due to the trial court’s failure to excuse for cause a racist juror.²⁰² Adopting jury instructions reminding jurors it is improper for racial prejudice or bias to affect jurors’ decision-making and that they must report any evidence of racial discrimination in jury deliberations would help “root out juror prejudice” and ensure fair sentencing.²⁰³

Accordingly, the Commonwealth is not in compliance with this Recommendation.

I. 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.

The Kentucky Code of Judicial Conduct (Code) requires judges to perform their judicial duties “without bias or prejudice,”²⁰⁴ and to disqualify him/herself in a proceeding in which the judge “has a personal bias or prejudice concerning a party” or in other instances in which the judge’s “impartiality might reasonably be questioned.”²⁰⁵ In addition, the Code mandates that “[a] judge

¹⁹⁹ See *Grooms v. Commonwealth*, 756 S.W.2d 131, 135–38 (Ky. 1988).

²⁰⁰ *Rodgers v. Commonwealth*, 285 S.W.3d 740, 758 (Ky. 2009).

²⁰¹ See Recommendation #1, *supra* notes __ and accompanying text (describing systemic racial discrimination found in numerous empirical studies on the Commonwealth’s criminal justice system as well as other surveys and research); *infra* notes __ and accompanying text (describing a study of Jefferson County’s judiciary finding racial discrimination in the courtrooms).

²⁰² *Gamble v. Commonwealth*, 68 S.W.3d 367, 373 (2002) (“While Juror # 54 did eventually state that he could be fair and reach a decision on the evidence, every indication was that he holds racist ideas which affected his view of Appellant before the first piece of evidence was presented to him. In short, he had indicated a bias so strong that he could not be rehabilitated.”). See also *Turley v. Commonwealth*, 2008 WL 3875433, at *1 (Ky.) (dismissing a claim regarding potentially racist jurors as waived since the defendant did not raise the issue on direct appeal); *Winstead v. Commonwealth*, 283 S.W.3d 678, 684–85 (Ky. 2009) (holding that the black capital defendant accused of murdering a white victim was not denied a fair trial by trial court’s limitations on jury voir dire on the issue of racial bias, restricting defendant from inquiring of potential jurors whether they agreed that racial prejudice had been, and continued to be, a serious social problem in the Commonwealth, and asking how jurors would react to interracial romantic relationships in their own families, where voir dire was permitted to ask potential jurors whether defendant’s race or his involvement in interracial relationships would have any bearing on their judgment).

²⁰³ See generally Eric Y. Drogin & Ryan Marin, *Extreme Emotional Disturbance (EED), Heat of Passion, and Provocation: A Jurisprudential Science Perspective*, 36 J. PSYCHIATRY & L. 133, 136 (2008) (suggesting “ ‘a cautionary jury instruction intended to root out juror prejudice’ ” in light of heterosexism, homophobia, sexism, and other discriminatory viewpoints).

²⁰⁴ SCR 4.300, Canon 3B(5).

²⁰⁵ SCR 4.300, Canon 3E; KY. REV. STAT. ANN. § 26A.015(2)(a), (e) (West 2011) (listing reasons for which a judge must disqualify him/herself).

shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion[,] or national origin,”²⁰⁶ noting that “public manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis . . . diminishes public confidence in the integrity and impartiality of the judiciary.”²⁰⁷

Despite the existence of the Code, it appears that there have been numerous instances of racial discrimination by Kentucky judges. Specifically, a 2003 study conducted by a University of Louisville professor identified at least fourteen Jefferson County judges who had shown racial bias in the courtroom and concluded that these judges sentenced black offenders more harshly than whites.²⁰⁸ In 2006, a Kentucky judge was found to have acted illegally when she ordered seventeen Hispanic defendants charged with traffic violations and misdemeanors to be held without bail and also made efforts to have the defendants deported.²⁰⁹ In 2007, the Kentucky Judicial Conduct Commission suspended her from the bench for fifteen days due to her conduct in the above cases.²¹⁰ Unfortunately, we were unable to determine whether other complaints, if any, have been filed against the Kentucky judiciary based on intentional or perceived racial bias. This was due, in part, to our inability to identify any entity within the Commonwealth, including the Judicial Conduct Commission or the Administrative Office of the Courts, which keeps track of this information, including data on judicial recusals made on this basis.²¹¹

Accordingly, we do not have sufficient information to assess whether the Commonwealth of Kentucky is in compliance with Recommendation #9.

J. Recommendation #10

²⁰⁶ SCR 4.300, Canon 2E.

²⁰⁷ SCR 4.300, Canon 2E cmt.

²⁰⁸ Steven C. Bourassa & Viviana Andreescu, *Racial Fairness in Sentencing: A Case Study of Selected Crimes in Jefferson County*, RACIAL FAIRNESS COMM’N, KY. CT. OF JUSTICE, Sept. 30, 2004, available at http://ksdc.louisville.edu/publications/racial_fairness_report.pdf (examining criminal cases between 1999 and 2002, focusing on cocaine possession and misdemeanor shoplifting cases). After the release of the report, one member of the commission’s executive committee concluded that some Jefferson County judges are racist, although the commission’s chair suggested that any discrimination is “subconscious.” Andrew Wolfson & Gregory A. Hall, *Study Sees Racial Bias*, COURIER-J. (Louisville, Ky.), July 29, 2003, at A1. Additionally, Chief Justice Lambert explained that he “knows most of Jefferson County’s judges and finds it hard to believe that any judge “is a racist and would intentionally sentence blacks more harshly than whites. It may be that there are racial considerations that a judge is unaware of.” *Id.* (quotations omitted).

²⁰⁹ *Ruling: Judge Acted Illegally in Jailing Immigrants Indefinitely*, AP ALERT, Oct. 7, 2006 (noting that the judge had contacted federal authorities requesting that they investigate the immigration status of the detained individuals, a request that was declined). Court records also showed that the judge “previously had ordered illegal immigrants in her court to leave Kentucky as a condition of probation and had given some 72 hours to do so.” *Id.*

²¹⁰ Brett Barrouquere, *Judge Suspended for Jailing of Immigrants*, KY. POST, Apr. 20, 2007.

²¹¹ Email Interview by Paula Shapiro with Leigh Anne Hiatt, Public Information Officer, Pub. Info. Office, Ky. Admin. Office of the Courts (May 24, 2011) (on file with author) (noting that “the Kentucky Administrative Office of the Courts has not conducted studies nor tracked trends regarding judges who have been asked to recuse themselves based on a racial/ethnic bias.”). The Judicial Conduct Commission (JCC) lists “[e]xpressions of bias based on race, gender or ethnicity” as a type of judicial courtroom misconduct that may lead to disciplinary sanctions, but the Kentucky Assessment Team was unable to determine whether the JCC retains any statistical or other information regarding this misconduct. *Types of Judicial Misconduct*, JUDICIAL CONDUCT COMM’N, <http://courts.ky.gov/jcc/#misconduct> (last visited May 24, 2011).

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.

As previously discussed, Kentucky was the first of two states to adopt a racial justice act. The KRJA permits capital defendants to raise, during pretrial proceedings, a claim that the Commonwealth prosecutor sought the death penalty against the defendant based, in part, on race, and it permits the trial court to remove the death penalty as a sentencing option if the defendant is successful under the KRJA.²¹² Claims challenging the Commonwealth's use of peremptory challenges on the basis of race,²¹³ the racial composition of the jury pool,²¹⁴ or racial bias in charging procedures brought under the KRJA generally are procedurally barred from consideration on direct appeal unless preserved at the trial level.²¹⁵ Inmates with claims of racial discrimination that were litigated during direct appeal, or "could and should have been litigated in the direct appeal" but were not, also are procedurally barred from raising the issue during Criminal Procedure Rule (RCr) 11.42 post-conviction proceedings.²¹⁶ Furthermore, if the issue could and should have been raised in an initial RCr 11.42 petition, the death row inmate will be precluded from raising the issue in a subsequent RCr 11.42 petition or in a Civil Procedure Rule 60.02 post-conviction petition for extraordinary relief.²¹⁷

For example, in *Taylor v. Commonwealth*, a death row inmate presented evidence during his 2001 post-conviction proceedings of prosecutors' policies of exclusion of minority jurors,

²¹² KY. REV. STAT. ANN. § 532.300 (West 2011); Recommendation #5, *supra*.

²¹³ See *Batson*, 476 U.S. at 89–90.

²¹⁴ See *Taylor v. Louisiana*, 419 U.S. 533, 528 (1975); see also *Commonwealth v. Nelson*, 841 S.W.2d 628, 629–30 (1992) (holding that defendants have a right to juries selected at random from a fair cross section of the community and finding that preserved error regarding substantial deviation from the statutes regarding the selection of jurors will result in reversal of a conviction).

²¹⁵ *Simmons v. Commonwealth*, 746 S.W.2d 393, 398 (Ky. 1988) ("If there is a challenge to be made to the exercise of peremptories in this state, it should be made when the list of strikes has been returned to the judge and before the jury has been accepted by the parties and sworn to try the case and before the remainder of the jurors have been discharged from service."); *Epperson*, 197 S.W.3d at 63 (noting that the defense "conceded that an argument about racial discrimination with respect to capital sentencing was not the subject of a pretrial motion or any evidence prior to trial as now required by the Kentucky Racial Justice Act, KRS 532.300"); *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (requiring trial counsel to make a sufficient record to permit appellate review of alleged errors regarding voir dire). See also *Bussell v. Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994) (finding that a statewide study of capital cases over fifteen years, which indicated racial discrimination in the imposition of death sentences in Kentucky was "not relevant.").

²¹⁶ KY. R. CRIM. P. 11.42(3) ("Final disposition of the [post-conviction review] motion shall conclude all issues that could reasonably have been presented in the same proceeding."); *Leonard v. Commonwealth*, 279 S.W. 3d 151, 156 (Ky. 2009) (citing *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998)); *Stanford v. Commonwealth*, 854 S.W.2d 742, 747 (Ky. 1993) ("The complaint now raised in the RCr 11.42 motion has [] already been considered by this Court and decided adversely to [the inmate]. It cannot be brought to the Court again."); *Taylor v. Commonwealth*, 63 S.W.3d 151, 157 (Ky. 2001) ("The [*Batson*] issue was decided against [the inmate] on direct appeal and, therefore, cannot be raised in his RCr 11.42 motion."), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²¹⁷ *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) ("Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); *Gross v. Commonwealth*, 648 S.W.2d 853, 855, 856 (Ky. 1983).").

including a 1975 *Kentucky Prosecutor's Handbook* and affidavits of prosecutors admitting policies to “remove all blacks” by using peremptory challenges.²¹⁸ However, the Kentucky Supreme Court rejected Taylor’s challenge to his death sentence, stating that the inmate had raised the issue of discriminatory use of peremptory challenges on direct appeal and therefore could not raise a *Batson* claim during post-conviction proceedings.²¹⁹

Finally, we are aware of at least two cases where the Kentucky Supreme Court has made a “reference to race” on direct appeal.²²⁰ Specifically, in *Bussell v. Commonwealth*, the Court noted that “[t]he sentence was not fixed because he was black or because the victim was white,”²²¹ and in *Wilson v. Commonwealth*, it stated that “[t]he sentence was not fixed because he was black”²²² However, we have found no case where the Kentucky Supreme Court has

²¹⁸ *Taylor*, 63 S.W.3d at 156–57 (Ky. 2001). In her dissent, Justice Stumbo noted the “very impressive” compilation of evidence submitted by Taylor and his attorneys and found that the inmate had made a prima facie case under both *Swain* and *Batson*. *Id.* at 171 (Stumbo, J., dissenting) (listing the evidence as: “(1) Passages from the *Kentucky Prosecutor's Handbook* that stated that the following were not ‘preferable’ jurors for the prosecution: ([a]) a juror who came from a ‘[m]inority group[] who may have a grudge against law enforcement;’ and ([b]) a ‘juror of racial or national background to that of the defendant.’ (2) Observations by a then-Jefferson Circuit Judge that she discharged a panel in a particular case because the Commonwealth Attorney used peremptory strikes to remove all black jurors on the venire and because of her ‘awareness that the Commonwealth had in other prior cases also elected to utilize strikes to remove all blacks.’ (3) The testimony of a former Jefferson County public defender that he had observed a pattern and practice of the Commonwealth using peremptory strikes to remove blacks from jury venires. (4) The testimony of a private attorney that he had observed the same pattern and practice on behalf of the Commonwealth in ‘dozens and dozens of murder cases, many of which had been tried capitally.’ (5) The testimony of a former staff attorney who worked for the Jefferson County Commonwealth Attorney, who testified that it was understood in the office that prosecutors should strive to strike jurors with the same ethnic background. Further, she testified that it was common knowledge that the same Commonwealth Attorney who prosecuted Taylor’s case—who is also African-American—believed that blacks on the jury panel were bad.”). The trial judge also was African-American. See Brett Barrouquere, *Former Supreme Court Justice McAnulty Dies*, AP ALERT, Aug. 24, 2007.

²¹⁹ *Taylor*, 63 S.W.3d at 157 (holding that “the [*Batson*] issue was decided against Taylor on direct appeal and, therefore, cannot be raised in his RCr 11.42 motion”). However, the direct appeal opinion contains no discussion of Taylor’s alleged *Batson* claim. See *Taylor v. Commonwealth*, 821 S.W.2d 72, 74 (Ky. 1990) (addressing only the admissibility of the defendant’s confession and the trial court’s refusal to grant a change of venue and noting that the petitioner, “through counsel, raises forty-four assignments of alleged error in this appeal,” adding: “We have carefully reviewed all of the issues presented by Taylor . . . [a]llegations of error which we consider to be without merit will not be addressed here.”), *overruled on other grounds by* *St. Clair v. Roark*, 10 S.W.3d 482, 487 (Ky. 1999); see also *Taylor*, 63 S.W.3d at 171–72 (Stumbo, J., dissenting) (“Taylor did raise a *Batson* claim on direct appeal. While that claim was necessarily rejected in the opinion affirming his conviction, there was absolutely no analysis of the claim. We are left in the dark as to why the claim was rejected. The majority opinion’s assertion that Taylor’s *Batson* claim was rejected on direct appeal because he failed to establish a prima facie case is pure speculation [I]f the majority opinion is correct in its assertion that Taylor’s *Batson* claim failed on direct appeal for failure to establish a prima facie case, then our error on direct appeal in affirming Taylor’s conviction on this issue is clear and palpable.”). It is unclear whether the 1975 Kentucky prosecutor’s handbook was known to the defense at the time of the direct appeal.

²²⁰ Bienen, *supra* note 56, at 237 n.416 (noting that “[i]t is unclear whether the court conducted some sort of analysis or systemwide review of black/white capital murders and concluded that the death sentence was not imposed on racial grounds or if the court is simply asserting its opinion as to that matter”).

²²¹ *Bussell*, 882 S.W.2d at 116. Bussell’s death sentence eventually was overturned during post-conviction proceedings. See *Commonwealth v. Bussell*, 226 S.W.3d 96, 107 (Ky. 2007).

²²² *Wilson v. Commonwealth*, 836 S.W.2d 872, 892 (Ky. 1992), *overruled on other grounds by* *St. Clair*, 10 S.W.3d at 487.

conducted any inquiry into whether a capital defendant or death row inmate's failure to raise a claim of racial discrimination was made knowingly or intelligently.

Accordingly, Kentucky fails to comply with Recommendation #10.

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The ABA unconditionally opposes the imposition of the death penalty on offenders with mental retardation¹ or on offenders who, at the time of the offense, had significant limitations in their intellectual functioning and adaptive behavior resulting from dementia or traumatic brain injury that made them functionally equivalent to persons with mental retardation. The ABA also opposes execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability.

Furthermore, given the irreparable consequences that flow from a death row inmate's decision to waive his/her appeals, the ABA also opposes execution of prisoners whose mental disorders or disabilities significantly impair their capacity (1) to make rational decisions with regard to post-conviction proceedings, (2) to assist counsel in those proceedings, or (3) when facing an impending execution, to appreciate the nature and purpose of the punishment or reason for its imposition.

Mental Retardation

While the U.S. Supreme Court prohibited the execution of people with mental retardation in *Atkins v. Virginia*,² this holding does not guarantee that persons with mental retardation will not be executed. *Atkins* did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate is mentally retarded.

In an effort to assist capital jurisdictions in determining who meets the criteria of mental retardation, the ABA adopted a resolution opposing the execution or sentencing to death of any person who, at the time of the offense, "had significant limitation in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia or traumatic brain injury."³ The ABA policy reflects language adopted by the American Association on Intellectual and Developmental

¹ "Intellectual disability" is gaining currency as the preferred term to describe the same condition known as mental retardation. See *FAQ on Intellectual Disability*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_104.cfm (last visited on July 11, 2011).

² 536 U.S. 304, 318–21 (2002).

³ ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), available at http://www2.americanbar.org/sdl/Documents/2006_AM_122A.pdf. See AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (text rev. 4th ed. 2000).

Disabilities (AAIDD) and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) on mental retardation.⁴

Unfortunately, some states do not define mental retardation in accordance with these commonly accepted definitions. Moreover, some states impose upper limits on the intelligence quotient (IQ) score necessary to prove mental retardation that are lower than the range that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence. Accordingly, a great deal of additional work is required to make the *Atkins* holding a reality.

The ABA resolution also encompasses dementia and traumatic brain injury; disabilities functionally equivalent to mental retardation, but that typically manifest after age eighteen. While these disabilities are not expressly covered in *Atkins*, the ABA opposes the application of the death penalty to any person who suffered from significant limitations in intellectual functioning and adaptive behavior at the time of the offense, regardless of the cause of the disability.

Mental Illness

In *Atkins*, the Court held that mentally retarded offenders are less culpable than other offenders because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."⁵ This same reasoning must logically extend to persons suffering from a severe mental disability or disorder that significantly impairs their cognitive or volitional functioning at the time of the capital offense.

In 2006, the ABA adopted a policy opposing imposition of the death penalty on persons who, at the time of the offense, suffered from a severe mental disability or disorder that affected their capacity or ability to "(1) to appreciate the nature, consequences or wrongfulness of their conduct; (2) to exercise rational judgment in relation to their conduct; or (3) to conform their conduct to the requirements of the law."⁶

Mental Illness after Sentencing

Concerns about a prisoner's mental competence and suitability for execution also arise long after the prisoner has been sentenced to death. Almost thirteen percent of all prisoners executed in the

⁴ For example, the AAIDD defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18." *FAQ on Intellectual Disability*, *supra* note 1. The DSM defines a person as mentally retarded if, before the age of 18, he or she exhibits "significantly subaverage intellectual functioning and concurrent deficits or impairments in present adaptive functioning." AM. PSYCHIATRIC ASS'N, *supra* note 3, at 39.

⁵ 536 U.S. at 318.

⁶ ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7-8, 2006), *available at* http://www2.americanbar.org/sdl/Documents/2006_AM_122A.pdf.

modern death penalty era have been “volunteers,” or prisoners who elected to forgo all available appeals.⁷ When a prisoner seeks to forgo or terminate post-conviction proceedings, jurisdictions should implement procedures that will ensure that the prisoner fully understands the consequences of that decision, and that the prisoner’s decision is not the product of his/her mental illness or disability.

Irrespective of a state’s law on the application of the death penalty to offenders with mental retardation or mental illness, mental disabilities and disorders can affect every stage of a capital trial. Evidence of mental illness 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, defense attorney, or jury is 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.

Juries often mistakenly treat mental illness as an aggravating factor rather than a mitigating factor in capital cases. States, in turn, have often failed to monitor or correct such unintended and unfair results. For example, a state’s capital sentencing statute may provide a list of mitigating factors that implicate mental illness, such as whether the defendant was under “extreme mental or emotional disturbance” or whether the defendant had the capacity to “appreciate the criminality (wrongfulness) of his[/her] conduct” at the time of the offense; however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness.⁸ One study found specifically that jurors’ consideration of “extreme mental or emotional disturbance” in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a capital defendant when it is considered in the context of determining “future dangerousness,” a criterion for imposing the death penalty in some jurisdictions. One study showed that a judge’s instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. This perception unquestionably affects decisions in capital cases. In addition, the medication some mentally ill defendants receive during trial often causes them to appear detached and unremorseful. This, too, can lead jurors to impose a sentence of death.

⁷ John Blume, *Killing the Willing: Volunteers, Suicide, and Competency*, 103 MICH. L. REV. 939, 959 (2005).

⁸ State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under “extreme mental or emotional disturbance” at the time of the offense; (2) whether “the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;” and (3) whether “the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his[/her] conduct.” MODEL PENAL CODE § 210.6(1)(f), 4(b), (d), (g) (1962). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 4, 2010, <http://www.nytimes.com/2010/01/05/us/05bar.html> (last visited on July 11, 2011).

I. FACTUAL DISCUSSION: KENTUCKY OVERVIEW

A. Mental Retardation

In 1990, the Kentucky General Assembly adopted section 532.140 of the Kentucky Revised Statutes (KRS), prohibiting the imposition of the death penalty on an offender who was seriously mentally retarded at the time of the offense.⁹ Section 532.140 allows a capital defendant to raise his/her mental retardation as a bar to execution in a pretrial motion, as long as the defendant's trial commenced after the law's effective date on July 13, 1990.¹⁰ Death row inmates sentenced prior to 1990 may raise mental retardation claims in post-conviction proceedings.¹¹

1. Definition of Mental Retardation

KRS 532.130 defines a “seriously mentally retarded defendant” as an individual with “significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period.”¹²

The KRS defines significant subaverage intellectual functioning as an intelligence quotient (IQ) of seventy or below.¹³ The Kentucky Supreme Court has interpreted the statute to include mildly and moderately mentally retarded offenders as well as “seriously mentally retarded” offenders.¹⁴ KRS 532.130 imposes a strict IQ maximum of seventy; therefore, a capital defendant with an IQ in the low to mid-seventies may be sentenced to death.¹⁵ Trial courts are not required to consider a potential rate of error in determining a defendant's IQ.¹⁶

The KRS does not provide a definition of “adaptive behavior.” In *Bowling v. Commonwealth*, the Kentucky Supreme Court held that Kentucky's statutory scheme on mental retardation generally conforms to the clinical definitions established by the American Association on Mental Retardation and the American Psychiatric Association, as described in *Atkins v. Virginia*.¹⁷ In addition, the statute requires a capital defendant to show two or more deficits in adaptive

⁹ KY. REV. STAT. ANN. § 532.140 (West 2011) (effective July 13, 1990) (originally enacted as 1990 Ky. Enact. Acts, ch. 488 § 3 (S.B. 172)).

¹⁰ KY. REV. STAT. ANN. § 532.140(3) (West 2011); *Bowling v. Commonwealth*, 163 S.W.3d 361, 371–72 (Ky. 2005) (noting that *Bowling* had procedurally defaulted on mental retardation claim because he failed to raise the issue at his original trial that began on December 10, 1990).

¹¹ *Bowling*, 163 S.W.3d at 371. *See also infra* notes 37–60 and accompanying text.

¹² KY. REV. STAT. ANN. § 532.130(2) (West 2011).

¹³ *Id.* *See also* KY. REV. STAT. ANN. § 504.020(2) (West 2011) (clarifying that mental illness or mental retardation does not include an abnormality manifested only by “repeated criminal or otherwise antisocial conduct”); KY. REV. STAT. ANN. § 504.060(7) (West 2011) (adding that mental retardation is a condition which may exist concurrently with mental illness or insanity).

¹⁴ *Bowling*, 163 S.W.3d at 373 (“[T]he fact that our statute refers to persons with IQs of 70 or below as ‘severely’ mentally retarded does not change the fact that an IQ of 70 or below includes the mildly, moderately, severely and profoundly mentally retarded” per the AAMR and DSM-IV definitions of mental retardation”).

¹⁵ *Bowling*, 163 S.W.3d at 376 (“The General Assembly's adoption of a bright-line maximum IQ of 70 as the ceiling for mental retardation ‘generally conform[s]’ to the clinical definitions approved in *Atkins*, thus does not implicate the Eighth Amendment's proscription against ‘cruel and unusual’ punishment.”).

¹⁶ *Bowling v. Commonwealth*, 163 S.W.3d 361, 375–76 (Ky. 2005).

¹⁷ *Bowling*, 163 S.W.3d at 370, 375; *Atkins v. Virginia*, 536 U.S. 304 (2002).

behavior.¹⁸ *Atkins* defines deficits in adaptive behavior as significant limitations in “at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. . . .”¹⁹

Finally, while the KRS does not provide a definition of the “developmental period” in which the offender’s alleged mental retardation must have been diagnosed, the *Bowling* Court noted that “mental retardation is a developmental disability that becomes apparent before adulthood.”²⁰

2. Pretrial Procedures for Raising Mental Retardation Claims

A capital defendant must provide pretrial notice if s/he intends to raise mental retardation as a bar to imposition of a death sentence.²¹ The defendant must also provide pretrial notice if s/he intends to present any expert testimony relating to his/her mental condition during trial or at sentencing.²²

a. Pretrial Determination to Exclude the Death Penalty as a Sentencing Option

Pursuant to KRS 532.135, a capital defendant may raise the issue of mental retardation as a bar to execution by filing a motion, at least thirty days prior to trial, seeking a pretrial determination from the court that the defendant is “seriously mentally retarded.”²³ The trial judge, not the jury, must determine whether a defendant has mental retardation, and is therefore ineligible for the death penalty “at least ten days before the beginning of the trial.”²⁴

Once the defendant raises the issue of mental retardation, the trial court must determine whether to conduct an evidentiary hearing.²⁵ The defendant must make “at least a prima facie showing that the defendant may, in fact, be mentally retarded.”²⁶ To meet the prima facie standard, the “defendant must produce some evidence creating a doubt as to whether he is mentally retarded.”²⁷ If the court denies the defendant an evidentiary hearing, on direct appeal, the

¹⁸ *Bowling*, 163 S.W.3d at 370 n.8 (“Use of the word ‘deficits,’ as opposed to ‘deficit,’ reflects a legislative intent to require ‘two or more deficits,’ in accordance with the definitions formulated by the AAMR and the American Psychiatric Association.”).

¹⁹ *Bowling*, 163 S.W.3d at 368 (citing *Atkins v. Virginia*, 536 U.S. 304, 314 (2002)).

²⁰ *Bowling*, 163 S.W.3d at 377.

²¹ KY. REV. STAT. ANN. § 532.135(1) (West 2011).

²² KY. REV. STAT. ANN. § 504.070(1) (West 2011).

²³ KY. REV. STAT. ANN. §§ 532.130(2), 532.135(1) (West 2011). The defense must file a motion to exclude death penalty because of mental retardation. See *Barnett v. Commonwealth*, 317 S.W.3d 49, 56 (Ky. 2010); KY. REV. STAT. ANN. § 532.135(1) (West 2011).

²⁴ KY. REV. STAT. ANN. § 532.135(2) (West 2011). In *Bowling*, the Kentucky Supreme Court found that there is “nothing unconstitutional or contrary to *Atkins* in the requirement in KRS 532.135 that mental retardation be determined prior to trial.” *Bowling v. Commonwealth*, 163 S.W.3d 361, 377 (Ky. 2005).

²⁵ *Bowling*, 163 S.W.3d at 384.

²⁶ *Bowling*, 163 S.W.3d at 383.

²⁷ *Bowling*, 163 S.W.3d at 384. In addition, if the court has concerns about a capital defendant’s mental capacity, the court, on its own motion, may order the defendant to be evaluated and tested, including IQ testing, at the Kentucky Correctional Psychiatric Center (KCPC). KY. REV. STAT. ANN. § 504.100 (West 2011); KY. R. CRIM. P. 8.06; *Bowling*, 163 S.W.3d at 384; *Edmonds v. Commonwealth*, No. 2007-SC-000350-MR, 2009 WL 4263142, at

Kentucky Supreme Court will review whether that denial resulted in a “fundamental miscarriage of justice.”²⁸

Only if the defendant makes a prima facie showing of mental retardation will the court conduct a full evidentiary hearing.²⁹ At the hearing, the defendant has the burden to allege and prove that s/he qualifies for the exemption, by presenting evidence to demonstrate his/her mental retardation, and the Commonwealth is permitted to present rebuttal evidence.³⁰ Both the defense and Commonwealth may produce documentary evidence, such as school test scores, and witnesses, such as psychologists or psychiatrists who have tested the defendant’s IQ and can testify as to the defendant’s IQ, the defendant’s adaptive behavior or social history, and when the mental retardation first manifested.³¹ Based on this evidence, the trial court must determine whether the defendant has proven, by a preponderance of the evidence, that s/he was mentally retarded at the time of the offense.³² The defendant may challenge the trial court’s decision on direct appeal.³³ Unless the defendant raised mental retardation as a bar to execution before trial, the issue will be waived and may not be raised on direct appeal.³⁴

If the trial court determines a defendant is mentally retarded, and the defendant is subsequently convicted of a capital crime, s/he will be subject to “imprisonment for life without benefit of probation or parole, or . . . imprisonment for life without benefit of probation or parole until [s/]he has served a minimum of twenty-five (25) years of his[/her] sentence, or to a sentence of life, or to a term of not less than twenty (20) years nor more than fifty (50) years.”³⁵

*11 (Ky. Nov. 25, 2009); *Woodall v. Commonwealth*, No. 2003-SC-000475-MR, 2005 WL 3131603, at *1 (Ky. Nov. 23, 2005).

²⁸ *Bowling*, 163 S.W.3d at 384 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); see also *Parrish v. Commonwealth*, 272 S.W.3d 161, 167 (Ky. 2008) (“If Appellant wanted to challenge the substance of the trial court’s ruling on [the defendant’s mental retardation claim], he should have done so in his direct appeal, not by means of an RCr 11.42 motion. ‘It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court.’”) (citing *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972)).

²⁹ *Bowling*, 163 S.W.3d at 383; KY. REV. STAT. ANN. § 532.135(1) (West 2011); see also *Skaggs v. Commonwealth*, 330 S.W.3d 52, 54 (Ky. 2005) (comparing the evidence of mental retardation in the instant case to *Bowling*, where no evidentiary hearing was deemed necessary based on the evidence available, and remanding to the trial court to hold an evidentiary hearing because “some evidence creating a doubt as to whether [Skaggs] is mentally retarded” existed).

³⁰ KY. REV. STAT. ANN. § 532.135(1) (West 2011) (placing the burden on the defendant to allege and prove that s/he or she qualifies for the exemption). See also *Bowling*, 163 S.W.3d at 370 (noting that Kentucky’s statutory scheme “places the burden on the defendant to allege and prove that he or she qualifies for the exemption, [] but does not establish the standard of proof applicable to that burden”).

³¹ KY. REV. STAT. ANN. § 532.135(1) (West 2011); KY. R. CRIM. P. 7.24; *Parrish v. Commonwealth*, 272 S.W.3d 161, 167 (Ky. 2008); *Skaggs*, 330 S.W.3d at 53–54.

³² *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005) (applying the preponderance of the evidence as the burden of proof).

³³ *Parrish*, 272 S.W.3d at 167.

³⁴ *Bowling*, 163 S.W.3d at 384.

³⁵ KY. REV. STAT. ANN. § 532.140(1) (West 2011) (specifying that the same sentencing procedures apply to seriously mentally retarded offenders who are subsequently convicted of the underlying capital offense); KY. REV. STAT. ANN. § 532.030(1) (West 2011) (listing the possible punishments). See, e.g., *Collett v. Commonwealth*, No. 2002-SC-1025-MR, 2004 WL 1907058, at *1 n.1 (Ky. Aug. 26, 2004) (noting that appellant’s mental retardation precluded the Commonwealth from seeking the death penalty).

Furthermore, if the capital defendant's mental retardation claim is raised and rejected, the defendant may nonetheless raise any legal defense related to his/her mental condition during trial, and may also offer evidence of mental retardation as a mitigating circumstance during the sentencing phase.³⁶

3. Post-Conviction Determinations of Mental Retardation

Death row inmates sentenced after July 13, 1990 may raise mental retardation as a bar to execution during post-conviction proceedings.³⁷ Death row inmates sentenced prior to the 1990 statutory ban may raise mental retardation in a successive collateral attack.³⁸

a. Procedures Applicable to Death Penalty Cases Conducted On or After 1990

A death row inmate sentenced after July 13, 1990 may raise his/her mental retardation as a bar to execution during post-conviction proceedings, via Kentucky Criminal Procedure Rule (RCr) 11.42.³⁹ A RCr 11.42 petition generally must be filed within three years after the judgment in the challenged case becomes final.⁴⁰ However, post-conviction relief will be barred if the issue has been previously determined or waived.⁴¹ Consequently, a petitioner sentenced to death after July 13, 1990, who had the opportunity to raise the issue of mental retardation at trial but failed to do so, will be barred from raising mental retardation as a bar to execution in his/her post-conviction petition.⁴² A death row inmate who raised mental retardation at trial is entitled to a hearing on his/her RCr 11.42 motion "if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record."⁴³

An inmate may also reopen his/her post-conviction proceedings through Kentucky Civil Procedure Rule (CR) 60.02, which provides relief on issues that could not have been raised at trial, on direct appeal, or by a motion for relief under RCr 11.42 on post-conviction review.⁴⁴ The Kentucky Supreme Court held that CR 60.02 "is an appropriate vehicle by which to seek

³⁶ KY. REV. STAT. ANN. § 532.135(4) (West 2011); *Bowling*, 163 S.W.3d at 381.

³⁷ KY. R. CRIM. P. 11.42(1); KY. R. CIV. P. 60.02; *Bowling*, 163 S.W.3d at 369.

³⁸ *Bowling v. Commonwealth*, 163 S.W.3d 361, 371 (Ky. 2005) ("[I]f a condemned mentally retarded offender had been tried prior to the effective date of the Kentucky Statutes, *Atkins* would exempt that offender from the death penalty.").

³⁹ KY. R. CRIM. P. 11.42(1). If the petition is denied, the death row inmate can appeal to the Kentucky Supreme Court as a matter of right. *See, e.g., Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008).

⁴⁰ KY. R. CRIM. P. 11.42(8), 11.42(10). *See also* KY. REV. STAT. ANN. § 532.075(1) (West 2011) (requiring the Kentucky Supreme Court to review all death sentences handed down by a trial court).

⁴¹ *See Bowling*, 163 S.W.3d at 372; *Leonard*, 279 S.W.3d at 154–55.

⁴² *Bowling*, 163 S.W.3d at 371–72. In *Bowling*, the Kentucky Supreme Court discusses the new constitutional right created in *Atkins* and noting that "[e]ven a constitutional right can be waived by failure to timely assert it." *Bowling*, 163 S.W.3d at 371 (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998)).

⁴³ *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); KY. R. CRIM. P. 11.42(5) (requiring a hearing "if the answer raises a material issue of fact that cannot be determined on the face of the record . . ."). *See also Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993) ("Even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing.") (citing *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990)).

⁴⁴ KY. R. CIV. P. 60.02; *Bowling v. Commonwealth*, 163 S.W.3d 361, 365 (Ky. 2005). Also available to death row inmates is Civil Procedure Rule 60.03, which provides equitable relief from a judgment in an independent action. *Bowling*, 163 S.W.3d at 365–66.

relief from a judgment that is no longer valid because it violates a constitutional right that was not recognized as such when the judgment was entered.”⁴⁵ This form of relief is available to death row inmates sentenced both before and after the 1990 statutory mental retardation exemption.⁴⁶

b. Procedures Applicable to Death Penalty Cases Conducted Before 1990

If a death row inmate was convicted and sentenced to death prior to Kentucky’s statutory ban on the execution of mentally retarded offenders in 1990, s/he may seek to raise the issue of mental retardation by reopening his/her post-conviction proceedings.⁴⁷

A petitioner may file for relief under RCr 11.42, despite the rule’s three-year statute of limitations, if the inmate proves that

- (1) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (2) the fundamental constitutional right asserted in the petition was not established within the statute of limitations provided in Rule 11.42 and the right has been held to apply retroactively.⁴⁸

If the motion qualifies under one of the above exceptions, the petition must be filed within three years after the event creating the exception occurred.⁴⁹

In 2005, the Kentucky Supreme Court held that *Atkins v. Virginia* retroactively applies to any condemned mentally retarded offender tried prior to the effective date of Kentucky’s mental retardation exemption statutes.⁵⁰ The Court noted that a claim of mental retardation for these offenders “may be asserted at any stage of the proceedings, presumably up to the moment of execution.”⁵¹

An inmate sentenced before July 13, 1990 who is seeking to reopen post-conviction proceedings must “produce some evidence creating a doubt as to whether he is mentally retarded.”⁵² In *Bowling*, despite evidence of low IQ scores, the Kentucky Supreme Court held that Bowling had “produced no evidence that creates a doubt as to whether he was mentally retarded.”⁵³ However, if the Court determines that there is some evidence that the petitioner was mentally retarded at

⁴⁵ *Bowling*, 163 S.W.3d at 365; KY. R. CIV. P. 60.02.

⁴⁶ *Bowling*, 163 S.W.3d at 365, 369–71. The Kentucky Supreme Court held that although the statutory ban does not apply retroactively, *Atkins* applies retroactively and thus permits a successive collateral attack. *Bowling*, 163 S.W.3d at 370–71.

⁴⁷ *Bowling*, 163 S.W.3d at 365; KY. R. CRIM. P. 11.42; KY. R. CIV. P. 60.02.

⁴⁸ KY. R. CRIM. P. 11.42(10)(a)–(b).

⁴⁹ KY. R. CRIM. P. 11.42(10).

⁵⁰ *Bowling v. Commonwealth*, 163 S.W.3d 361, 370–71 (Ky. 2005).

⁵¹ *Bowling*, 163 S.W.3d at 370.

⁵² *Bowling*, 163 S.W.3d at 384.

⁵³ *Bowling*, 163 S.W.3d at 384 (since the defendant produced evidence that his IQ ranged from seventy-four to eighty-seven, the court need not address whether the defendant had “substantial deficits in adaptive behavior”).

the time of the offense, it may set aside the death sentence and order the trial court to hold a new evidentiary hearing on the issue of the inmate's mental retardation.⁵⁴

If a hearing is granted, the death row inmate must prove by a preponderance of the evidence that s/he was mentally retarded at the time of the offense.⁵⁵ The petitioner may produce expert and lay witnesses, psychological examination reports, IQ tests, school records, and any other admissible, relevant information pertaining to the claim of mental retardation.⁵⁶ The Commonwealth may produce rebuttal witnesses and evidence to disprove the petitioner's claim and the defense may then provide additional rebuttal evidence.⁵⁷ If the court determines that the death row inmate is mentally retarded, it will hold a new sentencing hearing, excluding the death penalty as a sentencing option.⁵⁸ The Commonwealth has the right to appeal this determination.⁵⁹ Alternatively, if the court finds that the inmate is not mentally retarded, the inmate may be re-sentenced to death.

As of November 17, 2011, twelve of the thirty-five inmates currently on Kentucky's death row were originally sentenced to death prior to July 13, 1990.⁶⁰

B. *Mental Conditions other than Mental Retardation*

A capital defendant may introduce evidence regarding his/her mental condition in four instances under Kentucky law: (1) as an insanity defense, (2) as a plea or to compel a finding of "guilty but mentally ill," (3) to demonstrate that the defendant suffered from "extreme mental or emotional disturbance," and (4) as mitigation evidence during the sentencing phase of a capital trial.⁶¹

1. Definitions of Mental Conditions

a. Definition of Insanity

⁵⁴ *Skaggs v. Commonwealth*, 330 S.W.3d 52, 53–54 (Ky. 2005) (remanding the case back to the circuit court to hold an evidentiary hearing to determine whether the appellant is mentally retarded based on the fact that there is enough evidence "sufficient to entitle Appellant to an evidentiary hearing and a determination of the issue by the trial court"). See also *Bowling*, 163 S.W.3d at 384 (noting that the Court's denial of Bowling's request for an evidentiary hearing on his mental retardation and subsequent "[d]enial of an opportunity to further litigate this claim will not result in the fundamental miscarriage of justice").

⁵⁵ *Bowling*, 163 S.W.3d at 377, 382; *Skaggs*, 330 S.W.3d at 54 (noting that a hearing to determine mental retardation retrospectively is easier than determining competency "because mental retardation is generally a 'permanent, relatively static condition' once the person reaches adulthood and it would be 'rare for the condition to recede during the interim between the offense and the execution'" (citing *Bowling*, 163 S.W.3d at 377)).

⁵⁶ *Skaggs*, 330 S.W.3d at 54; *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005).

⁵⁷ *Skaggs*, 330 S.W.3d at 54.

⁵⁸ *Id.* at 54 ("The mental retardation issue pertains only to the penalty issue, thus should have been resolved prior to the commencement of the new penalty phase trial.").

⁵⁹ *Id.* at 55.

⁶⁰ *Profiles of Kentucky's Death Row Inmates*, KY. DEP'T OF CORR., <http://www.corrections.ky.gov/inmateinfo/deathrow.htm> (last visited Nov. 4, 2011). Two additional death row inmates, David Eugene Matthews and Miguel Soto, were also sentenced to death prior to 1990, but have recently had their death sentences overturned by an appellate court. Order, *Soto v. Commonwealth*, No. 99-CR-00041 (Oldham Cir. Ct. Jan. 31, 2011) (vacating death sentence); *Matthews v. Parker*, No. 09-5464, 2011 WL 2518895 (6th Cir. June 27, 2011) (vacating death sentence).

⁶¹ KY. REV. STAT. ANN. § 504.120, 532.025(2)(b) (West 2011); see KY. R. CRIM. P. 8.08, 8.12.

In 1975, the Kentucky General Assembly adopted legislation that made insanity an affirmative defense to prosecution.⁶² The KRS defines “insanity” as a “mental condition” characterized by a “lack of substantial capacity either to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law.”⁶³ The “mental condition” referenced in the insanity definition “must be a mental illness or mental retardation.”⁶⁴ The underlying mental illness “does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”⁶⁵ The defense must prove the defendant was insane at the time of the offense by a preponderance of the evidence.⁶⁶

b. Definition of Mentally Ill

An individual will be considered guilty but mentally ill under Kentucky law if s/he is found to have a “substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors.”⁶⁷ Thus, the mental illness does not reach the level of severity that would render a person insane.⁶⁸ Unlike insanity, mental illness does not absolve a defendant of criminal responsibility, but instead may entitle a convicted offender to treatment as “long as he remains mentally ill or until the expiration of his sentence.”⁶⁹

To be found guilty but mentally ill, the jury must determine that a) the prosecution has proven, beyond a reasonable doubt, that the defendant is guilty of an offense; and b) the defendant has proven, by a preponderance of the evidence, that s/he was mentally ill at the time of the offense.⁷⁰ Additionally, “[i]f the defendant waives his right to trial, the court may accept a plea of guilty but mentally ill if it finds that the defendant was mentally ill at the time of the offense.”⁷¹

c. Definition of Extreme Emotional Disturbance

⁶² See KY. REV. STAT. ANN. § 504.020 (West 2011) (effective Jan. 1, 1975).

⁶³ KY. REV. STAT. ANN. § 504.060(5) (West 2011).

⁶⁴ Lickliter v. Commonwealth, 142 S.W.3d 65, 68 (Ky. 2004).

⁶⁵ KY. REV. STAT. ANN. § 504.020(2) (West 2011).

⁶⁶ Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996) (reiterating the Court’s “dissatisfaction with use of the word ‘preponderance’ in jury instructions . . . [and] concluding that ‘use of the term ‘preponderance’ is redundant and bad practice, and that any attempted definition of ‘preponderance’ is perilous”) (citation omitted).

⁶⁷ KY. REV. STAT. ANN. § 504.060(6) (West 2011). In addition, the Kentucky Supreme Court has held that drug addiction, by itself, is not a disease constituting or leading to “mental illness.” Commonwealth v. Tate, 893 S.W.2d 368, 372 (1995).

⁶⁸ Brown, 934 S.W.2d at 247 (citing 1 Cooper *Kentucky Instructions to Juries* (Criminal) Defenses § 11.31 at 626 (1999)). A sentence of ‘guilty but mentally ill’ is available to defendants whose insanity defense does not satisfy the insanity standard. *Id.*

⁶⁹ McClellan v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986); KY. REV. STAT. ANN. § 504.150 (West 2011).

⁷⁰ KY. REV. STAT. ANN. § 504.130(1) (West 2011).

⁷¹ KY. REV. STAT. ANN. § 504.130(2) (West 2011).

Rather than relieving a defendant of criminal responsibility, proof of extreme emotional disturbance (EED) at the time of the offense reduces the degree of a homicide from murder to manslaughter.⁷² The Kentucky Supreme Court has clearly distinguished EED from mental illness or insanity, explaining that EED is a temporary state of mind due to a “sudden and uninterrupted . . . event which triggers the explosion of violence on the part of the criminal defendant.”⁷³

EED is based on a subjective reasonableness determined by the viewpoint of “a person in the defendant’s situation under the circumstances as the defendant believed them to be.”⁷⁴ Noting the absence of a statutory definition, the Kentucky Supreme Court has defined EED as “a temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.”⁷⁵ Evidence of a defendant’s mental condition is admissible to establish EED at the guilt phase.⁷⁶

d. Definition of Mental Condition at Sentencing

Evidence of mental illness is also relevant as mitigation during the capital sentencing phase.⁷⁷ Kentucky’s two statutory mitigating factors pertaining to mental condition and mental illness are whether (1) the defendant was under the influence of extreme mental or emotional disturbance, and (2) the capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was substantially impaired.⁷⁸ In addition to the statutory mitigating factors, the judge or jury may consider any aspect of a defendant’s character or mental health or any other circumstance “of the offense that the defendant proffers as a basis for a sentence less than death.”⁷⁹

2. Pretrial Procedures to Raise Insanity or Mental Illness

If a defendant intends to introduce any evidence relating to any mental condition relevant to guilt or punishment, s/he must provide written notice to the court and the Commonwealth at least

⁷² KY. REV. STAT. ANN. § 507.020(1)(a) (West 2011); *McClellan*, 715 S.W.2d at 469.

⁷³ *Hunt v. Commonwealth*, 304 S.W.3d 15, 34 (Ky. 2009) (citing *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991)).

⁷⁴ KY. REV. STAT. ANN. § 507.020(1)(a) (West 2011); *McClellan*, 715 S.W.2d at 469. The Court likened EED to the now-defunct “sudden heat of passion” provocation, noting that EED allows the provocation to be caused by any circumstance rather than limiting it to an act by the victim. *McClellan*, 715 S.W.2d at 469.

⁷⁵ *McClellan*, 715 S.W.2d at 468–69 (there is no statutory definition for EED). *See also* KY. REV. STAT. ANN. § 507.030(1) (West 2011); Eric Y. Drogin, *To the Brink of Insanity: “Extreme Emotional Disturbance” in Kentucky Law*, 26 N. KY. L.REV. 99, 107–08, 126 (1999) (“The only practical difference between [EED] and that of Kentucky’s ‘insanity’ defense is that the existence of some ‘triggering event’ is substituted for an extant ‘mental condition.’”).

⁷⁶ *See Coffey v. Messer*, 945 S.W.2d 944, 945–46 (Ky. 1997) (noting that EED is a defense to the extent that it precludes a conviction of murder).

⁷⁷ KY. REV. STAT. ANN. § 532.025(2)(b)(2) (West 2011).

⁷⁸ KY. REV. STAT. ANN. § 532.025(2)(b)(2), (2)(b)(7) (West 2011). Jury instructions at the sentencing phase of a capital trial state that the jury may consider evidence pertaining to both of these statutory mitigating factors, even if the evidence presented at trial “was not sufficient to constitute a defense to the crime.” 1 W. COOPER & D. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES (Criminal) § 12.05 (5th ed. 2010).

⁷⁹ *Parrish v. Commonwealth*, 272 S.W.3d 161, 174 (Ky. 2008) (internal citation omitted).

twenty days prior to trial.⁸⁰ Failure of the defense to provide pretrial notice may result in the exclusion of any evidence on the issue, including expert testimony.⁸¹ At least ten days prior to trial, the Commonwealth is required to “file the names and addresses of witnesses it proposes to offer in rebuttal, along with reports prepared by its witnesses.”⁸²

a. Examination of the Defendant

Once the defendant has provided notice of his/her intent to present evidence of his/her mental condition, the trial court may order a mental examination of the defendant, either upon the Commonwealth’s request or by its own motion.⁸³ The court will appoint “at least one psychologist or psychiatrist to examine, treat, and report on the defendant’s mental condition” and the defendant may be committed to the Kentucky Correctional Psychiatric Center for up to thirty days for this purpose.⁸⁴ A psychologist or psychiatrist retained by the defense may participate in the examination.⁸⁵ A defendant must submit to the court-ordered examination or, if the defendant refuses, the court may exclude any evidence offered by the defense on the issue.⁸⁶

The defendant is not entitled to have counsel present at the mental examination.⁸⁷ No statement made by the defendant during the course of the examination, or any expert testimony based on that statement, is admissible into evidence against the defendant in any criminal proceeding, unless the defendant first introduces testimony on the particular issue.⁸⁸ Information revealed by the defendant during the examination that relates to punishment will be disclosed to both parties if the defendant is found guilty.⁸⁹

At any time, the defendant may withdraw his/her notice of intent to offer expert mental condition testimony.⁹⁰ If the defendant withdraws the notice of intent, any evidence of the intent to raise the existence of a mental condition is not admissible in any proceeding against the defendant.⁹¹

⁸⁰ KY. REV. STAT. ANN. § 504.070(1) (West 2011); KY. R. CRIM. P. 7.24(3)(B)(i) (“at least 20 days prior to trial or at such later time as the court may direct”).

⁸¹ KY. R. CRIM. P. 7.24(3)(C).

⁸² KY. REV. STAT. ANN. § 504.070(4) (West 2011).

⁸³ KY. REV. STAT. ANN. § 504.070(2) (West 2011); KY. R. CRIM. P. 7.24(3)(B)(ii). In addition, the court may order the defendant to submit to a mental examination by a court-appointed expert at any stage of a felony criminal proceeding including pretrial, trial, sentencing, or post-conviction, if the court has concerns about the defendant’s competency to stand trial. KY. REV. STAT. ANN. § 504.100(1) (West 2011).

⁸⁴ KY. REV. STAT. ANN. § 504.070(3) (West 2011). See also KY. REV. STAT. ANN. § 504.080(1)–(2) (West 2011).

⁸⁵ KY. REV. STAT. ANN. § 504.080(5) (West 2011).

⁸⁶ KY. R. CRIM. P. 7.24(3)(C). The Kentucky Supreme Court has held that a pretrial mental examination is not a “compelled examination” because it is initiated by the defendant’s notice of intent to introduce mental condition evidence. *Bishop v. Caudill*, 118 S.W.3d 159, 164 (Ky. 2003).

⁸⁷ *Cain v. Abramson*, 220 S.W.3d 276, 281 (Ky. 2007) (holding that the defendant does not have the right to have counsel present at the mental examination because it is not a “critical stage” of a criminal proceeding); see also *Coffey v. Messer*, 945 S.W.2d 944, 947 (Ky. 1997) (noting that defendant’s Sixth Amendment rights are protected because the defendant gets advance notice of the examination and an opportunity to consult with defense counsel before the examination occurs).

⁸⁸ KY. R. CRIM. P. 7.24(3)(B)(ii). See also *Bishop*, 118 S.W.3d at 164 (noting that defendant’s Fifth Amendment rights are protected by the language contained in Rule 7.24(3)(B)(ii)); *Coffey*, 945 S.W.2d at 947.

⁸⁹ KY. R. CRIM. P. 7.24(3)(B)(ii). The parties may also agree to other terms of disclosure. *Id.*

⁹⁰ KY. R. CRIM. P. 7.24(3)(D).

3. Trial Proceedings

Kentucky law allows a capital defendant to plead guilty, not guilty, or guilty but mentally ill.⁹² An insanity defense is raised under a general plea of not guilty.⁹³

a. Insanity

During a criminal trial, a defendant must prove by a preponderance of the evidence that s/he was insane at the time of the offense.⁹⁴ The defendant may introduce mental health expert testimony as well as lay witness testimony and other evidence regarding the defendant's insanity or mental condition at the time of the offense.⁹⁵ The Commonwealth, in turn, may introduce its own mental condition evidence, including expert and lay witness testimony, to refute the defense experts' conclusions.⁹⁶ The Commonwealth also may introduce statements made by the defendant during his/her pretrial mental examination to impeach or rebut evidence previously proffered concerning the defendant's mental state.⁹⁷ The defense also has the opportunity to rebut the Commonwealth's evidence or impeach the Commonwealth's testimony.⁹⁸

If any evidence on insanity is presented at trial, the trier of fact must make a determination about the capital defendant's sanity or insanity.⁹⁹ The trial judge must instruct the jury on the relevant areas of law and the possible verdicts that the evidence may support.¹⁰⁰ If there is enough evidence to support an insanity verdict, the judge must instruct the jury to state a finding of insanity; alternatively, the judge will instruct the jury to reject the insanity defense if it finds the defendant guilty but mentally ill.¹⁰¹

Additionally, either party may request the judge to instruct the jury on the procedural disposition of the defendant upon either a verdict of not guilty by reason of insanity or guilty but mentally ill.¹⁰² The judge must inform the jury that if a defendant is found not guilty by reason of

⁹¹ *Id.*

⁹² KY. R. CRIM. P. 8.08, 8.12. Kentucky Criminal Procedure Rule 8.12 limits available pleas in a criminal case to pleas of guilty, guilty but mentally ill, and not guilty. KY. R. CRIM. P. 8.12.

⁹³ KY. R. CRIM. P. 8.08, 8.12, 9.90; KY. REV. STAT. ANN. § 504.120 (West 2011). Although the Commonwealth allows a specific verdict of not guilty by reason of insanity, there is no special plea of "not guilty by reason of insanity." KY. R. CRIM. P. 8.12.

⁹⁴ *Brown v. Commonwealth*, 934 S.W.2d 242, 247 (Ky. 1996); KY. REV. STAT. ANN. § 500.070(3) (West 2011); KY. R. CRIM. P. 9.42(d).

⁹⁵ See KY. REV. STAT. ANN. § 504.020 (West 2011); KY. R. CRIM. P. 7.24(3)(B)(i)–(ii). See generally *Woodall v. Commonwealth*, 63 S.W.3d 104, 126–27 (Ky. 2001) (mental health evidence offered by defendant pursuant to KRS 504.070 may relate to guilt or mitigation); *Brown*, 934 S.W.2d at 248 (lay witness testimony admissible on the defendant's sanity).

⁹⁶ KY. R. CRIM. P. 9.42(c)–(e); KY. REV. STAT. ANN. § 504.070(4) (West 2011). However, "expert witnesses are not required to be rebutted by expert witnesses." *Conley v. Commonwealth*, No. 2006-SC-000427-MR, 2007 WL 2404510, at *3 (Ky. Aug. 23, 2007).

⁹⁷ KY. R. CRIM. P. 7.24(3)(B)(ii).

⁹⁸ *Brown*, 934 S.W.2d at 247.

⁹⁹ *Cannon v. Commonwealth*, 777 S.W.2d 591, 593 (Ky. 1989).

¹⁰⁰ KY. R. CRIM. P. 9.54(1); *Jenkins v. Commonwealth*, 413 S.W.2d 624, 626 (Ky. 1966).

¹⁰¹ KY. R. CRIM. P. 9.90(1), 9.55; *Brown v. Commonwealth*, 934 S.W.2d 242, 247 (Ky. 1996).

¹⁰² KY. R. CRIM. P. 9.55; see also *Brown*, 934 S.W.2d at 245–46.

insanity, the court may order the defendant to be involuntarily hospitalized under Kentucky's statutory civil commitment procedures on its own motion or on motion by the Commonwealth.¹⁰³ Alternatively, the judge must instruct the jury that a defendant found guilty but mentally ill will be sentenced as any other offender and that "treatment shall be provided [to] the defendant until the treating professional determines that such treatment is no longer necessary or until the expiration of his sentence, whichever occurs first."¹⁰⁴

Upon a verdict of not guilty by reason of insanity, the court may order the defendant to be detained for ten days and examined to determine whether s/he meets the criteria for a civil commitment.¹⁰⁵ A defendant found not guilty by reason of insanity may be civilly committed only if s/he is found to be a danger to him/herself or others.¹⁰⁶ Upon a determination of dangerousness, a petition may be filed to involuntarily hospitalize the acquitted defendant for a period of sixty days or 360 days.¹⁰⁷ However, at the time of the verdict, if "there are no reasonable grounds for the court to believe the defendant will cause injury to himself or others if not immediately restrained, [then] even the short-term, temporary commitment . . . cannot be ordered."¹⁰⁸

Once involuntarily hospitalized, a defendant or his/her friend, relative, guardian, representative, or attorney, may at any time and without notice file for a writ of habeas corpus in the circuit court to challenge the legality of the detention.¹⁰⁹ When the hospitalized patient no longer meets the criteria for involuntary civil commitment, an authorized staff physician shall discharge him/her.¹¹⁰ At discharge, the administrator of the forensic psychiatric facility must notify "the law enforcement agency in the county to which the person is to be released, the prosecutor in the county where the violent crime was committed, and the Department of Corrections."¹¹¹

b. Guilty but Mentally Ill

A capital defendant may be found guilty but mentally ill after a jury trial or the accused may waive his/her right to a jury trial and enter a plea of "guilty but mentally ill."¹¹² At trial, a capital defendant may be found guilty but mentally ill if "(1) [t]he prosecution proves beyond a

¹⁰³ KY. REV. STAT. ANN. § 504.030(1) (West 2011).

¹⁰⁴ KY. REV. STAT. ANN. § 504.150 (West 2011); *Brown*, 934 S.W.2d at 246 (suggesting that although the "bare bones" instruction reflecting the exact language of KRS 504.150 is constitutional, if it is truly uncertain that a guilty but mentally ill inmate will actually receive treatment, this uncertainty should be reflected in the dispositional instruction). For more information on guilty but mentally ill, *see infra* notes 112–129 and accompanying text.

¹⁰⁵ KY. REV. STAT. ANN. § 504.030 (West 2011).

¹⁰⁶ KY. REV. STAT. ANN. § 202A.026 (West 2011) (stating that to be involuntarily hospitalized, a mentally ill person presents a danger to him/herself or others, can reasonably benefit from treatment, and "[f]or whom hospitalization is the least restrictive mode of treatment presently available").

¹⁰⁷ KY. REV. STAT. ANN. § 202A.051(1) (West 2011). A petition for involuntary hospitalization of a person may be filed by a qualified mental health professional, peace officer, county or Commonwealth attorney, spouse, relative, friend or guardian or any other interested party. KY. REV. STAT. ANN. § 202A.051(3) (West 2011).

¹⁰⁸ *Edwards v. Commonwealth*, 554 S.W.2d 380, 384 (1977).

¹⁰⁹ KY. REV. STAT. ANN. § 202A.151 (West 2011).

¹¹⁰ KY. REV. STAT. ANN. § 202A.171 (West 2011).

¹¹¹ KY. REV. STAT. ANN. § 202A.410(1) (West 2011) (requiring notification at the discharge of someone "who has been charged with or convicted of a violent crime").

¹¹² KY. REV. STAT. ANN. § 504.120(4), 504.130 (West 2011) (effective July 15, 1982); KY. R. CRIM. P. 8.08.

reasonable doubt that the defendant is guilty of an offense; and (2) [t]he defendant proves by a preponderance of the evidence that [s/]he was mentally ill at the time of the offense.”¹¹³ Similar to cases where an insanity defense is raised, the defendant may introduce mental health evidence, including expert and lay witness testimony, regarding the defendant’s mental condition at the time of the offense.¹¹⁴ The Commonwealth may introduce evidence and testimony on the defendant’s mental condition to impeach or refute evidence offered by the defense, and the defense will be provided with the opportunity to present rebuttal evidence.¹¹⁵ At the request of either party, the judge must instruct the jury on the procedural consequences of a guilty but mentally ill verdict.¹¹⁶

In lieu of trial, the court may accept a plea of guilty but mentally ill, and can do so “without the acquiescence of the Commonwealth.”¹¹⁷ The trial court must make findings of fact with respect to the defendant’s mental illness before accepting the plea.¹¹⁸ If the court refuses to accept a plea of guilty but mentally ill, the court may accept a plea of guilty or enter a plea of not guilty.¹¹⁹ At any time prior to judgment, the defendant is permitted to withdraw a plea of guilty but mentally ill and substitute a plea of not guilty.¹²⁰ If the court accepts a guilty plea, including a plea of guilty but mentally ill, the capital offender can choose whether to be sentenced by the trial judge or a jury.¹²¹

If a defendant is found guilty but mentally ill, the court may appoint at least one psychologist or psychiatrist to examine, treat and report on the defendant’s mental condition at sentencing.¹²² An offender found guilty but mentally ill is sentenced as any other guilty defendant,¹²³ and will

¹¹³ KY. REV. STAT. ANN. § 504.130(1) (West 2011).

¹¹⁴ KY. R. CRIM. P. 7.24(3)(B)(i); *Mitchell v. Commonwealth*, 781 S.W.2d 510, 512 (Ky. 1989) (discussing the evidence supporting the guilty but mentally ill verdict, which included case records and notes of social workers and psychiatric expert testimony).

¹¹⁵ KY. R. CRIM. P. 7.24(3)(B)(ii), 9.42; *Conley v. Commonwealth*, No. 2006-SC-000427-MR, 2007 WL 2404510, at *3 (Ky. Aug. 23, 2007).

¹¹⁶ KY. R. CRIM. P. 9.55; *Brown v. Commonwealth*, 934 S.W.2d 242, 246–47 (Ky. 1996) (where a defendant challenged the constitutionality of a GBMI verdict, although the Kentucky Supreme Court refused to make a determination on the verdict citing an insufficient record); *see supra* note 102–105 and accompanying text.

¹¹⁷ KY. REV. STAT. ANN. § 504.130(2) (West 2011); KY. R. CRIM. P. 8.08 (“The court may refuse to accept a plea of guilty or guilty but mentally ill, and shall not accept the plea without first determining that the plea is made voluntarily and with understanding of the nature of the charge.”); *Commonwealth v. Ryan*, 5 S.W.3d 113, 116 (Ky. 1999) (finding that the Court may accept a plea of guilty but mentally ill over the Commonwealth’s objections), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

¹¹⁸ KY. REV. STAT. ANN. § 504.130(2) (West 2011); *Ryan*, 5 S.W.3d at 115 (requiring findings of fact before accepting a guilty but mentally ill plea).

¹¹⁹ KY. R. CRIM. P. 8.10; Julia Hunter, *Kevin Dunlap pleas guilty to Trigg slayings*, KY. NEW ERA, Feb. 9, 2010, http://www.kentuckynewera.com/web/news/article_989977fc-2709-54dc-adce-07e88581628d.html (last visited July 11, 2011).

¹²⁰ KY. R. CRIM. P. 8.10.

¹²¹ KY. R. CRIM. P. 9.84(2).

¹²² KY. REV. STAT. ANN. § 504.140 (West 2011). *But see Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (where the Kentucky Supreme Court interprets KRS 504.140 to require the appointment of a psychologist to examine a defendant found GBMI prior to sentencing, despite the absence of statutory language mandating the appointment).

¹²³ *See* KY. REV. STAT. ANN. § 504.150 (West 2011). However, the DOC can initiate commitment proceedings for any inmate the DOC deems to need mental health care at the expiration of his sentence. *See* KY. REV. STAT. ANN. § 196.065(2) (West 2011).

serve out his/her sentence in the same local jail or Department of Corrections facility as any other convicted defendant.¹²⁴ The Kentucky Supreme Court has explained that a “plea of guilty but mentally ill does not inherently limit the sentence that may be imposed but *may provide* for additional mental health treatment after the defendant is committed to a correctional facility.”¹²⁵ However, treatment is not guaranteed to mentally ill offenders, and the Court has acknowledged that the promise of treatment for defendants found guilty but mentally ill may not actually come to fruition.¹²⁶ After sentencing, the convicted defendant may be treated “until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence, whichever occurs first.”¹²⁷

The Kentucky Supreme Court has held that the Eighth Amendment does not preclude the imposition of a death sentence on a person with mental illness that does not rise to the level of insanity.¹²⁸ The Court has also noted that despite there being no prohibition on sentencing a guilty but mentally ill offender to death, the Commonwealth has never done so.¹²⁹

c. Evidence to Negate Mens Rea/Extreme Emotional Disturbance

A defendant may introduce evidence regarding his/her mental condition even if his/her state of mind at the time of the offense does not conform to the exact requirements of an insanity defense or a plea of guilty but mentally ill.¹³⁰ When a defendant is charged with a crime requiring specific intent, such as murder, the defendant may introduce evidence on his/her mental condition to prove that s/he did not have the requisite state of mind to commit the offense charged.¹³¹ The defendant may offer evidence to establish that s/he suffered from EED at the time of the offense, which could reduce the offense from murder to manslaughter.¹³²

¹²⁴ KY. REV. STAT. ANN. § 504.150(1) (West 2011). Kentucky’s DOC operates a forensic psychiatric facility to provide mental health care for prisoners in need of mental health treatment. KY. REV. STAT. ANN. § 196.065(1) (West 2011). If a sentenced inmate is “so mentally ill that he cannot be properly treated” at prison, the inmate will be transferred to the psychiatric facility until his condition allows him to return. KY. REV. STAT. ANN. § 202A.201(1)–(2) (West 2011).

¹²⁵ *Johnson v. Commonwealth*, No. 2006-000548-MR, 2008 WL 4270731, at *6 (Ky. Sept. 18, 2008) (emphasis added) (internal citation omitted).

¹²⁶ *See, e.g., Brown v. Commonwealth*, 934 S.W.2d 242, 246 (Ky. 1996); *Mitchell v. Commonwealth*, 781 S.W.2d 510, 513–14 (Ky. 1990) (Leibson, J., dissenting) (declaring that the guilty but mentally ill verdict is “essentially meaningless and inherently confusing . . . [and] is, for all practical purposes, empty of legal consequence . . .”); *Brown*, 934 S.W.2d at 250 (Furkin, J., concurring) (“the legislature has consistently failed to provide adequate funding, [so] the reality is that treatment for those found GBMI is uncertain if not existent”).

¹²⁷ KY. REV. STAT. ANN. § 504.150(1) (West 2011). *See also* KY. REV. STAT. ANN. § 504.150(2) (West 2011) (providing that such “[t]reatment shall be a condition of probation, shock probation, conditional discharge, parole, or conditional release so long as the defendant requires treatment for his mental illness in the opinion of his treating professional”).

¹²⁸ *Johnson*, 2008 WL 4270731, at *6.

¹²⁹ *Id.* at *5.

¹³⁰ *See generally* *Wellman v. Commonwealth*, 694 S.W.2d 696, 697 (Ky. 1985) (distinguishing guilty but mentally ill and the requirement of an initiating circumstance for EED); *Coffey v. Messer*, 945 S.W.2d 944, 945–46 (Ky. 1997) (discussing expert mental health testimony used to prove EED).

¹³¹ KY. REV. STAT. ANN. § 507.020(1) (West 2011); *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986).

¹³² *Coffey*, 945 S.W.2d at 946.

The Commonwealth is permitted to provide rebuttal and impeachment evidence and the defense has the opportunity to impeach or rebut the Commonwealth's evidence.¹³³ At a jury trial, the judge then instructs the jurors on the relevant statutes and the jury is left to determine whether EED existed at the time of the offense.¹³⁴

4. Sentencing Phase of Trial Proceedings

If the accused is found guilty of a capital-eligible offense, the court will hold a sentencing hearing to determine punishment.¹³⁵ Prior to the guilt phase of the trial or "at such other time as the court may direct upon reasonable notice to the parties," the defendant must provide written notice to the court and Commonwealth if s/he intends to introduce mental condition testimony at the sentencing phase of a criminal trial or the court may exclude such evidence.¹³⁶ Any expert testimony offered by the Commonwealth based upon the pretrial mental examination is inadmissible unless the defendant introduces testimony on the issue.¹³⁷ At the hearing, additional evidence in extenuation, mitigation and aggravation of punishment is presented to the trier of fact.¹³⁸

The defense may offer any relevant evidence, including documentary evidence and expert and lay testimony, as mitigation during this phase of a capital trial.¹³⁹ Admissible evidence includes (1) the defendant's background history and character; (2) the defendant's mental condition historically, currently, and at the time of the offense; and (3) any other evidence in support of leniency or tending to establish or rebut the statutory aggravating or mitigating circumstances.¹⁴⁰ Evidence of the defendant's mental condition is specifically relevant to the following statutory mitigating factors: (1) whether the defendant was under the influence of extreme mental or emotional disturbance; and (2) whether the capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was

¹³³ *Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2006) (discussing when the burden of affirmatively proving or disproving the elements of EED is on the defense or Commonwealth). If the defense produces evidence of the presence of EED, but there is also contrary evidence such that a jury could find the absence of EED beyond a reasonable doubt, then the issue of the presence or absence of EED is a jury question. *Id.*

¹³⁴ *Id.* at 82.

¹³⁵ KY. REV. STAT. ANN. § 532.025(1) (West 2011).

¹³⁶ KY. R. CRIM. P. 7.24(3)(B)(i) ("If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his guilt or punishment, the defendant shall, at least 20 days prior to trial or at such later time as the court may direct" file notice of such intention.); KY. REV. STAT. ANN. § 504.070(1) (West 2011).

¹³⁷ KY. R. CRIM. P. 7.24(3)(B)(ii); *see also Coffey v. Messer*, 945 S.W.2d 944, 948 (Ky. 1997) (noting the defendant "can preclude introduction of the Commonwealth's evidence by declining to introduce mental health evidence in his own behalf"). However, once the defendant is found guilty of a felony, any statement made by him/her during the pretrial mental examination pertaining to the issue of punishment may be disclosed to the attorneys of both parties, unless the parties agreed otherwise. KY. R. CRIM. P. 7.24(3)(B)(ii).

¹³⁸ KY. REV. STAT. ANN. § 532.025(2) (West 2011). The defendant may waive his right to jury sentencing and his right to present mitigation evidence. *Chapman v. Commonwealth*, 265 S.W.3d 156, 177, 179 (Ky. 2007).

¹³⁹ KY. REV. STAT. ANN. § 532.025(2)(b) (West 2011); *Bowling v. Commonwealth*, 981 S.W.2d 545, 550 (Ky. 1998) ("In the penalty phase, counsel introduced extensive evidence pertaining to Appellant's family history of mental illness, his childhood, his marital history, and his deteriorating mental condition in the period leading up to the murders.").

¹⁴⁰ KY. REV. STAT. ANN. § 532.025(2)(b) (West 2011).

substantially impaired.¹⁴¹ The Commonwealth may introduce evidence to rebut the defendant's mental condition evidence.¹⁴²

C. Competency for Post-Conviction Proceedings

1. Tolling of Post-Conviction Statute of Limitations and Competency to Proceed with Post-Conviction Relief

In order to apply for state post-conviction relief, a death row inmate must file a motion for collateral review, via RCr 11.42, within three years after the conviction becomes final.¹⁴³ Until 2011, it appeared that an RCr 11.42 petitioner could move to toll the three-year statute of limitations generally imposed on petitioners seeking post-conviction relief, based on a challenge to his/her competency during the three-year statute of limitations period.¹⁴⁴ Under this framework, the Kentucky Supreme Court would consider whether the alleged mental incapacity (1) was unknown to the inmate during the three-year limitation period, or (2) could not have been ascertained by the petitioner by the exercise of due diligence during the three-year statute of limitations.¹⁴⁵ The “critical inquiry remain[ed] whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence.”¹⁴⁶

However, in January 2011, the Commonwealth's new “prison mailbox rule,” governing when the statute of limitations is tolled by an incarcerated petitioner's filing of a notice of appeal, came into effect.¹⁴⁷ The new section of Criminal Procedure Rule 12.04 states that “[i]f an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid.”¹⁴⁸

In April 2011, the Kentucky Supreme Court held, in *Hallum v. Commonwealth*, that where post-conviction petitions were pending before the Court when the prison mailbox rule took effect, the statutory “prison mailbox rule” applies retroactively to defendants' motions for post-conviction

¹⁴¹ KY. REV. STAT. ANN. § 532.025(2)(b)(2), (2)(b)(7) (West 2011).

¹⁴² KY. REV. STAT. ANN. § 532.025(1)(a) (West 2011).

¹⁴³ KY. R. CRIM. P. 11.42(10) (limiting the permitted time of filing). Rule 11.42 allows prisoners in custody of the Commonwealth of Kentucky to challenge the legality of their sentence by moving the court that imposed the sentence to vacate, set aside, or correct it. *See generally* KY. R. CRIM. P. 11.42.

¹⁴⁴ KY. R. CRIM. P. 11.42(10); *Robertson v. Commonwealth*, 177 S.W.3d 789, 791–92 (Ky. 2005) (adopting an “equitable tolling remedy” in the context of a pro se prisoner mailing a Rule 11.42 petition), *overruled by* *Hallum v. Commonwealth*, Nos. 2009–SC–000762–DG, 2010–SC–000049–DG, 2011 WL 1620593, at *2 (Ky. Apr. 21, 2011). *See also* *Commonwealth v. Stacey*, 177 S.W.3d 813, 816–17 (Ky. 2005) (standard for tolling the statute of limitations due to incompetency).

¹⁴⁵ *Stacey*, 177 S.W.3d at 817.

¹⁴⁶ *Id.* at 817 (citing *Dunlap*, 250 F.3d at 1010); *Robertson*, 177 S.W.3d at 792; *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2008).

¹⁴⁷ KY. R. CRIM. P. 12.04(5), *adopted by* KY. SUP. CT. ORD. 2010-09 (effective Jan. 1, 2011).

¹⁴⁸ *Id.*

relief that were timely placed in the prison mail system, but filed in the trial court after the deadline expired.¹⁴⁹ The Court also held that, in light of the adoption and application of the prison mailbox rule, the judicially-created “equitable tolling remedy” is no longer necessary in the Commonwealth, and the Court expressly overruled the precedent creating such a remedy.¹⁵⁰ In light of *Hallum*, therefore, it is unclear whether a petitioner who has waived or withdrew his/her petition for post-conviction relief due to a mental disorder or disability that existed prior to the expiration of the statute of limitations may seek to interrupt the running of the statute of limitations based on the doctrine of “equitable tolling.”¹⁵¹

To date, since the enactment of the three-year statute of limitations on Rule 11.42 motions in 1994, Kentucky courts have not tolled the statute of limitations for this reason in any case.¹⁵²

2. Competency to Withdraw Petition for Post-Conviction Review

a. Withdrawal of State Proceedings

The Commonwealth of Kentucky has not enacted any rules to govern a third party’s challenge to a condemned inmate’s competency to waive post-conviction review or withdraw his/her post-conviction petition. Since the reinstatement of the death penalty, two death row inmates in Kentucky have withdrawn or waived their appeals, including their post-conviction proceedings.¹⁵³ In one instance, the death row inmate was executed without ever filing for post-conviction review; in the second, the inmate exhausted his state post-conviction appeals and waived his remaining habeas corpus review in federal court.¹⁵⁴

¹⁴⁹ *Hallum v. Commonwealth*, Nos. 2009–SC–000762–DG, 2010–SC–000049–DG, 2011 WL 1620593, at *2 (Ky. Apr. 21, 2011).

¹⁵⁰ *Hallum*, 2011 WL 1620593, at *3 (expressly overruling *Robertson v. Commonwealth*, 177 S.W.3d 789, 792 (Ky. 2005)) (“At the outset, we note that the application of the multi-factor equitable tolling test is arduous, requir[ing] that the trial court engage in a more robust examination of the circumstances.”) (citation omitted).

¹⁵¹ *See, e.g., Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005) (permitting tolling due to incompetency when petitioner is able to present evidence that his/her “alleged mental incapacity was either unknown to him[her] or could not have been ascertained by him[her] by the exercise of due diligence during the three-year limitations period of RCr 11.42(10)”; *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2008) (same); *Stiltner v. Commonwealth*, No. 2007-CA-002048-MR, 2009 WL 102975, at *2 (Ky. Ct. App. Jan. 16, 2009) (same). The statute of limitations for filing post-conviction claims under Criminal Procedure Rule 11.42 was not enacted until October 1, 1994. KY. R. CRIM. P. 11.42(10).

¹⁵² *See, e.g., Carneal*, 274 S.W.3d at 429 (Ky. 2008) (non-capital case); *Stacey*, 177 S.W.3d at 817 (non-capital case); *Stiltner*, 2009 WL 102975, at *2. Notably, several pro se petitioners seeking to toll the statute of limitations in non-capital cases have been unable to proffer sufficient evidence to be granted an evidentiary hearing, and consequently were not entitled to be appointed counsel. *See, e.g., Griffith*, 2006 WL 3040846 (pro se); *Moore*, 2008 WL 162853 (pro se); *see also Burke v. Campbell County Fiscal Court*, No.Civ.A.06-CV-191-DLB, 2006 WL 3627711 (E.D. Ky., Dec. 11, 2006) (pro se). In 1994, the Kentucky Supreme Court amended RCr 11.42 to require the filing of an 11.42 motion within three years (1) after the judgment becomes final, (2) after the facts upon which a previously undiscovered claim is predicated became known, or (3) after the “fundamental constitutional right asserted” was created. KY. R. CRIM. P. 11.42(10).

¹⁵³ *Harper v. Parker*, 177 F.3d 567, 537 (6th Cir. 1999); *Chapman v. Commonwealth*, 265 S.W.3d 156, 182–84 (Ky. 2007).

¹⁵⁴ *See generally Chapman*, 265 S.W.3d at 180; *Harper*, 177 F.3d at 569.

The only reported case addressing a death row petitioner's competency to withdraw his/her appeals in Kentucky courts indicates that death row inmates in Kentucky may waive or withdraw their petition for post-conviction relief by requesting the court to waive any remaining appeals and carry out his/her sentence.¹⁵⁵ An inmate's counsel may challenge the inmate's competency to withdraw and may file additional petitions for post-conviction relief on the inmate's behalf.¹⁵⁶ Upon an inmate's request for withdrawal or a competency challenge by counsel, the circuit court may order the inmate to undergo an evaluation "to determine the Petitioner's competence to direct his attorneys to cease legal actions on his behalf."¹⁵⁷ The court will then hold a hearing where defense counsel, the Commonwealth, and the inmate each have the right to present relevant evidence, including expert mental condition testimony, documentary evidence and reports, and testimony from counsel or the inmate him/herself.¹⁵⁸ The circuit court will then make findings of fact as to whether the petitioner has the

capacity to appreciate his[/her] position and make a rational choice with respect to continuing or abandoning further litigation on his[/her] behalf[,] . . . is not suffering from a mental disease, disorder, or defect which substantially affects his[/her] capacity to forego further legal proceedings on his[/her] behalf[,] . . . appreciates the legal consequences of [his/her] actions . . . [and] is capable of making decisions concerning his own defense and legal representation.¹⁵⁹

In the Franklin County case in which this issue arose, the circuit court found the inmate competent, granted the inmate's request, and entered an order prohibiting the counsel "from filing, in the Petitioner's name, undesired appeals or other legal actions, direct or collateral, attacking the Petitioner's conviction and sentence."¹⁶⁰ The inmate, Marco Allen Chapman, after being found competent on November 17, 2008, was executed four days later, on November 21, 2008.¹⁶¹

b. Withdrawal of Federal Proceedings

If the inmate moves to waive all further habeas corpus proceedings in federal court, the federal district court must also determine the death row inmate's competency.¹⁶² The district court will hold a preliminary hearing to determine whether there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally

¹⁵⁵ Order, *Chapman v. Pub. Advocacy*, No. 07-CI-01523 (Franklin Cir. Ct., Nov. 17, 2008). *See generally Harper*, 177 F.3d at 567.

¹⁵⁶ *See generally* Order, *Chapman v. Pub. Advocacy*, No. 07-CI-01523, at *1 (Franklin Cir. Ct., Nov. 17, 2008) (prohibiting DPA from filing "undesired appeals or other legal actions in the petitioner's name").

¹⁵⁷ *Id.* at *2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *3

¹⁶⁰ *Id.*

¹⁶¹ Order, *Chapman v. Pub. Advocacy*, No. 07-CI-01523, at *3 (Franklin Cir. Ct., Nov. 17, 2008); *Convicted Murderer Marco Allen Chapman Executed*, WAVE3.COM, <http://www.wave3.com/Global/story.asp?S=9396274> (last visited July, 18, 2011).

¹⁶² *Harper v. Parker*, 177 F.3d 567, 569 (6th Cir. 1999).

incompetent to waive his right to further appeals.”¹⁶³ Defense counsel challenging competency may present evidence supporting the inmate’s present incompetency, including mitigation specialists, medical reports or expert testimony from psychiatrists, psychologists, or other mental health professionals, medical and mental health records of the inmate’s immediate family, and testimony from the inmate’s former legal representation.¹⁶⁴ Other evidence may include the Kentucky State Penitentiary’s resident clinical psychologist or psychiatrist, the Warden of the Penitentiary, the death row supervisor, and other institutional staff who may testify to their impressions of the inmate.¹⁶⁵ The inmate may be permitted to testify on his own behalf.¹⁶⁶

If the federal district court finds that there is reasonable cause to believe a death row inmate is incompetent to waive habeas proceedings, the court must hold a full evidentiary hearing on the inmate’s competency.¹⁶⁷ At this hearing, the court will determine whether the inmate “lacks the capacity to appreciate his[her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand[,] . . . is suffering from a mental disease, disorder, or defect which may substantially affect his[her] capacity in the premises.”¹⁶⁸ If the court determines that the petitioner is competent to withdraw the petition, then it will order the withdrawal of post-conviction proceedings.¹⁶⁹

Neither the state nor federal courts have found a Kentucky death row inmate incompetent during post-conviction or habeas corpus since Kentucky reenacted the death penalty in 1976.

3. “Next Friend” Petitions on Behalf of the Incompetent

There is no statutory provision or case law permitting a “next friend”¹⁷⁰ to pursue post-conviction relief on behalf of an incompetent death row inmate in the Commonwealth of Kentucky. However, the KRS does permit a “next friend” to bring actions on behalf of “infants and persons of unsound mind” in civil cases and trusts and estates.¹⁷¹ In addition, KRS section 431.2135, which provides the procedures for challenging a condemned person’s sanity, expressly allows a death row inmate’s attorney to file a petition challenging the inmate’s sanity to be executed.¹⁷² Although not expressly permitting a “next friend” to file for post-conviction relief

¹⁶³ *Id.* at 571. The Sixth Circuit, following U.S. Supreme Court precedent, recognized that the standard which “determines a defendant’s competence to stand trial[] also applies in cases where the death row inmate seeks to forego further appeals.” *Id.* (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)).

¹⁶⁴ *Id.* at 569–70.

¹⁶⁵ *Id.* at 570.

¹⁶⁶ *Id.* at 570–71.

¹⁶⁷ *Id.* at 570. Conversely, a determination that a full evidentiary hearing is unnecessary due to a lack of reasonable cause to believe the death row inmate is incompetent will be reviewed for abuse of discretion. *Id.*

¹⁶⁸ *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

¹⁶⁹ *See Harper v. Parker*, 177 F.3d 567, 573 (6th Cir. 1999); Order, *Chapman v. Pub. Advocacy*, No. 07-CI-01523, at *3 (Franklin Cir. Ct., Nov. 17, 2008).

¹⁷⁰ A “next friend” is not a party to an action, but is an officer of the court, specially appearing to look after the interests of the person for whose benefit they appear. *See generally* Paul F. Brown, “Next Friends” as Enemies: *Third Party Petitions for Capital Defendants Wishing to Waive Appeals*, 81 J. CRIM. L. & CRIMINOLOGY 981 (1991).

¹⁷¹ KY. R. CIV. P. 17.03(1) (“Actions involving unmarried infants or persons of unsound mind shall be brought by the party’s guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action.”).

¹⁷² KY. REV. STAT. ANN. § 431.2135(1) (West 2011).

per se, Kentucky has seemingly contemplated a petition by a third party on behalf of an incompetent petitioner.

As a matter of federal law, however, a person may have standing as a “next friend” where the “real party in interest is unable to litigate his[her] own cause due to mental incapacity, lack of access to court, or other similar disability.”¹⁷³ The U.S. Supreme Court has held that, in a capital post-conviction proceeding, a “next friend” has standing to file a petition on behalf of a death row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the “next friend” can demonstrate that (1) the inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief, and (2) that s/he is “truly dedicated to the [death-sentenced inmate’s] best interests and shares a significant relationship” with the inmate.¹⁷⁴

D. Sanity to be Executed

Kentucky prohibits the execution of an inmate who is insane.¹⁷⁵ If the death row inmate does not understand (1) the fact of his/her impending execution, and (2) why s/he is to be executed, the inmate’s execution date will be suspended until s/he is restored to sanity.¹⁷⁶

Once an execution date is set, the condemned person, or his/her attorney, is permitted to file a motion for a stay of execution due to the inmate’s insanity.¹⁷⁷ The motion must be supported by two affidavits and must be filed in the circuit court in the county where the inmate was convicted or is currently incarcerated.¹⁷⁸ The Kentucky Attorney General must file a response within the time ordered by the circuit court.¹⁷⁹ Once the court receives the motion, it must appoint at least two mental health professionals to conduct an examination of the inmate.¹⁸⁰ The examiners are required to submit written evaluations to the court within ten days of the examination.¹⁸¹ Upon receiving the report, the court will then hold a hearing to determine the sanity of the condemned inmate.¹⁸² The inmate’s insanity must be shown by a preponderance of the evidence, and the court’s decision may be appealed by the inmate or the Commonwealth.¹⁸³

¹⁷³ *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). In fact, in *Harper*, the Sixth Circuit noted that the Kentucky Department of Public Advocacy (DPA) filed a petition noting the possibility of DPA filing a habeas corpus or next friend petition on behalf of Harper. *Harper*, 177 F.3d at 569.

¹⁷⁴ *Whitmore*, 495 U.S. at 163–64. See, e.g., *Harper*, 177 F.3d at 569; *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

¹⁷⁵ KY. REV. STAT. ANN. § 431.240(2) (West 2011). In 1986, the U.S. Supreme Court held in *Ford v. Wainwright* that the Eighth Amendment prohibited the execution of an insane offender who was sane when he committed the offense. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

¹⁷⁶ KY. REV. STAT. ANN. §§ 431.213(2), 431.2135(4), 431.240(2) (West 2011).

¹⁷⁷ KY. REV. STAT. ANN. § 431.2135(1) (West 2011).

¹⁷⁸ *Id.* A “condemned person” is “a person for whom a specific day of execution is fixed by a mandate from the Kentucky Supreme Court or a warrant signed by the Governor.” KY. REV. STAT. ANN. § 431.213(1) (West 2011).

¹⁷⁹ KY. REV. STAT. ANN. § 431.2135(1) (West 2011).

¹⁸⁰ KY. REV. STAT. ANN. § 431.2135(2) (West 2011) (authorizing the court to appoint a mental health expert to aid in the determination of the inmate’s sanity to be executed).

¹⁸¹ *Id.*

¹⁸² *Id.* See also KY. REV. STAT. ANN. § 431.240(2) (West 2011) (requiring any hearings authorized under authority of this section to be conducted in accordance with KRS Chapter 13B).

¹⁸³ KY. REV. STAT. ANN. § 431.2135(3) (West 2011).

If the court finds the condemned person insane, the inmate will be transferred to the Kentucky Correctional Psychiatric Center until s/he is restored to sanity.¹⁸⁴ The treating psychiatrist is required to report at least once monthly, to the court and the inmate's counsel, on the inmate's progress and whether there is a substantial probability that s/he will become sane.¹⁸⁵ Upon receipt of a report that the inmate has become sane, the court must schedule a mental health evaluation and hearing to determine the inmate's sanity.¹⁸⁶ The court's decision may be appealed to the Kentucky Supreme Court by either the inmate or the Commonwealth.¹⁸⁷

¹⁸⁴ KY. REV. STAT. ANN. § 431.2135(4) (West 2011). *See also* KY. REV. STAT. ANN. § 431.240(2) (West 2011) (“If the condemned person is insane, as defined in KRS 431.213 . . . on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity . . .”).

¹⁸⁵ KY. REV. STAT. ANN. § 431.2135(4) (West 2011) (requiring periodic review of the inmate's sanity). The treating psychiatrist is also required to report immediately upon a psychiatric determination of sanity. *Id.*

¹⁸⁶ KY. REV. STAT. ANN. § 431.2135(5) (West 2011).

¹⁸⁷ *Id.*

II. ANALYSIS – MENTAL RETARDATION

A. Recommendation #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD).¹⁸⁸ 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.

The American Association on Intellectual and Developmental Disabilities (AAIDD) defines mental retardation as a “disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills. This disability originates before the age of 18.”¹⁸⁹

Since 1990, the Commonwealth of Kentucky has prohibited the execution of offenders with mental retardation.¹⁹⁰ The Commonwealth defines mental retardation as “significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period” and is a condition which may exist concurrently with mental illness or insanity.¹⁹¹ The statute defines “significantly subaverage general intellectual functioning” as an intelligence quotient (IQ) of seventy or below.¹⁹²

The AAIDD definition of mental retardation requires an individual to have an impairment in general intellectual functioning that places him/her in the lowest category of the general population’s IQ scores. IQ scores alone are not precise enough to identify the upper boundary of mental retardation, and while experts generally agree that mental retardation includes everyone with an IQ score of seventy or below, the definition also includes some individuals with IQ scores in the low to mid-seventies.¹⁹³ The AAIDD explains that “since the standard error of

¹⁸⁸ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. *About Us*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_2383.cfm?navID=2 (last visited July 20, 2011). AAIDD, “with membership over 5,000 [] in the United States and in 55 countries worldwide” is “the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities.” *Id.*

¹⁸⁹ *FAQ on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aamr.org/content_104.cfm (last visited July 20, 2011).

¹⁹⁰ S.B. 172, 1990 Reg. Sess. (Ky.), codified as KY. REV. STAT. ANN. § 532.140 (West 2011) (effective July 13, 1990).

¹⁹¹ KY. REV. STAT. ANN. §§ 532.130(2), 504.060(7) (West 2011).

¹⁹² KY. REV. STAT. ANN. § 532.130(2) (West 2011). *See also* KY. REV. STAT. ANN. § 504.020(2) (West 2011) (clarifying that mental illness or mental retardation does not include an abnormality manifested only by “repeated criminal or otherwise antisocial conduct”); *Bowling v. Commonwealth*, 163 S.W.3d 361, 371, 373 (Ky. 2005) (explaining that Kentucky’s statutory scheme, creating an IQ ceiling of seventy for the exemption, was enacted in 1989 before the the U.S. Supreme Court barred the execution of the mentally retarded).

¹⁹³ *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY LAW REP. 11–24 (2003). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the

measurement on most IQ tests is approximately 5, the ceiling may go up to 75.”¹⁹⁴ The AAIDD specifically states that in calculating IQ, a five-point standard error of measurement must be used.¹⁹⁵ Thus, no state should impose an IQ maximum lower than seventy-five.¹⁹⁶

The Commonwealth of Kentucky, by creating a bright-line maximum IQ of seventy, fails to comport with the AAIDD definition of mental retardation.¹⁹⁷ The Kentucky Supreme Court has explicitly refused to permit application of a margin of error or standard deviation in calculating an inmate’s IQ, reasoning that the Kentucky General Assembly, in adopting the Commonwealth’s bar on the execution of offenders with mental retardation, deliberately rejected a requirement to calculate IQ in consideration of the five-point standard error of measurement or the Flynn Effect, a phenomenon that “as time passes and IQ test norms grow older, the mean IQ

inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 20 n.22; *see also Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_185.cfm (last visited July 20, 2011) (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement.”) However, an IQ score is only one aspect in determining if a person has mental retardation, as “significant limitations in adaptive behavior skills and evidence that the disability was present before age 18 are two additional criteria”); *Definition of Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_100.cfm?navID=21 (last visited July 20, 2011) (noting that “an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning”); *FAQ on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_104.cfm (last visited July 20, 2011) (noting that mental retardation is not just determined by an IQ test but also tests that determine limitations in adaptive behavior); AM. ASS’N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT* 5 (Ruth Luckasson, ed., 9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AM. ASS’N ON MENTAL DEFICIENCY, *CLASSIFICATION IN MENTAL RETARDATION* 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 48 (text rev. 4th ed. 2000) (“[I]t is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior.”).

¹⁹⁴ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_185.cfm?navID=62 (last visited July 20, 2011).

¹⁹⁵ *Id.*

¹⁹⁶ In *Atkins v. Virginia*, the U.S. Supreme Court noted that “an IQ between 70 and 75” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002).

¹⁹⁷ *Bowling v Commonwealth*, 163 S.W.3d 361, 376 (Ky. 2005) (noting “[t]he General Assembly’s adoption of a bright-line maximum IQ of 70 as the ceiling for mental retardation”). Furthermore, Kentucky courts typically do not examine the second prong of the AAIDD definition of mental retardation—the existence of deficits in adaptive behavior—until the defendant proves that s/he has an IQ of seventy or below. *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008). The Kentucky Supreme Court has held that a death row inmate could not make a prima facie showing that would warrant a discussion of the inmate’s deficits in adaptive behavior because his IQ test scores were eighty-four and seventy-nine. *Bowling*, 163 S.W.3d at 384 (emphasis added). *But see Commonwealth v. Paisley*, 201 S.W.3d 34, 36 (Ky. 1996) (discussing a trial court’s decision to order an evidentiary hearing based only on deficits in adaptive behavior and expert testimony on the defendant’s mental condition, even though the defense did not have evidence of an IQ test ever having been conducted).

score tested by the same norm will increase approximately three points per decade.”¹⁹⁸ The Commonwealth also fails to distinguish between an actual IQ and an *IQ test score*, which “is merely evidence of a person’s actual IQ.”¹⁹⁹

While it is in the court’s discretion to determine whether a capital defendant has mental retardation, Kentucky trial courts frequently rule that, based on the prosecution’s proffered testimony, a defendant’s IQ score within the range of mental retardation is a result of malingering or lack of motivation.²⁰⁰ For example, in *Parrish v. Commonwealth*, the defense presented evidence of the defendant’s deficits in adaptive behavior and the defendant’s IQ test score of sixty-eight, which was taken when the capital defendant was fifteen.²⁰¹ Despite the evidence of an IQ score within the range considered “severely mentally retarded” by the KRS, the trial court relied on the prosecution’s proffered explanation from a Kentucky Correctional Psychiatric Center (KCPC) expert, who testified that the test score of sixty-eight had been “the result of lack of motivation” and the defendant’s actual IQ was seventy-nine.²⁰² As such,

¹⁹⁸ *Bowling*, 163 S.W.3d at 374–75 (noting that “*Atkins* did not discuss margins of error”). See also John H. Blume, et al., *Symposium: An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009). Factors, such as the standard error of measurement or the *Flynn effect*, “that introduces unreliability into the [calculation] and render[] a defendant’s test score erroneously high” must be included in a determination of a death row inmate’s IQ. John H. Blume, et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL’Y 689, 695 (2009) [hereinafter Blume II] (“Courts and advocates must . . . be aware that not all IQ tests are equal, and they must be vigilant to ensure that the tests are scored properly,[] are current, and account for the standard statistical concepts of measurement error, practice effect, and . . . the Flynn effect.”).

¹⁹⁹ *Bowling*, 163 S.W.3d at 388 (Keller, J. dissenting) (“[I]t is not clear that the General Assembly intended an IQ test score of 70 or below to be a bright-line cutoff Kentucky’s statutory scheme includes no limitations on the types of evidence that a judge can consider in making a mental retardation determination, nor should it.”).

²⁰⁰ See *White v. Commonwealth*, 178 S.W.3d 470, 485–86 (Ky. 2005) (evidence of an IQ test score of sixty-eight was due to malingering, according to mental health expert); *Edmonds v. Commonwealth*, No. 2007-SC-000350-MR, 2009 WL 4263142, at *11 (Ky. Nov. 25, 2009) (trial court rejected mental retardation based on evidence of defendant’s IQ test scores of seventy-one, seventy-three, and sixty-six at a pretrial competency hearing, where the defense conceded that the scores presented evidence of malingering); *Dean v. Commonwealth*, 777 S.W.2d 900, 901–02 (Ky. 1989) (expert testified that defendant’s IQ was closer to eighty-one than previous scores of fifty-nine and forty-eight and fifty-one because, the expert opined, the lower scores may be the result of malingering), *overruled on other grounds by Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003). See also *Skaggs v. Commonwealth*, 330 S.W.3d 52, 54 (Ky. 2005) (upon post-conviction review, Kentucky Supreme Court held that IQ scores of sixty-four, sixty-five, and seventy-three should have at least entitled the capital defendant to an evidentiary hearing despite expert opinion that the defendant was malingering). Since *Atkins*, no Kentucky death row inmate has been found mentally retarded and had his/her sentence reversed. *Sentence Reversals in Intellectual Disability Cases*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases> (last visited July 20, 2011). However, we are aware of at least one instance where a Kentucky trial court judge eliminated the death penalty as a sentencing option for a capital defendant with an IQ between sixty-eight and seventy-four, during pretrial proceedings for the retrial of Fred Grooms, who initially received a death penalty for the murder of a female prison official, although this death sentence was later reversed on other grounds. DR. WILLIAM WILBANKS, TRUE HEROINES: POLICE WOMEN KILLED IN THE LINE OF DUTY THROUGHOUT THE UNITED STATES 1916-1999 69 (Limited ed. 2000).

²⁰¹ *Parrish*, 272 S.W.3d at 167–68.

²⁰² *Id.* In *Bowling v. Commonwealth*, the Kentucky Supreme Court never acknowledged the factual ambiguity over whether the inmate’s 1966 IQ test score was seventy-four or eighty-four, where the handwritten test result showed a “7” superimposed over an “8.” *Bowling*, 163 S.W.3d at 384–85. Instead, the court interpreted the score to mean eighty-four instead of seventy-four and ultimately concluded that the defense “presented *no evidence* that creates a doubt as to whether [the defendant] is mentally retarded.” *Bowling*, 163 S.W.3d at 384 (emphasis added); see also

mentally retarded offenders may be sentenced to death when courts deny the existence of mental retardation without an IQ test score of seventy or below and then discount or reject such IQ scores when they are provided.

Additionally, in order to ensure that an individual is truly disabled and not simply a poor test-taker or malingering, the AAIDD definition of mental retardation also includes adaptive behavior limitations, which produce real-world disabling effects on a person's life.²⁰³ Under this definition, adaptive behavior is "expressed in conceptual, social, and practical adaptive skills" and focuses on broad categories of adaptive impairment, not service-related skills areas.²⁰⁴

While Kentucky's definition of mental retardation requires that a defendant exhibit "deficits in adaptive behavior," Kentucky courts recognize the presence or absence of deficits in adaptive behaviors without describing the evidentiary basis for this conclusion.²⁰⁵ In the Commonwealth's seminal case on the limits of Kentucky's bar on the execution of mentally retarded offenders, *Bowling v. Commonwealth*, the Kentucky Supreme Court fails to describe what constitutes deficits in adaptive behavior, noting that because the inmate failed to produce evidence of an IQ test within the range of mental retardation, the Court "need not address whether he meets the 'substantial deficits in adaptive behavior' criterion of the definition."²⁰⁶ In another opinion rejecting an inmate's petition for post-conviction relief, the Kentucky Supreme Court observed that the defendant proffered evidence of "substantial deficits in adaptive behavior," but the Court included no information about what evidence of these deficits, if any, was presented in the case.²⁰⁷ It thus remains unclear how a capital defendant in Kentucky may demonstrate that s/he exhibits deficits in adaptive behavior.

The final prong of the AAIDD's definition of mental retardation requires that mental retardation manifest "during the developmental period," which generally is defined as up to the age of eighteen.²⁰⁸ This does not mean that an individual must have been IQ tested with scores in the

Bowling, 163 S.W.3d at 387 (Keller, J., dissenting) (illustrating the discrepancy by including the image of the test score in his dissenting opinion).

²⁰³ Ellis, *supra* note 193, at 13; Blume II, *supra* note 198, at 695–96.

²⁰⁴ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_185.cfm (last visited July 20, 2011).

²⁰⁵ KY. REV. STAT. ANN. § 532.130(2) (West 2011). *See, e.g.*, *Bowling v Commonwealth*, 163 S.W.3d 361, 388 (Ky. 2005); *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008); *Commonwealth v. Paisley*, 201 S.W.3d 34, 36 (Ky. 2006).

²⁰⁶ *Bowling*, 163 S.W.3d at 384. The U.S. Court of Appeals for the Sixth Circuit did explain what deficits in adaptive behavior were present in *Bowling*. *Bowling v. Haeberline*, 422 F.3d 434, 437–38 (6th Cir. 2005) (describing the inmate's deficits in adaptive behavior, including his academic record, which noted that he was recommended for special education in first grade and failed ninth grade three times before dropping out of school, and affidavits by the inmate's mother, sister and son stating that "he was deficient in adaptive skills and unable to function in the basic aspects of everyday life . . . had problems with money, difficulty in keeping jobs, and difficulty maintaining personal relationships," among other evidence).

²⁰⁷ *Parrish*, 272 S.W.3d at 168. *See also Paisley*, 201 S.W.3d at 36 (noting that even though the inmate's petition described deficits in adaptive behavior that had convinced the trial court that there was sufficient "doubt as to whether he is mentally retarded" to warrant an evidentiary hearing," the Court failed to identify specific deficits in adaptive behavior).

²⁰⁸ *See Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_185.cfm (last visited July 20,

mentally retarded range during the developmental period, but that there must have been manifestations of mental disability, which at an early age generally materialize as problems in the area of adaptive functioning.²⁰⁹ The age of onset is used to distinguish mental retardation from other forms of mental disability that occur later in life, such as traumatic brain injury or dementia.²¹⁰

Like the AAIDD definition of mental retardation, the Commonwealth requires a capital defendant to prove that his/her mental retardation manifested during the “developmental period.”²¹¹ While the KRS does not explicitly define the “developmental period” as “prior to age eighteen,” the *Bowling* Court noted that “mental retardation is a developmental disability that becomes apparent before adulthood.”²¹²

It is unclear how Kentucky courts determine whether mental retardation manifested before the age of eighteen if a defendant was not IQ-tested as a juvenile.²¹³ In at least one instance, a Kentucky trial court found a defendant with an IQ of sixty-one *eligible* for the death penalty because the defendant’s IQ test was conducted after the age of eighteen.²¹⁴ Requiring that an IQ test have been performed before adulthood places an often unattainable burden on a capital offender’s ability to prove mental retardation because such individuals rarely have “taken standardized assessments of intelligence or adaptive behavior functioning prior to the age of eighteen.”²¹⁵

For the reasons set forth above, Kentucky’s definition of and application of the standard for mental retardation does not comport with the AAIDD, or modern scientific understanding of mental retardation. Therefore, the Commonwealth is not in compliance with Recommendation #1.

The Kentucky Death Penalty Assessment Team recommends that the Commonwealth adopt legislation defining mental retardation in conformance with the AAIDD 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

2011). Neither the AAIDD nor the APA require or specify that the evidence of onset must be proven by an IQ test taken prior to age eighteen. Blume II, *supra* note 202, at 729.

²⁰⁹ Ellis, *supra* note 193 at 21, n.31.

²¹⁰ *Id.* at 13.

²¹¹ *FAQ on Intellectual Disability and the AAIDD Definition*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_104.cfm?navID=22 (last visited July 20, 2011); *Bowling v. Commonwealth*, 163 S.W.3d 361, 377 (Ky. 2005).

²¹² KY. REV. STAT. ANN. § 532.130(2) (West 2011); *Bowling*, 163 S.W.3d at 377.

²¹³ *See generally* KY. REV. STAT. ANN. § 532.130(2) (West 2011). *But see* *Commonwealth v. Paisley*, 201 S.W.3d 34, 36 (Ky. 1996) (discussing a trial court’s decision to order an evidentiary hearing based only on deficits in adaptive behavior and expert testimony on the defendant’s mental condition, even though the defense did not have evidence of an IQ test ever having been conducted).

²¹⁴ *Commonwealth v. Giles*, No. 06 CR 436-1 (Jefferson Cir. Ct., 2009). *See also* Jason Riley, *Man With IQ of 61 May Face Death Penalty*, COURIER-J. (Louisville, Ky.), Nov. 12, 2009, at A1.

²¹⁵ Blume II, *supra* note 202, at 729–30 (noting that such “tests are not performed for charitable reasons, for instance where institutions don’t want to stigmatize a child, or financial reasons, if institutions do not want to pay benefits or have responsibility”).

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 is mentally retarded.

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.

The Commonwealth of Kentucky requires training on recognizing mental retardation for some, but not all, actors in the criminal justice system.

Kentucky State Police, city, county, and urban-county police officers, and deputy sheriffs are required to complete a Basic Law Enforcement Training provided by a school certified or recognized by the Kentucky Law Enforcement Council (KLEC).²¹⁶ Each of the Commonwealth's four accredited training academies, the Kentucky State Police Academy, the Louisville Metro Police Academy, the Lexington Basic Training Academy, and the Kentucky Department of Criminal Justice Training (DOCJT), requires varying training hours for officers to become certified, including training devoted specifically to identifying and interacting with persons with mental disabilities.²¹⁷

For example, to become certified by DOCJT, local law enforcement officers must complete 768 hours of basic training and pass a number of examinations within one year of appointment or employment.²¹⁸ Law enforcement officers are also required to complete forty hours of in-service training per year approved by KLEC.²¹⁹ DOCJT offers specialized, forty-hour courses in investigations, interviews, and interrogations, legal issues, as well as a course on "Law Enforcement Response to Special Needs Persons," which provides "information on special needs populations in Kentucky, such as persons with mental and/or physical impairments."²²⁰ Specifically, this course covers the behaviors associated with special needs populations as well as appropriate "responses to these citizens." However, it is unclear whether training on recognizing mental retardation in capital defendants death row inmates, or those suspected of

²¹⁶ KY. REV. STAT. ANN. §§ 15.380–15.404 (West 2011). Notably, sheriffs, certain deputy sheriffs identified in KRS 70.045 and 70.263(3), coroners, constables, jailers, and the Commissioner of State Police are exempt from the mandatory basic training and annual in-service training requirements. *Id.* KLEC, an independent government agency, governs the certification and approval of all four training academies and curricula for the Commonwealth's law enforcement. KY. LAW ENFORCEMENT COUNCIL, KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE (2011), *available at* http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

²¹⁷ *See, e.g.*, KY. REV. STAT. ANN. § 15.404 (West 2011); KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE 4, 75, 80 (2011), *available at* http://www.hcky.org/hcso/Training/Schedule%20Book_2011.pdf; Telephone Interview by Paula Shapiro with Lieutenant Kevin DeSpain, Commander, Basic Training Section, Louisville Metro. Police Acad., May 12, 2010 (on file with author); Telephone Interview by Paula Shapiro with Sergeant David Ashford, Training Acad., Lexington-Fayette Div. of Police, May 12, 2010 (on file with author).

²¹⁸ KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE 4, 42 (2011), *available at* http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

²¹⁹ KY. REV. STAT. ANN. § 15.404(2)(a) (West 2011); 503 KY. ADMIN. REGS. 1:120 (2010).

²²⁰ KY. DEP'T OF CRIMINAL JUSTICE TRAINING, 2011 TRAINING SCHEDULE 80 (2011), *available at* http://docjt.jus.state.ky.us/forms/ScheduleBook/2011/Schedule%20Book_2011.pdf.

capital crimes is a part of this course.²²¹ Court security officers must also complete basic training,²²² but we were unable to determine whether specific training on mental retardation or illness is included.

In addition to these training requirements, the Commonwealth has implemented Crisis Intervention Teams, the training for which is a five-day, forty-hour curriculum based on best practices for law enforcement intervention with persons who may have a mental illness, substance abuse disorder, mental retardation, developmental disability, or dual diagnosis.²²³

Correctional personnel also are trained to detect mental retardation in death row inmates. Kentucky's Department of Corrections (DOC) requires all Departmental personnel, including correctional, probation, and parole officers, and the elected jailors, to participate in at least four hours of mental health training during their first year of employment and at least one hour of additional mental health training annually.²²⁴ The curriculum offers instruction on various issues that may arise for DOC personnel when dealing with persons with all types of mental illnesses or disabilities, including mentally retarded individuals.²²⁵ Furthermore, Kentucky's "Jail Mental Health Crisis Network" provides all local jails with (1) screening instruments for Kentucky jail officers to identify risk and assess inmates' needs; (2) a 24-hour, free telephonic behavioral health triage system staffed by mental health professionals who can provide telephonic assessments of correctional inmates' potential mental health problems, suicide risk, substance abuse and mental retardation; and (3) "jail management protocols that standardize safe and humane responses" to inmates.²²⁶ This program also includes follow-up services by mental health counselors who may conduct further assessment onsite.²²⁷

Furthermore, the Kentucky Department of Public Advocacy (DPA) provides training on mental

²²¹ *Id.* at 80. The instruction for this course is offered by the Kentucky Department for Behavioral Health, Developmental and Intellectual Disabilities. *Id.*

²²² KY. REV. STAT. ANN. §§ 15.3971(3), 15.3975(1)–(2) (West 2011).

²²³ KY. REV. STAT. ANN. § 210.365 (West 2011) (effective July 13, 2004). As of April 1, 2010, about 530 Kentucky law enforcement officers successfully completed CIT training. Melinda Charles, *Fleming Officers Complete CIT Training*, LEDGER INDEP. (Maysville, Ky.), Apr. 1, 2010, http://www.maysville-online.com/news/local/article_b01749fc-3de7-11df-abdc-001cc4c002e0.html (last visited July 20, 2011). However, not every Kentucky law enforcement agency retains CIT-trained officers and the goal of CIT is not suited for instances in which a mentally retarded or mentally ill person is suspected of committing a capital crime. Interview with Lt. Kevin DeSpain, *supra* note 217.

²²⁴ 501 KY. ADMIN. REGS. 3:140 § 8 (2010); KY. REV. STAT. ANN. § 197.020 (West 2011), amended by 2011 Ky. Acts Ch. 2, sec. 32 (H.B. 463). In practice, the annual trainings are typically longer than required, lasting at least a half-day. Telephone Interview by Paula Shapiro with Chris Kleymeyer, Director, Ky. Div. of Corr. Training, Ky. Dep't of Corr., Apr. 30, 2010 (on file with author).

²²⁵ Interview with Chris Kleymeyer, *supra* note 224.

²²⁶ See KY. REV. STAT. ANN. § 210.365(12)–(19) (effective July 2005), 23A.2065 (West 2011) (establishing an additional fee on criminal cases in Kentucky district courts in order to fund the triage system); *Kentucky Jail Mental Health Crisis Network*, KY. DEP'T FOR BEHAVIORAL HEALTH, DEV. & INTELLECTUAL DISABILITIES, <http://www.mhmr.ky.gov/mhsas/jail%20triage.asp> (last visited July 20, 2011); Email to Paula Shapiro from Connie Mulligan, Ky. Jail Mental Health Crisis Network Director & Regional Director, Intake and Emergency Services, Bluegrass MH-MR Bd., Inc., May 24, 2010 (on file with author).

²²⁷ Email from Connie Mulligan, *supra* note 226. The program has been implemented in eighty-one out of the eighty-four jails in the Commonwealth, and at least 70,000 calls have been placed to its hotline. *Id.*

retardation to Commonwealth defense attorneys.²²⁸ This training, which includes Kentucky statutory and case law history on mental retardation, best practices, and how to effectively communicate with capital defendants and death row inmates with mental retardation and other mental illnesses, disorders, or diseases, is required by DPA for new public defenders and is optional for current DPA attorneys.²²⁹ DPA also provides manuals on mental health and expert witnesses via its website, and the Kentucky Bar Association offers continuing legal education programs to all Commonwealth criminal defense attorneys.²³⁰ For more information on specific training provided to the Commonwealth’s capital defense attorneys, see Recommendation #3 below.²³¹

While the Kentucky Administrative Office of the Courts offers a three-day training program for recently-appointed circuit and district judges in the Commonwealth,²³² and other educational or training opportunities are offered by the Kentucky District Judges College and the Kentucky Circuit Judges College,²³³ we were unable to determine the extent, if any, to which these trainings deal with issues related to recognizing mental retardation or mental illness in capital defendants or death row inmates. Similarly, while the Commonwealth requires annual basic training courses for new Commonwealth Attorneys, assistant Commonwealth Attorneys, and their staff, as well as continuing legal education seminars for those already practicing at least once every two years,²³⁴ we were unable to determine whether and to what extent these trainings address the issues described in Recommendation #2.

Because training on recognizing mental retardation in capital defendants and death row inmates is required of some but not all actors within the criminal justice system, Kentucky is in partial compliance with Recommendation #2.

C. 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

²²⁸ Telephone Interview by Paula Shapiro with Glenn McClister, Staff Attorney, Education and Strategic Planning Branch, Ky. Dep’t of Pub. Advocacy, Feb. 24, 2010 (on file with author).

²²⁹ *Id.* Glenn McClister, *KPDC’s Recent Past and Hopeful Future*, KY. DEP’T OF PUB. ADVOCACY, available at <http://dpa.ky.gov/NR/rdonlyres/3B98E4C8-DFBA-4552-885A-40272FE5AECF/0/KPDC20Overview.pdf>.

²³⁰ *Defender Resources*, KY. DEP’T OF PUB. ADVOCACY, <http://dpa.ky.gov/dr.htm> (last visited July 20, 2011); *CLE Programs*, KY. BAR ASS’N, <http://www.kybar.org/434> (last visited July 20, 2011).

²³¹ *See infra* notes 236–248 and accompanying text.

²³² *44 Judges Participate in Orientation Program for New Kentucky Judges*, KY. CT. OF JUSTICE (Mar. 17, 2010), <http://courts.ky.gov/pressreleases/03172010JB1.htm> (last visited July 20, 2011). The new circuit and district judges also had the option of earning up to twenty CLE credits. *Id.*

²³³ *Campbell County Judge Karen A. Thomas Elected President of Kentucky District Judges Association*, KY. CT. OF JUSTICE, Nov. 29, 2009, <http://courts.ky.gov/pressreleases/11252009JB2.htm> (last visited July 20, 2011).

²³⁴ KY. REV. STAT. ANN. § 15.718 (West 2011); *Prosecutors Advisory Council*, OFFICE OF KY. ATT’Y GEN., <http://ag.ky.gov/criminal/pac> (last visited July 20, 2011) (noting that the Prosecutors Advisory Council co-sponsors an annual Kentucky Prosecutors Conference, attended by over 600 prosecutors and law enforcement officials and sponsors the Kentucky Prosecutors Institute, a week-long trial skills course for new prosecutors).

eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

The Commonwealth of Kentucky offers, but does not require, special training on recognizing mental retardation and understanding its impact for attorneys who represent capital defendants. Kentucky does, however, provide resources to assist in the defense of an indigent capital defendant who counsel believes may have mental retardation or mental illness.

Training of Capital Defense Attorneys on Mental Retardation

DPA represents indigent capital defendants from 119 of 120 Commonwealth counties, while a capital defendant in Jefferson County will be assigned counsel from the Louisville Metro Public Defender's Office (Metro Defender) Capital Trial Branch.²³⁵

DPA provides training to its attorneys, as well as other criminal defense attorneys practicing in the Commonwealth, on recognizing mental retardation in their clients and understanding its full impact on a capital case.²³⁶ DPA also provides trainings for other actors within the criminal justice system, including social workers and investigators.²³⁷ However, there is no mechanism to ensure that all members of the capital defense team participate in these trainings.

DPA requires new public advocates to participate in a three-week program, called the Kentucky Public Defender College (KPDC), which includes training to assist attorneys in recognizing mental retardation.²³⁸ DPA also has offered related training seminars, available to all criminal defense attorneys, including seminars focusing on attorney/investigator case preparation and multi-day seminars on litigating mental illness issues in capital cases.²³⁹ DPA also makes available on its website a 215-page "Mental Health and Experts Manual" for criminal defense attorneys, with instruction on various mental health issues including competency to stand trial, criminal responsibility, mental illness and mental retardation, and other topics relevant to defending a person with a mental illness or disability.²⁴⁰ Specific chapters include "Breaking Through: Communicating and Collaborating with the Mentally Ill Defendant," "Working

²³⁵ Interview by Sarah Turberville and Paula Shapiro with the Louisville Metro Public Defender's Office (Metro Defender), June 14, 2010 (on file with author).

²³⁶ *Education Calendar 2009*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed/ecal.htm> (last visited Apr. 20, 2010).

²³⁷ *Id.*

²³⁸ *Education Overview*, KY. DEP'T OF PUB. ADVOCACY, <http://dpa.ky.gov/ed/> (last visited Apr. 20, 2010); Interview with Glenn McClister, *supra* note 228.

²³⁹ *See, e.g., Education Calendar 2009*, KY. DEP'T OF PUB. ADVOCACY, <http://web.archive.org/web/20100429022828/http://dpa.ky.gov/ed/ecal.htm> (last visited Apr. 20, 2010); NAT'L COALITION TO ABOLISH THE DEATH PENALTY, *Capital Defense Legal Training Workshop: Litigating Mental Illness Issues or Presenting Mental Illness in the Sentencing Phase*, NCADP 2010 ANNUAL CONFERENCE — BUILDING BRIDGES TO WIDER AUDIENCES, Louisville, Ky. (Jan. 14–17, 2010) (co-presented by the Kentucky Department of Public Education), available at <http://www.ncadp.org/events.cfm?event=1003&pg=46>.

²⁴⁰ KY. DEP'T OF PUB. ADVOCACY, MENTAL HEALTH AND EXPERTS MANUAL (8th ed. 2005), available at <http://dpa.ky.gov/dpapun.htm>.

Effectively with Capital Defendants: Identifying and Managing Barriers to Communication,” and “Top Ten Tips for Interviewing Emotionally Disturbed People.”²⁴¹

In the event that DPA’s Capital Trial Branch cannot represent an indigent capital defendant due to a conflict of interest, DPA assigns alternate counsel from its non-capital trial division or from “a list of private attorneys who are willing and qualified to enter into trial and post trial level capital conflicts.”²⁴² DPA requires these private attorneys to have “[c]ompleted a comprehensive training program, approved by DPA, in the defense of capital cases,” which includes training on the presentation and rebuttal of mental health evidence and the “unique” issues relating to representation of mentally retarded defendants charged with a capital offense.²⁴³ Additionally, private counsel appointed in a capital case must demonstrate “skill in the investigation, preparation, and presentation bearing on mental status” and mitigation evidence.²⁴⁴

In Jefferson County, Metro Defender capital trial attorneys undergo similar training to that of DPA capital defense attorneys on recognizing mental retardation in capital clients. However, conflict attorneys appointed to capital cases in Jefferson County may, but are not required by the Metro Defender, to undergo such training.²⁴⁵

While Kentucky law does not guarantee the appointment of counsel in post-conviction proceedings,²⁴⁶ in practice, DPA represents all death row inmates in post-conviction proceedings and provides these inmates with similarly-trained counsel for post-conviction review immediately after an initial opinion on direct appeal is issued.²⁴⁷

Although DPA and the Metro Defender strive to appoint conflict counsel trained to recognize mental retardation in their clients and understand its possible impact on their clients’ defense, there is no legal requirement that any Commonwealth defense attorney complete such training before representing a capital defendant or death row inmate.²⁴⁸

²⁴¹ *Id.* at 20-1, 28-1, 30-1.

²⁴² KY. DEP’T OF PUB. ADVOCACY, POLICIES AND PROCEDURES *Qualification and Compensation of Counsel in Contract Capital Cases* § 8.04(C) (revised Jan. 1, 2008) (on file with author) [hereinafter DPA POLICIES].

²⁴³ DPA POLICIES, *supra* note 242, at § 8.04(C)(3)(j), (l). Furthermore, DPA requires the private attorneys to attend and fully participate in selected DPA training events such as the Death Penalty Trial Practice Institute as well as other non-DPA trainings in order to become eligible for appointment in a capital case. *Id.* at 8.04(D)(3).

²⁴⁴ DPA POLICIES, *supra* note 242, at § 8.04(C)(1)(f), (g).

²⁴⁵ Interview with Metro Defender, *supra* note 235. In the event of a conflict of interest, per its “assigned counsel panel plan,” the Metro Defender will select private defense attorneys to represent a capital defendant. *Id.* Each conflict attorney is required to sign a contract with the Metro Defender, but the contract is silent with respect to any training requirements. *Id.*

²⁴⁶ Kentucky law requires an appointment of counsel only when the petitioner “raises a material issue of fact that cannot be determined on the face of the record.” KY. R. CRIM. P. 11.42(5); *see generally* *Fraser v. Commonwealth*, 59 S.W.3d 448, 451–53 (Ky. 2001).

²⁴⁷ Telephone Interview by Sarah Turberville with Marguerite Thomas, Post Conviction Branch Manager, Ky. Dep’t of Pub. Advocacy, Mar. 18, 2010 (on file with author). Typically, DPA represents all death row post-conviction petitioners. Interview by Sarah Turberville and Paula Shapiro with the Ky. Dep’t of Pub. Advocacy (DPA), June 14, 2010 (on file with author).

²⁴⁸ Interview with DPA, *supra* note 247. The Commonwealth of Kentucky has not adopted an external mechanism for enforcement of the *American Bar Association Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, which would include requirements to ensure that capital defendants are

Funding and Resources to Detect and Prove Mental Retardation in Capital Defendants

Through KRS 31.185, capital defense attorneys may be provided with funding and resources to accurately determine and prove the mental capacity and adaptive skills bearing on their clients' culpability and sentencing.²⁴⁹ The KRS provides that an indigent capital defendant in Kentucky is entitled "to be provided with the necessary services and facilities of representation including investigation and other preparation"²⁵⁰ and "[t]o use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth."²⁵¹

However, a defendant has no right to hire an expert of his/her own choosing at state expense.²⁵² Instead, s/he must first demonstrate that use of state facilities is impractical,²⁵³ that private expert assistance is "reasonably necessary,"²⁵⁴ and must describe the specific information the expert would be able to provide.²⁵⁵ Kentucky trial courts will grant to defense counsel funds to accurately determine and prove the mental capacities and adaptive skills deficiencies of a capital defendant.²⁵⁶ Trial courts may place an initial "cap" on funding for expert services. However, the court may grant additional funding when defense counsel demonstrates its necessity.²⁵⁷ In Jefferson County, in some instances, courts will not place a cap on funding and will instead permit defense counsel to use "reasonable" funds for the provision of expert services.²⁵⁸

In addition to mental health experts, effective representation requires the assistance of both investigators and social workers. DPA and the Metro Defender use funds from their general

represented by attorneys whose training and qualifications comply with this Recommendation. See ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 8.1, 31 HOFSTRA L. REV. 913, 984–85 (2003).

²⁴⁹ KY. REV. STAT. ANN. § 31.185(1) (West 2011); *Binion v. Commonwealth*, 891 S.W.2d 383, 385 (Ky. 1995).

²⁵⁰ KY. REV. STAT. ANN. § 31.110(1)(b) (West 2011). See also KY. REV. STAT. ANN. § 31.110(2)(a)–(c) (West 2011) ("[a] needy person is entitled to . . . be counseled and defended at all stages of the matter . . . to be represented in any appeal . . . to be represented in any other post-conviction" proceeding); *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979); *Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984).

²⁵¹ KY. REV. STAT. ANN. § 31.185(1) (West 2011).

²⁵² *Crawford v. Commonwealth*, 824 S.W.2d 847, 850 (Ky. 1992) (noting that *Ake v. Oklahoma*, 470 U.S. 68 (1985) did not support the proposition that an indigent defendant had the right to choose a psychiatrist or receive funds to hire one of his choosing); *Commonwealth v. Paisley*, 201 S.W.3d 34, 35–36 (2006) (holding that "it was an abuse of discretion for [the trial court] to order the Finance and Administration Cabinet to pay up to \$5,000 for a private psychologist without the requisite showing that the use of state facilities was somehow impractical").

²⁵³ KY. REV. STAT. ANN. § 31.185(1) (West 2011).

²⁵⁴ *Young*, 585 S.W.2d at 379; *Hicks*, 670 S.W.2d at 838.

²⁵⁵ *Benjamin v. Commonwealth*, 266 S.W.3d 775, 789 (Ky. 2008). A court need not authorize funding for expert assistance if the defendant "offers little more than an undeveloped assertion that the requested assistance would be beneficial." *Simmons v. Commonwealth*, 746 S.W.2d 393, 395 (Ky. 1988). See also *Young*, 585 S.W.2d at 379; *Hicks*, 670 S.W.2d at 838 ("[T]rial courts are not required to provide funds to defense experts for fishing expeditions.").

²⁵⁶ KY. REV. STAT. ANN. § 31.185(5) (West 2011); Interview with DPA, *supra* note 247. Under KRS 31.185(5), each Commonwealth county provides a per capita amount of money into a special fund for indigent defense expert and investigative resources. KY. REV. STAT. ANN. § 31.185(5) (West 2011). However, when this fund is depleted, the Commonwealth of Kentucky must pay any additional funding requirements granted by the court. *Id.*

²⁵⁷ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235.

²⁵⁸ Interview with Metro Defender, *supra* note 235.

revenue budget to hire investigators and social workers as staff.²⁵⁹ Until 2010, DPA employed a single investigator in its entire Capital Trial Branch (it now employs two), which handles approximately twelve to sixteen capital cases each year.²⁶⁰ The Metro Defender employs one investigator for its entire Capital Trial Division, which handles approximately twenty-five capital cases each year.²⁶¹ To our knowledge, courts have granted additional KRS 31.185 funding to DPA and the Metro Defender to support investigative and mitigation assistance in some capital cases, although it has been less successful in obtaining other ancillary assistance through KRS 31.185.²⁶² We were unable to determine if trial courts will grant funding for social workers and investigative assistance in capital cases handled by appointed private counsel.

During post-conviction proceedings, an indigent death row petitioner may be entitled “to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner’s case.”²⁶³ However, Kentucky post-conviction courts do not typically authorize any funding for mental health experts to accurately determine and prove the mental capacities and adaptive skills deficiencies in potentially mentally retarded death row inmates.²⁶⁴

Conclusion

In summary, not all defense attorneys assigned to represent capital defendants are required to undergo training on recognizing mental retardation and Kentucky does not ensure that all defense attorneys have sufficient resources to determine accurately and prove the mental capacities of capital defendants and death row inmates at trial and during post-conviction proceedings. Therefore, the Commonwealth is in partial compliance with Recommendation #3.

²⁵⁹ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235.

²⁶⁰ Interview with DPA, *supra* note 247. *See also* Chapter Six on Defense Services for a detailed discussion of investigative, expert, and other ancillary services available to capital defendants and death row inmates.

²⁶¹ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235. Both entities have stated that when necessary, investigators and/or social workers are borrowed from their other divisions in order to keep up with demand. Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235.

²⁶² Email to Sarah Turberville & Paula Shapiro from Tom Griffiths, Capital Trial Branch Manager, Ky. Dep’t of Pub. Advocacy, Sept. 10, 2011 (on file with author) (describing the difficulty in obtaining KRS 31.185 funds for mitigation experts in capital cases); Interview with Metro Defender, *supra* note 235.

²⁶³ *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008); *Hodge v. Coleman*, 244 S.W.3d 102, 108 (Ky. 2008), *overruling* *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005) (“has determined that the [] petition sets forth allegations sufficient to necessitate an evidentiary hearing”).

²⁶⁴ *See Hodge*, 244 S.W.3d at 108; *Mills*, 268 S.W.3d at 367; *Johnson v. Commonwealth*, No. 2006-SC-000548-MR, 2008 WL 4270731, at *7 (Ky. Sept. 18, 2008) (“an indigent post-conviction prisoner may not receive public funds under KRS 31.185 unless a court of competent jurisdiction has determined that the post-conviction petition sets forth allegations that necessitate an evidentiary hearing”); Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235. The same judge that presided over the original trial presides over the post-conviction proceeding. KY. R. CRIM. P. 11.42(1). Kentucky trial courts have discretion to determine whether a post-conviction “petition sets forth allegations sufficient to necessitate an evidentiary hearing,” which requires a showing that the desired defense expert’s testimony may either change the trial verdict or the reliability of the trial verdict. *Hodge*, 244 S.W.3d at 108; *Mills*, 268 S.W.3d at 367; *Foley v. Commonwealth*, No. 2008-SC-000909-TG, 2010 WL 1005873, at *3 (Ky. Mar. 18, 2010). If an indigent petitioner seeks funding for out-of-state expert witnesses, the court will examine the petitioner’s proposed list of witnesses and will grant funds for witnesses that the court determines to be reasonably necessary to fully present the petitioner’s post-conviction claims. *Hodge*, 244 S.W.3d at 108–09.

D. Recommendation #4

For cases commencing after the United States Supreme Court’s decision in *Atkins v. Virginia*²⁶⁵ 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.

In 1990, the Kentucky General Assembly passed legislation to prohibit the execution of offenders with mental retardation.²⁶⁶ The statute requires a defendant whose trial commences on or after July 13, 1990 to raise the issue of his/her mental retardation as a bar to execution thirty days prior to trial and for the court to make a determination on the issue at least ten days before trial.²⁶⁷ The KRS also permits a capital defendant to challenge, on direct appeal, the trial court’s determination that the offender does not have mental retardation and was therefore eligible for the death penalty.²⁶⁸ Death row inmates tried and sentenced prior to July 13, 1990 may seek to raise mental retardation as bar to execution during post-conviction proceedings.²⁶⁹

Based on the above information, the Commonwealth is in compliance with Recommendation #4.

However, we note that Kentucky’s procedural rules could permit a death row inmate who is mentally retarded to be executed for failure to raise his/her mental retardation as a bar to execution at the proper time.²⁷⁰ The Kentucky Supreme Court has held that a capital defendant is statutorily “afforded [] the opportunity to assert his[/her] mental retardation claim . . . [but if s/]he chose not to assert the claim at trial [s/he has] thereby waived it”²⁷¹ and cannot raise mental retardation as a bar to execution in any subsequent proceeding.²⁷²

²⁶⁵ 536 U.S. 304 (2002).

²⁶⁶ S.B. 172, 1990 Gen. Assemb., Reg. Sess. (Ky. 1990), codified as KY. REV. STAT. ANN. §§ 532.130–.140 (West 2011) (effective July 13, 1990).

²⁶⁷ KY. REV. STAT. ANN. § 532.135(1)–(2) (West 2011).

²⁶⁸ KY. REV. STAT. ANN. § 532.135 (West 2011); *Skaggs v. Commonwealth*, 330 S.W.3d 52, 55 (Ky. 2005); *Bowling v. Commonwealth*, 163 S.W.3d 361, 377 (Ky. 2005).

²⁶⁹ *Bowling*, 163 S.W.3d at 371. In 2005, the Kentucky Supreme Court held that the bar on the execution of mentally retarded offenders recognized in *Atkins v. Virginia* applies only to offenders tried prior to July 13, 1990 (the effective date of Kentucky’s mental retardation exemption statutes). *Id.*

²⁷⁰ *Bowling*, 163 S.W.3d at 385–86 (Keller, J., dissenting) (“The majority opinion [] claims that because Kentucky provides a statutory mechanism for raising the issue of mental retardation before trial, and Appellant failed to utilize that mechanism even though it had been in effect all of five months before his trial, Appellant has waived any Eighth Amendment mental retardation claim The mere fact that Kentucky’s statutes provided (and still provide) a pretrial means to challenge the applicability of the death penalty when the defendant may be mentally retarded is not enough to protect the interest recognized in *Atkins* Ultimately, while pretrial measures are laudable, they alone are not sufficient to protect the substantive right implicit in the Eighth Amendment and recognized in *Atkins*.”).

²⁷¹ *Bowling v. Commonwealth*, 224 S.W.3d 577, 579 (Ky. 2006).

²⁷² *Bowling*, 163 S.W.3d at 372. *See also Bowling*, 224 S.W.3d at 578 (“Because [the death row inmate] was tried after the effective date of the exemption statutes and had not raised the mental retardation issue at trial, he was held to have procedurally defaulted the issue”); *Parrish v. Commonwealth*, 272 S.W.3d 161, 167 (Ky. 2008) (stating that an inmate’s claim of mental retardation to bar execution is not an appropriate claim for a Rule 11.42 post-conviction proceeding).

For this reason, the Kentucky Death Penalty Assessment Team recommends that Kentucky adopt a rule or law that provides a mechanism for a death row inmate who failed to adequately raise mental retardation as a bar to execution before trial, to file an initial or successive petition for post-conviction review permitting the court to review the inmate's claim on the merits.

E. Recommendation #5

Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution, If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

The Commonwealth requires a capital defendant whose trial commenced on or after July 13, 1990 to show, by a preponderance of the evidence, that s/he was mentally retarded at the time of the offense.²⁷³ During post-conviction review, a defendant convicted prior to the 1990 enactment of Kentucky's bar on the execution of mentally retarded offenders, must also prove, by a preponderance of the evidence, that s/he was mentally retarded at the time of the offense.²⁷⁴ The Commonwealth, therefore, is in compliance with Recommendation #5.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Commonwealth of Kentucky has implemented some legal mechanisms and adopted some law enforcement practices to help ensure that the *Miranda* rights of mentally retarded offenders are sufficiently protected during investigations and interrogations.²⁷⁵

Legal Mechanisms

Kentucky trial courts will permit the waiver of a capital defendant's Fifth Amendment constitutional right to remain silent, and permit the resulting confession to be introduced at trial, when the court determines that defendant's statement was made "voluntarily, knowingly and intelligently."²⁷⁶ The voluntariness of a confession will be based on the totality of the

²⁷³ *Bowling*, 163 S.W.3d at 382.

²⁷⁴ *See Bowling v. Commonwealth*, 163 S.W.3d 361, 370–71, 382 (Ky.2005).

²⁷⁵ *Miranda v. Arizona* safeguards the right against compelled self-incrimination by conditioning the admissibility of statements on prior warnings, once a suspect is in custody and under interrogation, that the accused has a right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In all capital cases, as in all criminal cases, a "confession cannot be used if it is involuntary." *United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1990), *cert. denied*, 498 U.S. 840, (1990). *See also Colorado v. Connelly*, 479 U.S. 157, 164 (1986); *Blackburn v. Alabama*, 361 U.S. 199, 205–06 (1960); *Fikes v. Alabama*, 352 U.S. 191, 196 (1957).

²⁷⁶ *Mills v. Commonwealth*, 996 S.W.2d 473, 481–82 (Ky. 1999), *overruled in part on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). *Mills* argued, unsuccessfully, that subjective factors, namely "that his relatively low IQ (76) and his limited educational background," must be considered in assessing the totality of the circumstances surrounding the making of his confession and render his confession involuntary. *Id.* at 481 (stating

circumstances surrounding the confession,²⁷⁷ and “turns on the presence or absence of coercive police activity.”²⁷⁸

The Kentucky Supreme Court has held that “mental retardation is a *factor* to consider in assessing the voluntariness of a confession,” but that “the mere existence of a mental condition, by itself and apart from its relation to police coercion, does not make a statement constitutionally involuntary.”²⁷⁹ Recently, the Court held that a confession of a murder defendant was voluntary despite the court finding the defendant “seriously mentally retarded” and therefore ineligible for the death penalty.²⁸⁰

A review of case law in the Commonwealth reveals that law enforcement practices are not always without coercion in Kentucky. In *Bailey v. Commonwealth*, the police interrogated a mentally retarded, illiterate defendant with an IQ of fifty for seven hours despite the suspect’s “complete inability to understand his *Miranda* rights.”²⁸¹ The Kentucky Supreme Court later explained that despite the absence of physical coercion in *Bailey*,

coercion can be psychological as well [,and] . . . [t]his case justifies the rationale underlying the use of the totality of circumstances approach: it is simply impossible to evaluate the police action outside the lens of Bailey’s very serious mental deficiency, which necessarily calls into question his ability to give a reliable confession.²⁸²

Under these circumstances, the Court upheld suppression of the severely mentally retarded defendant’s confession.²⁸³ However, it is unclear whether Kentucky is sufficiently protecting against the admission of involuntary confessions from individuals with mild to moderate mental retardation. For example, in *Rogers v. Commonwealth*, the Kentucky Supreme Court held that a

that “these factors are only relevant inasmuch as their presence causes a defendant to be predisposed to yield to coercive police tactics”).

²⁷⁷ *Bailey v. Commonwealth*, 194 S.W.3d 296, 300, 302 (Ky. 2006). Other factors that the court will consider are the defendant’s age, education, intelligence, and linguistic ability. *Id.* at 300.

²⁷⁸ *Mills*, 996 S.W.2d at 481.

²⁷⁹ *Rogers v. Commonwealth*, 86 S.W.3d 29, 37 (Ky. 2002) (non-death penalty case) (emphasis added) (citing *Lewis v. Commonwealth*, 42 S.W.3d 605, 612 (Ky. 2001)).

²⁸⁰ *Edmonds v. Commonwealth*, No. 2007-SC-000350-MR, 2009 WL 4263142, at *12–14 (Ky. Nov. 25, 2009) (“Under the totality of the circumstances surround the making of the confession, [] including [the defendant’s] mental retardation, this Court finds there was nothing inherently or objectively coercive about the interrogation in this case [] and that his initial statement was made voluntarily.”) (internal citations omitted).

²⁸¹ *Bailey*, 194 S.W.3d at 298, 303–04 (noting that the defendant had an IQ of “50 which places him in the bottom .07% of the population. According to testimony presented at the suppression hearing, Bailey’s mental ability is equivalent to that of a six-year-old child. He is illiterate and left school in the ninth grade.”). The court must determine whether the defendant’s *Miranda* waiver was (1) “the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and (2) “made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” *Mills*, 996 S.W.2d at 482 (citing *Moran v. Burbine*, 475 U.S. 412 (1986)). The Commonwealth only needs to prove a waiver of *Miranda* by a preponderance of the evidence. *Mills*, 996 S.W.2d at 482.

²⁸² *Bailey*, 194 S.W.3d at 302.

²⁸³ *Bailey v. Commonwealth*, 194 S.W.3d 296, 304 (Ky. 2006) (noting that deference to the trial court’s factual findings and rulings should be “*required* because the trial court is in the best position to evaluate the evidence”).

confession was voluntary even though the police had misused interrogation techniques when interviewing a mentally retarded defendant who had an IQ of sixty-five.²⁸⁴

Thus, while mental retardation is not a per se bar to a court's finding of the voluntariness of a confession, in some instances, the severity of a suspect's mental retardation will raise "issues of suggestibility and possible overreaching" that "must be factored into a consideration of the totality of the circumstances."²⁸⁵ However, it is unclear whether Kentucky courts adequately consider a defendant's mental capacity in determining whether s/he voluntarily confessed.²⁸⁶

Law Enforcement Practices

Kentucky law enforcement agencies and training academies certified by the Commission on Accreditation for Law Enforcement Agencies (CALEA) are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.²⁸⁷ CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements relating to interviews, interrogations, and access to counsel.²⁸⁸ Although directives produced in an effort to comply with CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, only two law enforcement agencies within the Commonwealth are accredited by CALEA.²⁸⁹

However, under the Kentucky Association of Chiefs of Police (KACP) Accreditation Program, Kentucky law enforcement agencies seeking KACP accreditation must adopt written directives establishing procedures to be used in criminal investigations, including procedures and best practices on interviews, interrogations and access to counsel.²⁹⁰ In 2009, KACP adopted new standards requiring all entities applying for accreditation or reaccreditation to create written directives "establish[ing] procedures for handling mentally ill individuals, including those

²⁸⁴ *Rogers*, 86 S.W.3d at 34–36 ("This Court does not doubt that [petitioner's] intellectual capability is limited. However, this fact alone does not render his statement involuntary."). The Court did, however, find that the trial court's refusal to allow the defendant to introduce evidence of the deceptive tactics used by the police was reversible error. *Id.* at 37–38. See also *Smith v. Commonwealth*, No. 2000-CA-001735-MR, 2003 WL 21362056 (Ky. June 13, 2003) (reversed and remanded based on *Rogers*).

²⁸⁵ *Bailey*, 194 S.W.3d at 302.

²⁸⁶ See, e.g., *Humphrey v. Commonwealth*, No. 2002-SC-0437-MR, 2003 WL 1217735, at *1–2 (Ky. Feb. 20, 2003) (non-death penalty case) (finding the defendant's confession voluntary despite an IQ of seventy-three and a two year hospitalization after being found incompetent to stand trial); *Rogers*, 86 S.W.3d at 35–36; *Edmonds v. Commonwealth*, No. 2007-SC-000350-MR, 2009 WL 4263142, at *12–14 (Ky. Nov. 25, 2009).

²⁸⁷ COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (5th ed. 2009) [hereinafter CALEA STANDARDS] (Standard 42.2.2).

²⁸⁸ CALEA STANDARDS, *supra* note 287, at 1–3 (Standard 1.2.3).

²⁸⁹ See *About Us*, COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/commission> (last visited July 21, 2011); *CALEA Client Database*, COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/calea-client-database> (last visited July 21, 2011) (searching Kentucky clients).

²⁹⁰ KY. ASS'N OF CHIEFS OF POLICE, ACCREDITATION PROGRAM (2009), available at http://www.kypolicechiefs.org/joomla/attachments/095_STANDARDS_2009_April_20_.doc [hereinafter KACP STANDARDS].

pending criminal charges and mental health commitments.”²⁹¹ As of November 21, 2011, eighty-four law enforcement entities within the Commonwealth were accredited by KACP; however, we were unable to determine the number of agencies that currently comply with the new standards on handling individuals with mental illness.²⁹² In addition, we were unable to determine whether newly adopted policies specifically address protection of the *Miranda* rights of mentally retarded persons.

As described in Recommendation #2, Kentucky requires that all law enforcement officers in the Commonwealth complete a basic training program, which consists of, among other requirements, forty hours on the legal aspects of interviews, interrogations, and investigations, and at least an additional forty hours on interview and interrogation techniques.²⁹³ However, we are unable to determine the extent to which this training covers special treatment of mentally retarded suspects during custodial interviews.

In addition, as discussed in Recommendation #2, the Commonwealth has adopted legislation requiring the use and development of Crisis Intervention Teams (CIT), which requires training on best practices for law enforcement intervention with persons who may have mental retardation or mental illness.²⁹⁴ CIT-trained officers are better aware of the effects of mental retardation and mental illness on a suspect’s ability to voluntarily waive his/her *Miranda* rights.²⁹⁵ However, we were unable to determine whether smaller, local law enforcement agencies have implemented CIT training programs or similar policies, procedures, or protocols on the special treatment of mentally retarded suspects during custodial interrogations.

Not all law enforcement agencies within the Commonwealth are accredited, either by KACP or CALEA, and we are unable to assess the extent to which law enforcement agencies across the Commonwealth have adopted or implemented policies and procedures that ensure that the *Miranda* rights of mentally retarded suspects are sufficiently protected. We also are unable to determine if courts protect against admission of false, coerced, or garbled confessions by suspects with mild to moderate mental retardation. Therefore, we are unable to determine whether the Commonwealth is in compliance with Recommendation #6.

G. Recommendation #7

²⁹¹ KACP STANDARDS, *supra* note 290, at 57 (Standard 30-8).

²⁹² See *Accredited Agencies*, KY. ASS’N OF CHIEFS OF POLICE, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=54&Itemid=64 (last visited July 21, 2011).

²⁹³ KY. REV. STAT. ANN. § 15.404 (West 2011).

²⁹⁴ KY. REV. STAT. ANN. § 210.365 (West 2011); see *supra* notes 222–33 and accompanying text. LMPD officers are provided forty hours of crisis intervention training on recognizing and addressing mental health issues during basic training. LMPD officers are required to attend 1148 hours of Basic Training provided by the Louisville Metro Police Academy. Interview with Lt. Kevin DeSpain, *supra* note 227 (noting that all of LMPD’s over 1,200 officers have had some sort of crisis intervention training, even if not all of them have received certification).

²⁹⁵ While CIT may divert a mentally ill or retarded individual suspected of a misdemeanor or minor felony from police custody to a mental health facility for treatment, if a mentally ill individual is suspected of a major felony or a capital offense, s/he instead will remain in police custody. Interview with Lt. Kevin DeSpain, *supra* note 227.

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.

In Kentucky, a defendant is permitted to waive his/her constitutional rights, such as the right against compelled self-incrimination and the right to counsel, if a court determines that the defendant did so knowingly, voluntarily, and intelligently.²⁹⁶ When assessing the voluntariness of a defendant’s waiver of any right, the court is required to “consider such factors as the person’s age, education, and familiarity with English, and the complexity of the crime involved.”²⁹⁷ If the court had previously determined the defendant competent to stand trial, such a finding will be a strong indicator that the defendant is competent to waive constitutional rights guaranteed in a criminal trial.²⁹⁸

If a defendant unequivocally and timely requests to waive his/her right to counsel, a Kentucky trial court must hold an evidentiary hearing (known as a *Faretta* hearing) to determine whether this waiver meets the “knowing, voluntary and intelligent” standard.²⁹⁹ During this hearing, the defendant’s testimony must demonstrate that the waiver meets the requisite standard, the court must issue a warning to the defendant about the dangers of relinquishing counsel or any other constitutional right, and the court must make a specific finding on the record that the defendant meets the “knowing, intelligent and voluntary” standard.³⁰⁰ The Kentucky Supreme Court has noted that the “waiver of counsel by a borderline-competent *pro se* defendant, adds [] additional difficulties to an already complex clash of fundamental constitutional rights.”³⁰¹ In order to safeguard against a defendant’s mental limitations, a trial court may deny a defendant’s “right to proceed *pro se* and to structure the role and scope of hybrid counsel” accordingly.³⁰²

Additionally, before a capital defendant can waive the presentation of mitigating evidence, the trial court must inform the defendant of his/her right to present such evidence, inquire about

²⁹⁶ KY. REV. STAT. ANN. § 31.140 (West 2011); *Commonwealth v. Terry*, 295 S.W.3d 819, 822–24 (Ky. 2009); *Grady v. Commonwealth*, 325 S.W.3d 333, 341 (Ky. 2010); *Faretta v. California*, 422 U.S. 806, 835 (1975).

²⁹⁷ KY. REV. STAT. ANN. § 31.140 (West 2011).

²⁹⁸ *Major v. Commonwealth*, 275 S.W.3d 706, 719 (Ky. 2009); *Chapman v. Commonwealth*, 265 S.W.3d 156, 174–75 (Ky. 2007) (holding that there is no heightened standard of competency for waiver of the right to trial; it is the same standard as that used for a competency to stand trial); *Wooden v. Commonwealth*, No. 2009-CA-000325-MR, 2010 WL 1133242, at *3 (Ky. Ct. App. Mar. 26, 2010) (noting that a trial court is *not required* to hold successive competency evaluations or hearings) (emphasis added).

²⁹⁹ *Major*, 275 S.W.3d at 718–19; *Grady*, 325 S.W.3d at 341–42; *Chapman*, 265 S.W.3d at 174.

³⁰⁰ KY. REV. STAT. ANN. § 31.140 (West 2011) (A defendant “may waive in writing, or by other record, any right provided by this chapter, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law.”); *Terry*, 295 S.W.3d at 823; *Depp v. Commonwealth*, 278 S.W.3d 615, 616–20 (Ky. 2009) (non-capital case) (upholding the trial court’s decision to permit the defendant to waive his right to counsel, despite the trial court’s failure to specifically state the “knowing and voluntary” language of the requisite standard).

³⁰¹ *Major*, 275 S.W.3d at 719.

³⁰² *Major*, 275 S.W.3d at 722. Kentucky courts permit a criminal defendant to make a limited waiver of the right to counsel and represent him/herself only on certain matters, “specifying the extent of services [s/]he desires, and [s/]he then is entitled to counsel whose duty will be confined to rendering the specified kind of services,” known as hybrid representation. *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974); KY. CONST. 11. A *Faretta* hearing must be held when a defendant will receive hybrid representation. *Major*, 275 S.W.3d at 718–19, 722. See also *Chapman*, 265 S.W.3d at 174.

whether the defendant and his/her counsel have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that mitigating evidence could be used to offset aggravating circumstances.³⁰³ The trial court may accept the defendant's waiver of mitigation by making findings of fact regarding the defendant's understanding and waiver on the record.³⁰⁴ Similarly, if a defendant wishes to forgo an insanity defense against the advice of counsel, and the court "feel[s] that [the defendant] is not mentally sufficient to waive" the defense, the court must determine if the defendant "notwithstanding competency to stand trial, is capable of voluntarily and intelligently waiving such defense."³⁰⁵

If a capital defendant pleads guilty and requests the death penalty, the court, in addition to determining that the waivers were made "competently, knowingly, intelligently, and voluntarily," will also determine "whether [s/]he has capacity to appreciate his[/her] position and make a rational choice with respect to pleading guilty, waiving jury sentencing, waiving [the presentation of] mitigating evidence, and seeking the death penalty or on the other hand whether [s/]he is suffering from a mental disease, disorder, or defect which may substantially affect his[/her] capacity in the premises."³⁰⁶ It is unclear whether a capital defendant who wishes to enter a guilty plea to capital murder, without any condition on sentencing, will be afforded the additional scrutiny described above to ensure that the decision to plead guilty, thereby increasing the possibility of a death sentence, is not borne out of the defendant's mental disability or illness.

If a capital defendant is sentenced to death, s/he is not permitted to waive the automatic proportionality review that is conducted by the Kentucky Supreme Court each time a death sentence is imposed.³⁰⁷ Additionally, it does not appear that a condemned defendant may waive his/her right to file a direct appeal that would challenge any trial errors, both preserved and unpreserved, relating to the defendant's conviction and sentence.³⁰⁸ Outside of official court

³⁰³ *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560–61 (Ky. 2004); *Chapman*, 265 S.W.3d at 172.

³⁰⁴ *St. Clair*, 140 S.W.3d at 560–61.

³⁰⁵ *Jacobs v. Commonwealth*, 870 S.W.2d 412, 418 (Ky. 1994). Furthermore, if at any time during trial a court has reasonable grounds to believe a defendant may be incompetent to stand trial, it may appoint a psychologist or psychiatrist to examine, treat and report on the defendant's condition. KY. REV. STAT. ANN. § 504.100(1) (West 2011); KY. R. CRIM. P. 8.06; *Bishop v. Caudill*, 118 S.W.3d 159, 163 (Ky. 2003). For example, in *Chapman v. Commonwealth*, the court appointed a psychiatrist to evaluate the capital defendant on three separate occasions to ensure that he was competent to waive his right to an attorney and to trial, to plead guilty, to request the death penalty, and to waive his right to any post-conviction review pursuant to KRS § 504.100. *Chapman v. Commonwealth*, 265 S.W.3d 156, 161 (Ky. 2007).

³⁰⁶ *Chapman*, 265 S.W.3d at 179–80 (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)) (internal brackets omitted).

³⁰⁷ See KY. REV. STAT. ANN. § 532.075 (West 2011). The Kentucky Supreme Court must review any death sentence handed down by a Kentucky court, and must determine (a) "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; (b) whether the evidence supports the enumerated statutory aggravating chapter; and (c) "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KY. REV. STAT. ANN. § 532.075(3)(a)–(c) (West 2011).

³⁰⁸ KY. REV. STAT. ANN. § 532.075(1) (West 2011) ("Whenever the death penalty is imposed for a capital offense, and upon the judgment becoming final in the Circuit Court, the sentence shall be reviewed on the record by the Supreme Court."). In *Chapman*, the capital defendant sought to waive his rights and requested the death penalty. *Chapman*, 265 S.W.3d at 156. However, the Kentucky Department of Public Advocacy filed the direct appeal petition on his behalf. *Chapman*, 265 S.W.3d at 162 n.2 ("For simplicity's sake, this opinion will refer to the arguments advanced on Chapman's behalf as being advanced by Chapman himself.").

proceedings, the Governor's power to grant clemency as guaranteed in the Kentucky Constitution is absolute, and could be granted over the inmate's objection.³⁰⁹

While the Commonwealth has enacted several measures to ensure that individuals with mental retardation or mental illness are protected against waivers that may be a product of that disability, we cannot determine if the Commonwealth is ensuring that such individuals are protected against waivers when the capital defendant pleads guilty without any condition on sentencing. Therefore, we cannot determine if the Commonwealth is fully compliant with Recommendation #7.

³⁰⁹ See KY. CONST. § 77.

III. ANALYSIS—MENTAL ILLNESS

A. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.

As in Mental Retardation Analysis Recommendation #2, several actors within Kentucky's criminal justice system receive training on identifying and interacting with mentally ill capital defendants and death row inmates.³¹⁰ However, because the Commonwealth does not require such training of all law enforcement, court officers, prosecutors, defense attorneys, judges or correctional staff, it is in partial compliance with Recommendation #1.

B. Recommendation #2

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Commonwealth of Kentucky has implemented legal mechanisms and adopted law enforcement practices to help ensure that the *Miranda* rights of mentally ill offenders are sufficiently protected during investigations and interrogations.³¹¹

Legal Mechanisms

Similar to the Commonwealth's consideration of the voluntariness of a mentally retarded suspect's confession, mental impairments are factors to be considered in weighing whether or not a defendant made a knowing and voluntary waiver of his/her *Miranda* rights.³¹² For a full discussion on the steps taken by the courts to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, see Mental Retardation Analysis Recommendation #6.³¹³

Law Enforcement Practices

In addition to the Commonwealth's training and accreditation requirements of police officers described in Mental Retardation Analysis Recommendation #6, in 2009 Kentucky's main law enforcement accrediting body adopted new standards requiring all entities applying for accreditation or reaccreditation to create written directives "establish[ing] procedures for handling mentally ill individuals, including those pending criminal charges and mental health commitments."³¹⁴ However, we were unable to determine the number, if any, of law

³¹⁰ See *supra* notes 216–44 and accompanying text.

³¹¹ See *supra* note 284 and accompanying text.

³¹² *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006).

³¹³ See *supra* notes 275–295 and accompanying text.

³¹⁴ KACP STANDARDS, *supra* note 290, at 57 (Standard 30-8).

enforcement agencies that have adopted or implemented these new standards on handling individuals with mental illness.³¹⁵

While the Commonwealth has adopted legal mechanisms to guard against the admission of false, coerced, or garbled confessions, because we are unable to determine to what extent law enforcement takes special steps to guard against the obtainment of such confessions, we are unable to determine whether the Commonwealth is in compliance with Recommendation #2.

C. 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 (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

The Commonwealth, through the Department of Public Advocacy (DPA), provides capital defense attorneys training on recognizing and understanding the impact of mental illness in their clients. However, private counsel used in the event of a conflict of interest in the Louisville Metro Public Defender’s Office (Metro Defender) are not required to undergo such training before accepting a capital case.³¹⁶ For a detailed discussion on the training provided to capital defense attorneys in the Commonwealth, see Mental Retardation Analysis Recommendation #3.³¹⁷

As described in Mental Retardation Analysis Recommendation #3, the Commonwealth provides “reasonably necessary” funding and resources, including expert and investigative services, to capital defense attorneys in order to diagnose and prove their clients’ mental disabilities at trial under KRS 31.185.³¹⁸ It appears that, upon request, Commonwealth trial courts grant adequate funding for capital defense attorneys to obtain mental health experts to diagnose and prove defendants’ mental disabilities.³¹⁹ However, although DPA and the Metro Defender maintain social workers, investigators and mitigation specialists on staff, and therefore do not have to request statutory funding for such services, due to the ever-increasing number of capital trials in the Commonwealth, these defense personnel are overburdened with capital cases.³²⁰ From 2009

³¹⁵ See *Accredited Agencies*, KY. ASS’N OF CHIEFS OF POLICE, http://www.kypolicechiefs.org/joomla/index.php?option=com_content&view=article&id=54&Itemid=64 (last visited July 26, 2011).

³¹⁶ Interview with Metro Defender, *supra* note 235.

³¹⁷ See *supra* notes 236–247 and accompanying text.

³¹⁸ KY. REV. STAT. ANN. § 31.185 (West 2011); see *supra* notes 249–264 and accompanying text.

³¹⁹ Interview with DPA, *supra* note 247.

³²⁰ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235247.

to 2010, defense counsel have recently requested funding for the assistance of a mitigation specialist at trial, which Kentucky trial courts have rejected on at least two occasions.³²¹

During post-conviction proceedings, an indigent petitioner may be entitled to legal representation as well as public funds for an expert witness if the trial or appellate court “has determined that the post-conviction petition sets forth allegations sufficient to necessitate an evidentiary hearing.”³²² It appears death row inmates and their defense counsel have significantly greater difficulty obtaining such resources at post-conviction than at trial; typically, post-conviction courts in Kentucky do not authorize funding for experts and resources.³²³ For an in-depth discussion on the funding and resources provided by the Commonwealth to detect and prove mental illness in capital defendants, see Mental Retardation Analysis Recommendation #3.³²⁴

For the reasons set forth, Kentucky is in partial compliance with Recommendation #3.

D. 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.

Whenever a question about the defendant’s competency to stand trial exists, a court is required to appoint at least one psychologist or psychiatrist, who “is working for the court, not necessarily the defense or the Commonwealth,” to examine the defendant.³²⁵ In addition, a Commonwealth prosecutor may move the court to order a pretrial evaluation when the defendant gives notice that s/he intends to rely on an insanity defense or produce expert mental health testimony for any reason (e.g., to produce evidence of a capital defendant’s mental condition at sentencing).³²⁶

In either of the above instances, Commonwealth prosecutors typically employ, and trial judges appoint, mental health experts based on their employment status at the Kentucky Correctional Psychiatric Center (KCPC).³²⁷ KCPC’s stated purpose is to “assist[] the Courts in the evaluation

³²¹ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235.

³²² *Hodge v. Commonwealth*, 244 S.W.3d 102, 108 (Ky. 2008) (the court will examine the petitioner’s proposed list of witnesses and will grant funds for witnesses that the court determines to be “reasonably necessary for those [indigent post-conviction] petitioners fully to present their claims.”). *See also* *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008) (noting that the “trial court still maintains the discretion to deny such funds if it determines that the expert testimony is not reasonably necessary.”).

³²³ Interview with DPA, *supra* note 247; *supra* notes 256–258 and accompanying text.

³²⁴ *See supra* notes 249–73 and accompanying text.

³²⁵ KY. REV. STAT. ANN. § 504.100(1) (West 2011); *Bishop v. Caudill*, 118 S.W.3d 159, 163 (Ky. 2003).

³²⁶ KY. REV. STAT. ANN. § 504.070(2) (West 2011); KY. R. CRIM. P. 7.24(3)(B). In this event, the court may commit the defendant in a Commonwealth psychiatric facility for up to thirty days. KY. REV. STAT. ANN. § 504.080(1) (West 2011).

³²⁷ Letter from Sharon Proctor, Associate Superintendent, Ky. Cabinet for Health & Family Services and Ky. Corr. Psychiatric Ctr., to Amy Staples, Assistant Public Advocate, Ky. Dep’t of Pub. Advocacy, Oct. 3, 2007 (on file with

of suspected criminal offenders to determine competency to stand trial and/or to determine the existence of a mental disease or defect at the time of the alleged criminal act.”³²⁸ The Associate Superintendent of KCPC has declared that “[i]t has been a long-standing policy to decline to conduct any evaluations as an expert exclusively for either the prosecution or the defense in order to maintain our objectivity in delivering services to the courts.”³²⁹ However we note in the vast majority of cases where mental retardation or mental illness is at issue, Commonwealth prosecutors use KCPC experts to demonstrate their case or to rebut the testimony of experts proffered by the defense.³³⁰ Indeed, the Court has stated that a pretrial “psychiatric evaluation is the Commonwealth’s most powerful means of refuting a mental defense and that the evaluation’s specific purpose is to give the Commonwealth an opportunity to refute [the defendant’s] anticipated insanity or mental illness defense.”³³¹

As discussed in Mental Retardation Analysis Recommendation #3, an indigent capital defendant may make an ex parte request to be appointed a private mental health expert to assist the defense by showing, with requisite specificity, that the expert is “reasonably necessary” and that the use of state facilities, i.e. KCPC, is impractical.³³² As previously noted, it appears that Kentucky trial courts provide adequate funding for defense attorneys to be able to hire qualified mental health experts to assist the defense confidentially, according to the needs of the defense, and to prove any mental disabilities of a capital defendant at trial.³³³

A defendant is entitled to an appointed mental health expert that only serves the needs of the defendant who will “provide assistance to the accused to help evaluate the strength of his defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution’s case by testifying and/or preparing counsel to cross-examine opposing experts.”³³⁴ This

author). *See, e.g.*, *Binion v. Commonwealth*, 891 S.W.2d 383, 384 (Ky. 1995); *Hunter v. Commonwealth*, 869 S.W.2d 719, 721 (Ky. 1994).

³²⁸ Letter from Sharon Proctor, *supra* note 327.

³²⁹ *Id.*

³³⁰ *See, e.g.*, *White v. Commonwealth*, 178 S.W.3d 470, 485–86 (Ky. 2005); *Edmonds v. Commonwealth*, No. 2007-SC-000350-MR, 2009 WL 4263142, at *11 (Ky. Nov. 25, 2009); *Dean v. Commonwealth*, 777 S.W.2d 900, 901 (Ky. 1989), *overruled on other grounds by Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003); *Skaggs v. Commonwealth*, No. 2002-SC-0436-MR, 2005 WL 2314073, at *2 (Ky. Sept. 25, 2005); *Parrish v. Commonwealth*, 272 S.W.3d 161, 167 (Ky. 2008); *Chapman v. Commonwealth*, 265 S.W.3d 156, 161, 172–73 (Ky. 2007); *Berry v. Commonwealth*, No. 2001-SC-0457-MR, 2003 WL 22415627, at *4 (Ky. Oct. 23, 2003); *Berry v. Commonwealth*, No. 2008-CA-001612-MR, 2009 WL 2901313, at *4 (Ky. Ct. App. Sept. 11, 2009); *Gaither v. Commonwealth*, No. 2004-SC-0474-MR, 2006 WL 436071, at *3 (Ky. Feb. 23, 2006).

³³¹ *Cain v. Abramson*, 220 S.W.3d 276, 282 (Ky. 2007) (internal citations omitted) (non-death penalty case). However, Kentucky Rule of Criminal Procedure 7.24 provides as least some safeguards for the defendant’s constitutional rights by limiting the admissibility of any statements “made by the defendant in the course of any [mental condition] examination provided for by this rule, whether the examination be with or without the consent of the defendant,” as well as any “testimony by the expert based upon such statement, and no fruits of the statement . . . except upon an issue regarding mental condition on which the defendant has introduced testimony.” KY. R. CRIM. P. 7.24(3)(B)(ii) (permitting the court to enter, during the guilt phase, an order “prohibiting disclosure to [] attorneys for either party of any self-incriminating information divulged by the defendant”).

³³² *See supra* notes 249–258 and accompanying text; KY. REV. STAT. ANN. §§ 31.110(1)(b), 31.185(1)–(2) (West 2011); *Benjamin v. Commonwealth*, 266 S.W.3d 775, 790 (Ky. 2008); *Commonwealth v. Paisley*, 201 S.W.3d 24, 36 (Ky. 2006); *Binion*, 891 S.W.2d at 386.

³³³ *See supra* notes 256–258 and accompanying text.

³³⁴ *Binion v. Commonwealth*, 891 S.W.2d 383, 385–86 (Ky. 1995) (if the capital defendant’s mental capacity “is to be a significant factor at trial, the [Commonwealth] must, at a minimum, assure the defendant access to a competent

psychologist or psychiatrist may also participate in a court-ordered pretrial evaluation; however, a defendant is not entitled to have counsel present at this evaluation.³³⁵

There have been instances in the Commonwealth where defense counsel employed incompetent or ineffective mental health experts at trial. For example, in *Skaggs v. Parker*, the U.S. Court of Appeals for the Sixth Circuit reversed and remanded an inmate's death sentence for a new penalty phase hearing based on the defense's repeated use of a mental health expert whose testimony was "bizarre and eccentric."³³⁶ It was subsequently determined that the testifying expert was, in fact, fraudulent, since he had actually only finished two years of college as an English major.³³⁷ We are aware of at least one other criminal trial where this expert or others like him testified, although we are unable to determine the extent to which fraudulent experts have testified at additional capital trials.³³⁸

While Kentucky trial courts typically grant a defendant's motion for funding to hire a qualified mental health expert at trial, Kentucky courts often appoint an expert based on his/her employment status at the Commonwealth-affiliated Kentucky Correctional Psychiatric Center, regardless of the expert's qualifications and relevant professional experience. Therefore, we are unable to determine if the Commonwealth is in compliance with Recommendation #4.

E. 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.

As discussed in Mental Retardation Analysis Recommendation #3, under KRS 31.110 and KRS 31.185, capital defendants in Kentucky are entitled to funds for expert services if the funds are "reasonably necessary."³³⁹ Post-conviction petitioners on death row are "entitled to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner's case."³⁴⁰ According to the KRS, such funding

mental health expert who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense"). In *Binion*, the defendant had been provided a neutral examination at KCPC, which the trial court had found insufficient to meet due process requirements. *Id.*

³³⁵ KY. REV. STAT. ANN. § 504.080(5) (West 2011); *Cain*, 220 S.W.3d at 280–81 ("In the context of the case at bar, we find the psychiatric evaluation . . . is not a critical stage in the procedural system giving rise to a constitutional necessity for the presence of counsel . . . [U]nder the facts of this case, [] there is no constitutional right . . . for an accused to have counsel present during a psychiatric examination.").

³³⁶ *Skaggs v. Parker*, 235 F.3d 261, 269, 275 (6th Cir. 2001).

³³⁷ *Skaggs*, 235 F.3d at 265, 268.

³³⁸ *Young v. Commonwealth*, 585 S.W.2d 378, 378–79 (Ky. 1979) (same expert as in *Skaggs*) (where defense counsel noted in request for funds "this particular defense expert was chosen by the undersigned counsel because of his long experience in the field of forensic psychology").

³³⁹ See *supra* notes 249–258 and accompanying text; KY. REV. STAT. ANN. §§ 31.110(1)(b), 31.185 (West 2011).

³⁴⁰ See *supra* notes 263–264 and accompanying text.

is to be paid by the county or local government where the proceeding is held, although the amount is not to “exceed the established rate charged by the Commonwealth and its agencies.”³⁴¹

Commonwealth trial courts typically provide adequate funds to public advocates for the purpose of employing qualified mental health experts to thoroughly evaluate capital defendants.³⁴² In practice, defense counsel obtains advance authorization for funding to obtain expert services in order to later seek reimbursement for the cost of expert services.³⁴³ However, it appears that Kentucky courts generally do not provide funding for expert evaluations to be conducted during post-conviction proceedings for death row inmates.³⁴⁴

Therefore, Kentucky is in partial compliance with Recommendation #5.

F. Recommendation #6

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

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

³⁴¹ KY. REV. STAT. ANN. § 31.185(3) (West 2011) (providing funding for “[a]ny direct expense, including the cost of a transcript or bystander’s bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person”).

³⁴² See *supra* notes 256–258 and accompanying text (noting that trial courts consistently grant multiple requests for additional funding or “good faith” orders allowing defense counsel to use “reasonable” amounts of funds to hire expert assistance).

³⁴³ *Id.*; *Young*, 585 S.W.2d at 379 (“We read [KRS 31.185] as requiring such authorization in advance of procuring the desired services” where the public advocates were not yet authorized to represent the defendant during the time the mental health evaluation was conducted); *McCracken County Fiscal Court v. Graves, et al.*, 885 S.W.2d 307, 314 (Ky. 1994) (“[W]e cannot overstate the importance of the process of *advance authorization*. With this opinion, we hold that it is the duty of trial counsel (as counsel did in this case) to move for advance authorization of expenses which he considers properly chargeable to the county.”).

³⁴⁴ Interview with DPA, *supra* note 247; Interview with Metro Defender, *supra* note 235. See, e.g., *St. Clair v. Commonwealth*, 140 S.W.3d 510, 530 (Ky. 2004); *Bowling v. Commonwealth*, 163 S.W.3d 361, 365–66 (Ky. 2005); *Bowling v. Commonwealth*, 80 S.W.3d 405, 421 (Ky. 2002). While trial courts may exercise their discretion to order an evaluation to determine if a capital defendant is competent to stand trial, we are unaware of any instance where a post-conviction court ordered a competency evaluation to determine if an inmate is competent to proceed with post-conviction relief. See *Stiltner v. Commonwealth*, No. 2007-CA-002048-MR, 2009 WL 102975, at *2 (Ky. Ct. App. Jan. 16, 2009) (finding that “it is reasonable to believe” that, in order for a post-conviction petitioner to obtain a competency evaluation, s/he must show “the existence of ‘specific factual matters at issue that require the defendant to competently consult with counsel’”) (internal citations omitted). In at least one case, Kentucky defense counsel was unable to obtain an independent mental expert to evaluate the capital defendant prior to trial, despite contacting over twenty psychiatrists, although it is unclear whether this was due to time or financial constraints. *Hunter v. Commonwealth*, 869 S.W.2d 719, 722 n.1 (Ky. 1994).

conduct, or (c) to conform one’s conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.

The Commonwealth of Kentucky excludes from the death penalty defendants who, at the time of the offense, were mentally retarded.³⁴⁵ The KRS defines “mental retardation” as (1) “significant subaverage intellectual functioning” as evidenced by a functional intelligence quotient (IQ) score of seventy or below, (2) “existing concurrently with substantial deficits in adaptive behavior[.]” and (3) that “manifested during the developmental period.”³⁴⁶ This prohibition does not include defendants who have mental disabilities other than mental retardation, such as dementia and traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning, but may manifest after the age of eighteen.³⁴⁷ Furthermore, Kentucky courts cannot exclude the death penalty as a sentencing option based on a court’s pretrial determination that the defendant is mentally ill,³⁴⁸ nor does the Commonwealth prohibit imposition of a death sentence on or execution of an individual who, at the time of their 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.³⁴⁹

Furthermore, the Commonwealth is one of a small number of states that permit a trier of fact to return a “guilty but mentally ill” (GBMI) verdict in a criminal trial.³⁵⁰ While no capital defendant has been sentenced to death upon the return of a GBMI conviction, Kentucky does not preclude the imposition of a death sentence on a defendant found GBMI.³⁵¹

As a result, the Commonwealth is not in compliance with either Recommendation #6 or Recommendation #7.

The Kentucky General Assembly has considered legislation that would bar the death penalty for offenders found to be severely mentally ill at the time of the offense, based on the same

³⁴⁵ KY. REV. STAT. ANN. § 532.140 (West 2011) (effective July 13, 1990). *See also* *Bowling*, 163 S.W.3d at 377.

³⁴⁶ KY. REV. STAT. ANN. § 532.130(2) (West 2011).

³⁴⁷ *See generally* KY. REV. STAT. ANN. § 532.130 (West 2011) (explicitly exempting only mentally retarded offenders).

³⁴⁸ *Commonwealth v. Ryan*, 5 S.W.3d 113, 116–17 (Ky. 1999), *abrogated on other grounds by* *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

³⁴⁹ *Id.*

³⁵⁰ *See* ALASKA STAT. ANN. § 12.47.030 (West 2011); DEL. CODE ANN. tit. 11, § 401(b) (West 2011); GA. CODE ANN. § 17-7-131(b)(1)–(2) (West 2011); ILL. COMP. STAT. ANN. 5/115-2 (West 2011); IND. CODE. ANN. § 35-36-2-5 (West 2011); KY. REV. STAT. ANN. § 504.130 (West 2011); 18 PA. CONS. STAT. ANN. § 314 (West 2011); *but see* *Commonwealth v. Stevens*, 739 A.2d 507, 514 (Pa. 1999) (a guilty but mentally ill verdict is unavailable in a capital case in Pennsylvania); S.C. CODE ANN. § 17-24-20 (West 2011); S.D. CODIFIED LAWS ANN. § 23A-26-14 (West 2011); *see also* N.M. STAT. ANN. § 31-9-3 (West 2003) (repealed by L. 2010, Ch. 97, § 1, effective May 19, 2010). KY. R. CRIM. P. 8.08, 8.12 (limiting available pleas in a criminal case to pleas of guilty, guilty but mentally ill, and not guilty); KY. R. CRIM. P. 9.90; KY. REV. STAT. ANN. §§ 504.120, 504.130 (West 2011) (effective July 15, 1982).

³⁵¹ KY. REV. STAT. ANN. §§ 504.120–504.150 (West 2011). Recently, in an unpublished opinion, the Kentucky Supreme Court upheld the constitutionality of the Commonwealth’s GBMI statutes, although the Court did not eliminate the question of statute’s constitutionality entirely. *Star v. Commonwealth*, 313 S.W.3d 30, 35–36 (Ky. 2010) (non-death penalty case).

diminished capacity premise that precludes the death penalty for mentally retarded offenders.³⁵² The proposed law defines a severely mentally ill defendant as someone who, “at the time of the offense, had a severe mental disorder or disability that significantly impaired his or her capacity to appreciate the nature, consequences, or wrongfulness of his or her conduct, exercise rational judgment in relation to conduct, or conform his or her conduct to the requirements of the law.”³⁵³ The legislation stipulates that a “mental disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs shall not, standing alone, constitute a mental disorder or disability.”³⁵⁴ This language mirrors Recommendation #7.

The Kentucky Death Penalty Assessment Team applauds the introduction of the legislation described above, exempting severely mentally ill defendants from the death penalty, and recommends that the Commonwealth adopt such legislation. In addition, the Assessment Team recommends that the Commonwealth adopt a rule or law that forbids death sentences and executions with regard to everyone who, at the time of the offense, had significantly sub-average 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. Finally, the Assessment Team recommends that the Kentucky General Assembly adopt a rule or law to preclude imposition of the death penalty in cases where a defendant is found GBMI.

G. 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 (see Recommendations #6–7 as to when it should do so), 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.

Section 532.025 of the KRS contains two relevant mitigating circumstances that permit a capital juror to consider a defendant’s mental condition: (1) “[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime[.]” and (2) “[a]t the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct [or to conform the conduct] to the requirements of law was impaired as a result of mental illness or retardation or intoxication” despite the fact that this impairment was “insufficient to constitute a defense to the crime.”³⁵⁵ The KRS also contains a catchall provision allowing a capital jury to consider “any mitigating circumstances . . .

³⁵² H.B. 16, 2010 Gen. Assemb., Reg. Sess. (Ky. 2010).

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ KY. REV. STAT. ANN. § 532.025(2)(b)(2), (2)(b)(7) (West 2011).

otherwise authorized by law”³⁵⁶ However, Kentucky does not require that judges instruct capital juries that mental illness is a mitigating and not an aggravating factor, or 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.³⁵⁷

The mitigating circumstances described above distinguish evidence of a mental disorder or defect applied as mitigation during the sentencing phase from the use of that same evidence to establish a defense to the crime during the guilt phase of a capital trial.³⁵⁸ However, Kentucky does not require trial courts to instruct jurors to distinguish between the affirmative defense of insanity, specifically, and the defendant’s subsequent reliance on similar evidence to demonstrate a mental disorder or disability as a mitigating factor.

Because the Commonwealth does not require, when applicable, that jurors be instructed on any of the three issues described in this Recommendation, Kentucky is not in compliance with Recommendation #8.

H. 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.³⁵⁹

To the best of our knowledge, the Commonwealth of Kentucky does not permit, when requested by defense counsel, that when the defendant is receiving medication for a mental disorder or disability, capital jurors be instructed that this affects the defendant’s perceived demeanor and such demeanor should not be considered in aggravation.³⁶⁰ Accordingly, the Commonwealth is not in compliance with Recommendation #9.

I. 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

³⁵⁶ KY. REV. STAT. ANN. § 532.025(2) (West 2011). Evidence offered under this provision is limited to that which is relevant to the prescribed statutory mitigating circumstances, facts or a qualified opinion bearing on the defendant’s character, or prior record or circumstances of the offense. *Id.*; *Stanford v. Commonwealth*, 734 S.W.2d 781, 790 (Ky. 1987).

³⁵⁷ *Hodge v. Commonwealth*, 17 S.W.3d 824, 853 (Ky. 2000) (permitting the prosecutor to discuss future dangerousness, despite not having provided advance notice of the non-statutory aggravator to the defense, where the defense introduced the issue); Interview with DPA, *supra* note 247. For a more detailed discussion on jury instructions, see Chapter Ten.

³⁵⁸ KY. REV. STAT. ANN. § 532.025(2)(b)(2), (2)(b)(7) (West 2011).

³⁵⁹ The Kentucky Death Penalty Assessment Team emphasizes that there are circumstances in which defense counsel’s request for an instruction on this issue could be denied and that it remains in the trial court’s discretion to determine if and when it is appropriate for the jury to be instructed on the effect of medication on a capital defendant’s perceived demeanor.

³⁶⁰ See generally 1 W. COOPER & D. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES (5th ed. 2010).

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 or her capacity to make a rational decision.

Recommendation #10 is divided into two parts: the first, which is identical to Recommendation #7 in the Mental Retardation Analysis Section, relates to the existence of state mechanisms that protect against waivers resulting from an inmate’s mental disability; and the second relates to the specific mechanism of “next friend” petitions when a death row inmate wishes to forego or terminate post-conviction proceedings.

As discussed in the Mental Retardation Analysis Section, the Commonwealth of Kentucky has in place some mechanisms to protect individuals with a mental disorder or disability against waivers of *Miranda* rights, waivers of counsel, waivers of jury sentencing, and waivers of presentation of mitigation at sentencing.³⁶¹ It is unclear whether Kentucky adequately guards against a waiver of a trial without any condition on sentencing when a capital defendant may suffer from a mental disorder or defect affecting his/her decision to plead guilty to a capital-eligible offense.

Furthermore, when a death row inmate seeks to terminate post-conviction proceedings in order to be executed, a Commonwealth post-conviction court should inquire whether the death row inmate “had the capacity to appreciate his[/her] position and make a rational choice with respect to [continuing or abandoning further litigation] or on the other hand [whether the inmate] is suffering from a mental disease, disorder or defect which may substantially affect his[/her] capacity in the premises.”³⁶² In the single case in which a death row inmate sought to waive state post-conviction proceedings, the post-conviction court held a competency hearing and determined that the inmate

- (1) had the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation on his behalf;
- (2) was not suffering from a mental disease, disorder or defect which substantially affects his capacity to decide to forego further legal proceedings on his behalf;
- (3) presented no evidence of any mental condition that impairs his ability or shows a lack of capacity to appreciate his present legal situation;
- (4) appreciated the legal consequences of the actions he requests; and
- (5) was capable of making decisions concerning his own defense and legal representation.³⁶³

³⁶¹ See *supra* notes 275–309 and accompanying text.

³⁶² *Chapman v. Commonwealth*, 265 S.W.3d 156, 182 (Ky. 2007) (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)). “Although *Rees* involved the abandonment of post-conviction proceedings and *Chapman*’s request is pre-trial, this is essentially a distinction without a difference.” *Chapman*, 265 S.W.3d at 180.

³⁶³ Order, *Chapman v. Pub. Advocacy*, No. 07-CI-01523, at *3 (Franklin Cir. Ct., Nov. 17, 2008). The Franklin Circuit Court heard testimony from one medical expert and the death row inmate himself. *Id.* at *2.

Consequently, the circuit court found the inmate competent to waive his right to post-conviction review and the inmate was executed four days later.³⁶⁴ Based on this single case, we are unable to conclude whether the Commonwealth has mechanisms in place to guard against an inmate's waiver of post-conviction review as a result of his/her mental disorder or disability.³⁶⁵

The Commonwealth also has not enacted any laws, rules, or regulations that allow courts to appoint a "next friend" to initiate or pursue available remedies to set aside a conviction or death sentence on an incompetent inmate's behalf.³⁶⁶ We note, however, that in *Chapman v. Commonwealth*, the death row inmate's counsel was permitted to file a direct appeal petition on the inmate's behalf, which included counsel's concerns about the inmate's competency to waive his legal rights and to be executed.³⁶⁷

Under federal law, a third party may have standing as a "next friend" to file a post-conviction petition on behalf of a death-row inmate if the "next friend" can demonstrate that (1) the death row inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief, and (2) that s/he is "truly dedicated to the [death-sentenced inmate's] best interests and shares a significant relationship" with the inmate.³⁶⁸ It is in the court's discretion as to whether a "next friend" may be appointed to pursue post-conviction relief on behalf of the incompetent death row inmate.³⁶⁹

Although the Commonwealth of Kentucky protects against certain waivers that are a product of a capital defendant or death row inmate's mental illness, there is no provision for appointment of a

³⁶⁴ *Id.* at *3.

³⁶⁵ Since the death penalty was reinstated in 1976, there have been three executions in the Commonwealth, two of which involved death row inmates who had waived or withdrawn post-conviction review. *Chapman*, 265 S.W.3d at 156; *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999). In one case, described above, the death row inmate was executed without filing for state or federal post-conviction review; in the other, the inmate was executed after he exhausted his state post-conviction appeals and waived his remaining habeas corpus review in federal court. *Chapman*, 265 S.W.3d at 156; *Harper*, 177 F.3d at 572.

³⁶⁶ See *supra* notes 170–84. In fact, in *Chapman v. Commonwealth*, the Kentucky Supreme Court declined to permit amicus curiae, or "friend of the court," to present mitigation evidence over the capital defendant's objection. *Chapman*, 265 S.W.3d at 169–70. A "next friend" is not a party to an action, but is an officer of the court, specially appearing to look after the interests of the person for whose benefit they appear. See generally Paul F. Brown, "Next Friends" as Enemies: Third Party Petitions for Capital Defendants Wishing to Waive Appeals, 81 J. CRIM. L. & CRIMINOLOGY 981 (1991). The U.S. Supreme Court has stated that "'next friend' standing [during capital habeas corpus proceedings] is by no means granted automatically to whomever seeks to pursue an action on behalf of another," instead, a "'next friend' must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action," and "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) ("[I]t has been further suggested that a 'next friend' must have some significant relationship with the real party in interest.").

³⁶⁷ *Chapman*, 265 S.W.3d at 162 n.2 ("The Department of Public Advocacy then filed this [direct] appeal on [the inmate's] behalf."). See also *Harper*, 177 F.3d at 569 (noting that DPA expressed concerns to the federal district court about whether the inmate was competent to decide not to proceed with *habeas*, and presented evidence on this issue at the subsequent competency hearing).

³⁶⁸ See *Whitmore*, 495 U.S. at 163–65; *Rees v. Peyton*, 384 U.S. 312, 314 (1966); *Harper*, 177 F.3d at 569.

³⁶⁹ *Whitmore*, 495 U.S. at 165. In fact, in *Harper*, the Sixth Circuit noted that when DPA filed a Motion for Stay of Execution and Motion to Disqualify the Attorney General and Department of Corrections, DPA also noted the possibility that DPA may file a *habeas corpus* or next friend petition on behalf of Harper. *Harper*, 177 F.3d at 569.

“next friend” on behalf of a petitioner who wishes to forego or terminate state post-conviction proceedings due to a mental disorder, disease, or disability. Consequently, the Commonwealth is only in partial compliance with Recommendation #10.

The Kentucky Death Penalty Assessment Team notes that in 2008, legislation was introduced in the Kentucky General Assembly providing that

if a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or 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.³⁷⁰

The Kentucky Death Penalty Assessment Team recommends adoption of such legislation.

J. Recommendation #11

The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or 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.

Recommendation #11 consists of two parts: the first involves the suspension of post-conviction proceedings due to the prisoner’s mental disorder or disability; the second involves the reduction of the prisoner’s sentence due to the unlikelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings.

It is unclear whether Kentucky courts require a post-conviction petitioner to have the mental capacity to understand or communicate pertinent information, or otherwise assist counsel, in connection with post-conviction proceedings, when the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. Therefore, we cannot determine if such a finding would require a court to stay post-conviction proceedings.³⁷¹ For example, in *Stiltner v. Commonwealth*, the Kentucky Court of Appeals contemplated the need for a prisoner to competently assist counsel during post-conviction

³⁷⁰ H.B. 659, 2008 Gen. Assemb., Reg. Sess. 2 (Ky. 2008).

³⁷¹ However, Commonwealth courts may hold a hearing to determine whether an inmate is competent and thus able to *waive* or *withdraw* his/her post-conviction review. Order, Chapman v. Pub. Advocacy, No. 07-CI-01523 (Franklin Cir. Ct., Nov. 17, 2008). For further discussion about waiver and withdrawal of post-conviction review, see Mental Illness Recommendation #10. See *supra* notes 361–370 and accompanying text.

proceedings.³⁷² However, the Commonwealth has not set out any rules or laws to govern whether a prisoner would receive a stay of post-conviction proceedings should s/he have a mental disorder or disability that affects his/her ability to assist counsel in connection with the resolution of those proceedings.

The Kentucky Supreme Court has held that where a death row inmate can show that his/her ongoing mental incompetence prevented the inmate from filing a timely post-conviction petition, and that the incompetence was unknown or “beyond the petitioner’s control and unavoidable despite due diligence,” a court may apply the equitable tolling doctrine to the post-conviction statute of limitations.³⁷³ A death row inmate seeking to toll the statute of limitations has no right to counsel unless s/he is able to demonstrate that his/her claim warrants an evidentiary hearing.³⁷⁴

To our knowledge, the Kentucky Supreme Court has never equitably tolled the statute of limitations applicable to post-conviction proceedings under RCr 11.42 due to a death row inmate’s incompetence. In fact, to our knowledge, the Court has not tolled the statute of limitations due to a petitioner’s mental incompetence prior to the expiration of the statute of limitations in any *non-capital* post-conviction proceeding.³⁷⁵ For example, in *Commonwealth v. Carneal*, the petitioner presented evidence that he experienced periods of incompetence after his conviction and before the statute of limitations imposed on post-conviction filings expired in his case.³⁷⁶ However, because the petitioner experienced “*intermittent* competence,” the Kentucky

³⁷² *Stiltner v. Commonwealth*, No. 2007-CA-002048-MR, 2009 WL 102975, at *2 (Ky. App. Jan. 16, 2009) (“[W]e have not located any Kentucky authority governing post[-]conviction competency evaluations.”). The Kentucky Court of Appeals denied the petitioner’s request, but also stated that “it is reasonable to believe” that when a prisoner seeks a competency evaluation, the prisoner would need to show “the existence of ‘specific factual matters at issue that require the [prisoner] to competently consult with counsel.’” *Id.* (internal citations omitted).

³⁷³ *Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005) (citing *Dunlap v. United States*, 250 F.3d 1001, 1010 (6th Cir. 2001)). Also noting that “a claim of mental incompetence does not constitute a per se reason to toll a statute of limitations” (*Stacey*, 177 S.W.3d at 817); KY. R. CRIM. P. 11.42(10)(a). In *Stacey*, the Kentucky Supreme Court ultimately rejected the inmate’s request to equitably toll the RCr 11.42 statute of limitations for lack of evidence to support the equitable relief. *Stacey*, 177 S.W.3d at 817. See also *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2005).

³⁷⁴ KY. R. CRIM. P. 11.42(5). Although not required by law, in practice, the Kentucky Department of Public Advocacy provides capital defendants with counsel for post-conviction review before the final opinion on direct appeal is issued. Telephone Interview by Sarah Turberville with Marguerite Thomas, Manager, Post Conviction Branch, Ky. Dep’t of Pub. Advocacy, March 18, 2010 (on file with author). The standard to obtain an evidentiary hearing appears identical to that required for the inmate to succeed on the merits for his claim for equitable tolling: that the inmate suffered *ongoing* mental incompetence and that the mental incapacity was unknown to him/her or could not have been ascertained by the exercise of due diligence during the three-year statute of limitations. *Carneal*, 274 S.W.3d at 429–30 (emphasis added).

³⁷⁵ *Carneal*, 274 S.W.3d at 429 (Ky. 2008) (non-capital case); *Stacey*, 177 S.W.3d at 817 (non-capital case); *Stiltner*, 2009 WL 102975 at *2 (Ky. App. 2009). Notably, several pro se petitioners seeking to toll the statute of limitations in non-capital cases have been unable to proffer sufficient evidence to be granted an evidentiary hearing, and consequently were not entitled to be appointed counsel. See, e.g., *Griffith v. Commonwealth*, No. 2005-CA-002601-MR, 2006 WL 3040846 (Ky. Ct. App. Oct. 27, 2006) (pro se); *Moore v. Commonwealth*, No. 2006-CA-001469-MR, 2008 WL 162853 (Ky. Ct. App. Jan. 18, 2008) (pro se); see also *Burke v. Campbell County Fiscal Court*, No. Civ.A.06-CV-191-DLB, 2006 WL 3627711 (E.D. Ky. Dec. 11, 2006) (pro se).

³⁷⁶ *Carneal*, 274 S.W.3d at 429 (emphasis added).

Supreme Court was “unconvinced that his condition prevented compliance with the RCr 11.42 time limitation such that equitable tolling would be appropriate.”³⁷⁷

However, in 2011, the Kentucky Supreme Court held in *Hallum v. Commonwealth*, that an equitable tolling remedy is not necessary because the Commonwealth has adopted a “prison mailbox rule” which now governs the statute of limitations.³⁷⁸ In light of *Hallum*, it is unclear whether, a petitioner who has waived or withdrew his/her petition for post-conviction relief due to a mental disorder or disability that existed prior to the expiration of the statute of limitations may seek to interrupt the running of the statute of limitations based on the doctrine of “equitable tolling.”³⁷⁹

Because we have found no instance of the Commonwealth staying post-conviction proceedings when a death row inmate is incompetent or of the Commonwealth reducing a death row inmate’s sentence when there is no significant likelihood of restoring the inmate’s capacity to participate in post-conviction proceedings in the foreseeable future, Kentucky is not in compliance with Recommendation #11.

The Kentucky Death Penalty Assessment Team notes that the Kentucky General Assembly has considered legislation specifically addressing the issues described in Recommendation #11, which would provide that

if a court finds at any time that a prisoner under a sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court shall [stay or] suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future, as defined in KRS 504.060, it shall reduce the prisoner’s sentence to a sentence imposed in capital cases when execution is not an option.³⁸⁰

The Kentucky Death Penalty Assessment Team recommends adoption of such legislation.

³⁷⁷ *Id.*

³⁷⁸ See *Hallum v. Commonwealth*, No. 2009–SC–000762–DG, 2011 WL 1620593, at *2 (Ky. Apr. 21, 2011) (holding that the statutory mailbox rule applies retroactively), *overruling* *Robertson v. Commonwealth*, 177 S.W.3d 789, 792 (Ky. 2005). See KY. R. CRIM. P. 12.04(5) (“[I]f an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution’s internal mail system on or before the last day for filing with sufficient First Class postage prepaid.”) (adopted by KY. SUP. CT. ORDER 2010-09 (effective Jan. 1, 2011)). But see *infra* note 379 (citing *Stacey*, 177 S.W.3d at 813; *Carneal*, 274 S.W.3d at 429).

³⁷⁹ See, e.g., *Stacey*, 177 S.W.3d at 816–17 (permitting tolling due to incompetency when petitioner is able to present evidence that his/her “alleged mental incapacity was either unknown to him[her] or could not have been ascertained by him[her] by the exercise of due diligence during the three-year limitations period of RCr 11.42(10)”; *Carneal*, 274 S.W.3d at 429 (same); *Stiltner*, 2009 WL 102975, at *2 (same). The statute of limitations for filing post-conviction claims under RCr 11.42 was not enacted until October 1, 1994. KY. R. CRIM. P. 11.42(10).

³⁸⁰ H.B. 659, 2008 Gen. Assemb., Reg. Sess. 3 (Ky. 2008).

K. 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.

Recommendation #12 is divided into two parts: the first pertains to the Commonwealth’s standard for determining whether a death row inmate is competent to be executed and the second pertains to the Commonwealth’s sentencing procedures after a death row inmate has been found incompetent to be executed.³⁸¹

Standard for Competency to be Executed³⁸²

In order for a death row inmate to be found competent for execution under Recommendation #12, the death row inmate must not only “understand” the nature and purpose of the punishment, but s/he must also “appreciate” its particular application in the death row inmate’s own case—that is, that the inmate have a *rational* understanding of the reasons s/he is to be executed.³⁸³

Kentucky prohibits the execution of a death row inmate who is incompetent.³⁸⁴ If the death row inmate does not understand (1) the fact of his/her impending execution, and (2) why s/he is to be executed, the inmate will be declared incompetent, and his/her execution date will be suspended until s/he is restored to competency.³⁸⁵

Sentencing Procedures after a Finding of Incompetency

³⁸¹ The consensus of the Kentucky Assessment Team was that the Commonwealth should have the opportunity to “restore” competency upon an initial finding of a death row inmate’s ineligibility for execution due to mental incompetence. This view is contrary to that of the ABA standard, which recommends an automatic reduction to the sentence imposed in capital cases when execution is not an option upon an initial finding of a death row inmate’s incompetency for execution. See generally ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), available at http://www2.americanbar.org/sdl/Documents/2006_AM_122A.pdf (“[T]reating a condemned prisoner, especially over his or her objection, for the purpose of enabling the state to execute the prisoner . . . violates fundamental ethical norms of mental health professionals.”).

³⁸² We note that the Kentucky statutes addressing this issue refer to the term “sanity” to be executed, rather than competency to be executed. KY. REV. STAT. ANN. §§ 431.213, 431.2135, 431.240 (West 2011).

³⁸³ Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (holding that the Eighth Amendment prohibits the execution of an “insane” offender who is not aware of his impending execution and of the reasons for it); Panetti v. Quarterman, 551 U.S. 930, 959–60 (2007) (A determination of competency to be executed requires an inquiry into whether the death row inmate has a *rational* understanding of the reasons s/he will be executed.) (emphasis added).

³⁸⁴ KY. REV. STAT. ANN. § 431.240(2) (West 2011).

³⁸⁵ KY. REV. STAT. ANN. §§ 431.213(2), 431.2135(4), 431.240(2) (West 2011). The Kentucky Supreme Court has held that the Eighth Amendment does not preclude the execution of an inmate with a mental illness that does not rise to the level of insanity. See Johnson v. Commonwealth, No. 2006-SC-000548-MR, 2008 WL 4270731, at *6 (Ky. Sept. 18, 2008).

In cases in which a death row inmate is found incompetent and therefore currently ineligible for execution, the inmate will be transferred to the Kentucky Correctional Psychiatric Center until s/he is restored to competency.³⁸⁶ The treating psychiatrist is required to report at least once monthly, to both the circuit court and the inmate’s counsel, on the inmate’s progress and whether there is a substantial probability that s/he will become competent.³⁸⁷ Upon receipt of a report that the inmate has become competent, the circuit court will schedule a mental health evaluation and hearing to determine whether the inmate is legally competent to be executed.³⁸⁸ If the court determines the inmate competent, the Governor will reschedule the execution and the warden will carry out the sentence on the date scheduled.³⁸⁹ Kentucky law does not require that a death row inmate who is found incompetent to be executed to have his/her sentence reduced to the sentence imposed in capital cases when execution is not an option.

Although statutory procedures for challenging competency to be executed are in place, we are unaware of any party that has challenged a death row inmate’s competency to be executed since the reenactment of Kentucky’s death penalty in 1976.³⁹⁰

Based on the above information, we are unable to determine if the Commonwealth is in compliance with Recommendation #12.

L. 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.

In addition to the trainings offered to, and at times required of, actors within the criminal justice system,³⁹¹ entities devoted to protecting mentally disabled persons throughout Kentucky also work collaboratively to develop resources and best practice methods for implementation across the Commonwealth.

³⁸⁶ KY. REV. STAT. ANN. § 431.2135(4) (West 2011). *See also* KY. REV. STAT. ANN. § 431.240(2) (West 2011) (“If the condemned person is insane, as defined in KRS 431.213 . . . on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity”). A death row inmate in the Commonwealth may not raise the issue of competency to be executed until s/he has exhausted all state and federal remedies for challenging the validity and constitutionality of his/her conviction and sentence and the Governor of Kentucky has set an execution date. KY. REV. STAT. ANN. § 431.213, 431.2135(1) (West 2011).

³⁸⁷ KY. REV. STAT. ANN. § 431.2135(4) (West 2011) (requiring periodic review of the inmate’s sanity). The treating psychiatrist is also required to report immediately upon a psychiatric determination of sanity. *Id.*

³⁸⁸ KY. REV. STAT. ANN. § 431.2135(5) (West 2011). *See also* KY. REV. STAT. ANN. § 431.240(2) (West 2011) (requiring any hearings authorized under authority of this section to be conducted in accordance with KRS Chapter 13B).

³⁸⁹ KY. REV. STAT. ANN. § 431.240(4) (West 2011).

³⁹⁰ KY. REV. STAT. ANN. § 431.2135 (West 2011).

³⁹¹ Described *supra* notes 216–234 and accompanying text.

All law enforcement (especially Crisis Intervention Team-trained officers) and correctional personnel who receive training on mental illness are trained by experts from a number of government and private entities who specialize in the identification and treatment of mental illness.³⁹² The Kentucky Department of Behavioral Health, Developmental and Intellectual Disabilities (DBHDID),³⁹³ along with various other Commonwealth entities, have issued educational documents and trainings for correctional officers and jailers on how to recognize and interact with persons with mental illness, mental retardation, and other developmental disabilities.³⁹⁴ In addition, every inmate entering into a detention facility must be screened for “mental health risk issues, including mental illness, suicide, mental retardation, and acquired brain injury.”³⁹⁵

DBHDID also funds services and programs for Commonwealth residents with mental illness, mental retardation, and other developmental disabilities, such as the Regional Community Mental Health Program, which “provides a comprehensive range of accessible and coordinated mental health services, including direct or indirect mental health” through Kentucky’s fourteen regional mental health and mental retardation boards.³⁹⁶ The Commonwealth has also published *Best Practice Implementation in Kentucky’s Public Mental Health & Mental Retardation System*, which is a culmination of a statewide assessment of evidence-based practices implemented throughout Kentucky’s public mental health and mental retardation system and available to Commonwealth government officials, employers, workers, and general public.³⁹⁷

Based on the best practices described above, the Commonwealth of Kentucky is in compliance with Recommendation #13.

³⁹² Interview with Lt. Kevin DeSpain, *supra* note 227; *see supra* notes 223, 294–295 and accompanying text

³⁹³ The DBHDID was known at the time as the Kentucky Department for Mental Health and Mental Retardation Services. Ky. Exec. Order No. 2009-541 (June 12, 2009).

³⁹⁴ *See, e.g.*, KY. DEP’T OF BEHAVIORAL HEALTH, DEVELOPMENTAL & INTELLECTUAL DISABILITIES, INSTRUCTOR MATERIALS, BEHAVIORAL HEALTH NEEDS IN LOCAL JAILS: A CROSS TRAINING PROGRAM, *available at* <http://www.mhmr.ky.gov/mhsas/files/jailer%20training.pdf>. For example, the DBHDID collaborated with the Kentucky Chapter of the National Alliance of Mental Illness, the Kentucky Department of Corrections and the Kentucky Commission on the Services and Supports for Individuals with Mental Illness, Alcohol and other Drug Abuse Disorders, and Dual Diagnosis to create training materials for jail personnel. *Id.* at 1. The training included information on how to recognize mental illness or retardation during mandatory screenings of incoming offenders. *Id.* at 8, 14, 58–59.

³⁹⁵ KY. REV. STAT. ANN. § 441.048 (West 2011).

³⁹⁶ KY. REV. STAT. ANN. §§ 210.370–210.460 (West 2011); *Community Mental Health Centers*, KY. CABINET FOR HEALTH & FAMILY SERV., <http://chfs.ky.gov/dms/Community+Mental+Health+Centers.htm> (last visited July 27, 2011) (“Regional Boards are private, nonprofit organizations established to serve residents of a designated multicounty region”).

³⁹⁷ LOUIS KURTZ & VESTENA ROBBINS, TRAINING, RESEARCH, EVALUATION & DISSEMINATION DIVISION OF ADMINISTRATION & FINANCIAL MANAGEMENT, DEP’T FOR MENTAL HEALTH & MENTAL RETARDATION SERVICES, *BEST PRACTICE IMPLEMENTATION IN KENTUCKY’S PUBLIC MENTAL HEALTH & MENTAL RETARDATION SYSTEM* (Mar. 2006), *available at* <http://mhmr.ky.gov/mhsas/files/CMHC%20Best%20Practice%20Report.pdf>.

APPENDIX

Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011

KEY	Death sentence reversed		No relief provided; appeal may be pending.		* Death sentence imposed as a result of retrial		** May include reversal of conviction								
	# Capital Cases	# Death Sent. Imposed	Name	County	Year DP imposed	Direct Appeal Citation	Year DP rev'd	Reversal Citation	Direct App.	State PCR	Fed HB	Clemency	Other	Executed	Comment
DEATH SENTENCES IMPOSED															
DEATH SENTENCES REVERSED**															
1	1	1	Robert Lee Askew	Jefferson	1985	768 S.W.2d 51 (Ky. 1989)	1989	768 S.W.2d 51	x						
2	2	2	Ralph Stephen Baze, Jr.	Rowan	1994	965 S.W.2d 817 (Ky. 1997)									
3	5	5	William O. Bevins	Greenup	1983	712 S.W.2d 932 (Ky. 1986)									Died on Row (non-execution)
4	1	1	Alexander Bowling	unable to determine	1981	Died prior to Direct Appeal									Died on Row (non-execution)
5	2	2	Ronnie L. Bowling	Laurel	1992	942 S.W.2d 293 (Ky. 1997)									
6	2	2	Thomas Clyde Bowling, Jr.	Fayette	1991	873 S.W.2d 175 (Ky. 1993)									
7	1	1	Phillip L. Brown	Adair	2006	313 S.W.3d 577 (Ky. 2010)	2010	313 S.W.3d 577	x						
8	1	1	Charles Wayne Bussell	Christian	1992	882 S.W.2d 111 (Ky. 1994)	2007	226 S.W.3d 96		x					
9	1	1	Virginia Susan Caudill	Fayette	2000	120 S.W.3d 635 (Ky. 2003)									Waived remaining appeals (volunteered for execution)
10	2	2	Marco Allen Chapman	Boone	2004	265 S.W.3d 156 (Ky. 2007)								11/21/2008	
11	1	1	Michael Dean Clark	Fayette	1987	833 S.W.2d 793 (Ky. 1991)	1991	833 S.W.2d 793	x						Co-defendant is Walls.
12	2	2	Teddy Lee Cosby	Jefferson	1986	776 S.W.2d 367 (Ky. 1989)	1989	776 S.W.2d 367	x						Died on Row (non-execution)
13	1	1	Allen Cushman	Laurel	1994	Died prior to Direct Appeal									
14	1	1	Roy Wayne Dean	Todd	1985	777 S.W.2d 900 (Ky. 1989)	1989	777 S.W.2d 900	x						
15	6	6	Kevin Dunlap	Livingston	2010	Direct Appeal Pending; Brief of Petitioner-Appellant, No. 09 CR-00027 (Ky. Aug. 15, 2011)									
16	1	1	Roger Dale Epperson	Letcher	1986	809 S.W.2d 835 (Ky. 1990)									Co-defendant is Hodge.
17	2	2	Roger Dale Epperson	Laurel	1987	No. 88-SC-712 (Ky.)	1991	No. 88-SC-713					x		Conviction set aside by Court (197 S.W.3d 46, 51); Co-defendant is Hodge.
	2	2	Roger Dale Epperson*	Warren	2003	197 S.W.3d 46 (Ky. 2006)									Severed trial; no co-defendant
18	1	1	Samuel Stevens Fields	Rowan	1997	12 S.W.3d 275 (Ky. 2000)	2000	12 S.W.3d 275	x						
	1	1	Samuel Stevens Fields*	Floyd	2004	274 S.W.3d 375 (Ky. 2008)									
19	2	2	Robert Carl Foley	Laurel	1993	942 S.W.2d 876 (Ky. 1996)									

Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011

KEY		* Death sentence reversed No relief provided; appeal may be pending.															
		** May include reversal of conviction															
# Capital Cases	# Death Sent. Imposed	Name	County	DEATH SENTENCES IMPOSED				DEATH SENTENCES REVERSED**							Comment		
				Year DP imposed	Direct Appeal Citation	Year DP rev'd	Reversal Citation	Direct App.	State PCR	Fed HB	Clemency	Other	Executed				
20	4	Robert Carl Foley	Madison	1994	953 S.W.2d 924 (Ky. 1997)												
21	5	LaFonda Fay Foster	Fayette	1987	827 S.W.2d 670 (Ky. 1991)			1991	827 S.W.2d 670	x							
22	1	Fred Furnish	Kenton	1999	95 S.W.3d 34 (Ky. 2002)			2002	95 S.W.3d 34	x							
22	1	Fred Furnish*	Kenton	2004	267 S.W.3d 656 (Ky. 2007)												
23	1	Eugene William Gall, Jr.	Boone	1978	607 S.W.2d 97 (Ky. 1980)			2000	231 F.3d 265 (6th Cir.)			x					
24	3	John Roscoe Garland	McCreary	1999	127 S.W.3d 529 (Ky. 2003)												
25	1	Johnathon Wayne Goforth	Fayette	2000	120 S.W.3d 635 (Ky. 2003)												
26	1	Fred Grooms	Lyon	1985	756 S.W.2d 131 (Ky. 1988)			1988	756 S.W.2d 131	x							
27	2	Randy Winton Haight	Garrard	1986	760 S.W.2d 84 (Ky. 1988)			1988	760 S.W.2d 84	x							
27	2	Randy Winton Haight*	Jefferson	1994	938 S.W.2d 243 (Ky. 1996)												
28	2	Leif C. Halvorsen	Fayette	1983	730 S.W.2d 921 (Ky. 1986)												
29	2	Edward Lee Harper, Jr.	Jefferson	1982	694 S.W.2d 665 (Ky. 1985)												Waived remaining appeals (volunteered for execution)
30	1	Benny Lee Hodge	Letcher	1986	809 S.W.2d 835 (Ky. 1990)												Co-defendant is Epperson.
31	2	Benny Lee Hodge	Harlan	1987	No. 88-SC-713 (Ky.)			1991	No. 88-SC-713					x			Conviction set aside by Court (197 S.W.3d 46, 51); Co-defendant is Epperson.
31	2	Benny Lee Hodge*	Laurel	1996	17 S.W.3d 824 (Ky. 2000)												Severed trial; no co-defendant
32	1	Jack Joe Holland	Oldham	1981	703 S.W.2d 876 (Ky. 1985)			1985	703 S.W.2d 876	x							Co-defendant is James.
33	1	James Hunt	Floyd	2006	304 S.W.3d 15 (Ky. 2009)												
34	1	James D. Hunter	Clark	1991	869 S.W.2d 719 (Ky. 1994)			1994	869 S.W.2d 719	x							
35	1	Todd Ice	Wolfe	1980	667 S.W.2d 671 (Ky. 1984)			1984	667 S.W.2d 671	x							Ice was 15 at time of offense.
36	1	Clawvern Jacobs	Knott	1989	870 S.W.2d 412 (Ky. 1994)			1994	870 S.W.2d 412	x							
36	1	Clawvern Jacobs*	Warren	1997	58 S.W.3d 435 (Ky. 2001)			2001	58 S.W.3d 435	x							
37	1	Larry James	Oldham	1981	703 S.W.2d 876 (Ky. 1985)			1985	703 S.W.2d 876	x							Co-defendant is Holland.
38	1	Donald Herb Johnson	Floyd	1997	910 S.W.2d 229 (Ky. 1995)												

Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011

KEY		* Death sentence imposed as a result of retrial														
		** May include reversal of conviction														
# Capital Cases	# Death Sent. Imposed	Name	County	Year DP imposed	DEATH SENTENCES IMPOSED				DEATH SENTENCES REVERSED**				Comment			
					Direct Appeal Citation	Year DP rev'd	Reversal Citation	Direct App.	State PCR	Fed HB	Clemency	Other		Executed		
39	1	Paul Kordenbrock	Boone	1981	700 S.W.2d 384 (Ky. 1985)	1990	919 F.2d 1091 (6th Cir. en banc)				x					
40	1	Jeffrey Leonard a.k.a. James Earl Slaughter	Jefferson	1983	744 S.W.2d 407 (Ky. 1987)	2007						Granted 12/10/07				
41	1	Hugh Marlowe	Harlan	1982	709 S.W.2d 424 (Ky. 1986)	2001	2006 WL 3386629 (Ky.) (aff'g lower ct)			x						
42	2	David Eugene Matthews	Jefferson	1982	709 S.W.2d 414 (Ky. 1986)	2011	651 F.3d 489 (6th Cir.)				x				Inmate's death sentence reversed; inmate remains on death row	
43	1	Raymond (William) McClellan	Jefferson	1982	715 S.W.2d 464 (Ky. 1986)	1986	715 S.W.2d 464	x								
44	3	Gary Casper McKinney	Pulaski	1998	60 S.W.3d 499 (Ky. 2001)	2001	60 S.W.3d 499	x								
45	1	Harold McQueen	Madison	1981	669 S.W.2d 519 (Ky. 1984)									7/1/1997		
46	3	William Meece	Warren	2006	2011 WL 2433733 (Ky.)											
47	1	John Mills	Knox	1996	996 S.W.2d 473 (Ky. 1999)											
48	1	Brian Keith Moore	Jefferson	1980	634 S.W.2d 426 (Ky. 1982)	1982	634 S.W.2d 426	x								
48	1	Brian Keith Moore*	Jefferson	1984	771 S.W.2d 34 (Ky. 1988)											
49	1	Joseph Edward Morris	Harlan	1986	766 S.W.2d 58 (Ky. 1989)	1989	766 S.W.2d 58	x								
50	2	Sherman Noble	Jefferson	2005	Died prior to Direct Appeal										Died on Row (non-execution)	
51	1	La Verne O'Bryan	Jefferson	1980	634 S.W.2d 153 (Ky. 1982)	1982	634 S.W.2d 153	x								
52	2	Carlos Lamont Ordway	Fayette	2010	Direct Appeal Pending											
53	2	Larry Osborne	Whitley	1999	43 S.W.3d 234 (Ky. 2001)	2001	43 S.W.3d 234	x								
54	2	Melvin Lee Parrish	Jefferson	2001	121 S.W.3d 198 (Ky. 2003)											
55	1	Tommie Perdue	Russell	1992	916 S.W.2d 148 (Ky. 1995)	1995	916 S.W.2d 148	x								
56	1	Ernest Arnaze Rogers	Christian	1996	992 S.W.2d 183 (Ky. 1999)	1999	992 S.W.2d 183	x								
57	1	Parramore Lee Sanborn	Henry	1984	754 S.W.2d 534 (Ky. 1988)	1988	754 S.W.2d 534	x								
57	1	Parramore Lee Sanborn*	Jefferson	1991	892 S.W.2d 542 (Ky. 1994)											
58	2	David Lee Sanders	Madison	1987	801 S.W.2d 665 (Ky. 1990)											
59	6	Beoria A. Simmons	Jefferson	1985	746 S.W.2d 393 (Ky. 1988)	2010	Killer of 3 wins fight to avoid execution Deal gives Simmons life, Courier-J., March 3, 2010, at B1								x	Commonwealth agreed to lesser sentence during federal habeas litigation.

Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011

KEY		Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011												
Death sentence reversed		* Death sentence imposed as a result of retrial												
No relief provided; appeal may be pending.		** May include reversal of conviction												
# Capital Cases	# Death Sent. Imposed	Name	County	Year DP imposed	Direct Appeal Citation	Year DP rev'd	Reversal Citation	Direct App.	State PCR	Fed HB	Clemency	Other	Executed	Comment
DEATH SENTENCES IMPOSED														
60	2	David Leroy Skaggs	Barren	1982	694 S.W.2d 672 (Ky. 1985)	2000	235 F.3d 261 (6 th Cir. 2000)			x				
	2	David Leroy Skaggs*	Barren	2002	803 S.W.2d 573 (Ky. 1990)									Inmate died prior to PCR evidentiary hearing ordered by Kentucky Supreme Court.
61	4	David Smith	Pike	1983	734 S.W.2d 437 (Ky. 1987)									Died on Row (non-execution)
62	1	Johnny Marshall Smith	Muhlenberg	1978	599 S.W.2d 900 (Ky. 1980)	1980	599 S.W.2d 900	x						
63	1	Robert Allen Smith	McCracken	1990	845 S.W.2d 534 (Ky. 1993)	1993	845 S.W.2d 534	x						
64	2	Miguel Soto	Oldham	2000	139 S.W.3d 827 (Ky. 2004)	2011	No. 99-CR-00041 (Oldham Cir. Ct. Jan. 31, 2011)		x					Inmate's death sentence reversed; inmate remains on death row
65	1	Kevin N. Stanford	Jefferson	1982	734 S.W.2d 781 (Ky. 1987)	2003					Granted 10/9/03			Stanford was 17 at time of offense.
66	1	Michael D. St. Clair	Bullitt	1998	140 S.W.3d 510 (Ky. 2004)	2004	140 S.W.3d 510	x						
	1	Michael D. St. Clair**	Bullitt	2005	319 S.W.3d 300 (Ky. 2010)	2010	319 S.W.3d 300	x						
	1	Michael D. St. Clair*	Bullitt	2011	Sentencing Nov. 16, 2011									
67	1	Michael D. St. Clair	Hardin	2001 (2)	174 S.W.3d 474 (Ky. 2005)	2005	174 S.W.3d 474	x						
68	1	Vincent Christian Stopher	Jefferson	1998	57 S.W.3d 787 (Ky. 2001)									
69	2	Eugene Frank Tamme	Washington	1985	759 S.W.2d 51 (Ky. 1988)	1988	759 S.W.2d 51	x						Died on Row (non-execution)
	2	Eugene Frank Tamme*	Fayette	1994	973 S.W.2d 13 (Ky. 1998)									2/4 death sentences reversed.
70	4	Victor Dewayne Taylor	Fayette	1986	821 S.W.2d 72 (Ky. 1990)	1990	821 S.W.2d 72	x						
71	1	Alfred Grayson Thomas	Knott	1988	864 S.W.2d 252 (Ky. 1993)	1993	864 S.W.2d 252	x						
72	1	Eugene William Thompson	Lyon	1986	862 S.W.2d 871 (Ky. 1993)	1993	862 S.W.2d 871	x						
	1	Eugene William Thompson*	Lyon	1998	56 S.W.3d 406 (Ky. 2001)									

Kentucky Death Sentences Imposed, Reversed & Commuted, 1976 – 2011

KEY	Death sentence reversed
	* Death sentence imposed as a result of retrial
	** May include reversal of conviction

# Capital Cases	# Death Sent. Imposed	Name	County	Year DP imposed	DEATH SENTENCES IMPOSED		DEATH SENTENCES REVERSED**							Comment		
					Direct Appeal Citation	Year DP rev'd	Reversal Citation	Direct App.	State PCR	Fed HB	Clemency	Other	Executed			
73	2	Christopher Charles Walls	Jefferson	1986	776 S.W.2d 367 (Ky. 1989)	776 S.W.2d 367	x								Co-defendant is Cosby; 1 death sent. for capital kidnapping	
74	1	Douglas Ward	Clay	1983	695 S.W.2d 404 (Ky. 1985)	695 S.W.2d 404	x									
75	2	Roger Lamont Wheeler	Jefferson	2001	121 S.W.3d 173 (Ky. 2003)											
76	3	Karu Gene White	Powell	1980	671 S.W.2d 241 (Ky. 1983)											
77	2	Larry Lamont White	Jefferson	1985	725 S.W.2d 597 (Ky. 1987)								x		Resentenced on Commonwealth's motion following penalty phase.	
78	2	Mitchell L. Willoughby	Fayette	1983	730 S.W.2d 921 (Ky. 1986)										1/2 death sentences reversed.	
79	2	Gregory Wilson	Kenton	1988	836 S.W.2d 872 (Ky. 1992)	836 S.W.2d 872	x									
80	2	Shawn Windsor	Jefferson	2006	2010 WL 3374240 (Ky.)											
81	1	Robert Keith Woodall	Caldwell	1998	63 S.W.3d 104 (Ky. 2001)	2009 WL 464939 (W.D. Ky.)					x				Inmate's death sentence reversed; inmate remains on death row	
82	1	Gerald Young	Fayette	1998	50 S.W.3d 148 (Ky. 2001)	50 S.W.3d 148	x									
161		# Death Sentences imposed since 1976 (including re-sentencings for the same offense after a reversal and multiple death sentences which may have been handed down in a single case).														
				82	Number of capital cases in which death penalty originally imposed				38	3	5	2	4	Number of death sentences resulting in execution		
				78	Number of capital defendants who received a death sentence									Number of executions of death row inmates who waived remaining appeals ("volunteered" for execution)		
				50	Number of capital cases in which a death sentence was reversed by the state or federal courts due to serious error at trial									Number of death row inmates who died on death row (non-execution) with remaining appeals available		
				2	Number of cases in which a death sentence was commuted by the Governor									Number of inmates who remain on death row following recent reversal of death sentence (Nov. 17, 2011)		
				35	Number of inmates on Kentucky's Death Row (Nov. 17, 2011)											

State or federal courts have reversed a death sentence in 50 of 82 Kentucky capital cases since 1976 as a result of serious error that occurred at trial. This is a reversal rate of approximately 60% (60/97). In addition, one death row inmate's sentence was commuted by the Governor due to ineffective assistance of counsel (Leonard); a second was commuted due to the offender's age at the time of the murder (Stanford). NOTE: Four defendants (Lepperson, Foley, Hodge, and St. Clair) were sentenced to death for two separate capital crimes occurring in Kentucky. Therefore, there have been 82 capital cases/offenses for which 78 defendants have been sentenced to death in Kentucky since 1976.

Kentucky Prosecutor Correspondence

Turberville, Sarah

From: Turberville, Sarah
Sent: Friday, May 28, 2010 5:37 PM
To: Graham, Janet (KYOAG)
Cc: Martin Johnstone; Michael Mannheimer; Linda S Ewald; Mayton, Dana (KYOAG)
Subject: RE: June 15 or 16 - Assessment of the Kentucky Death Penalty
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Prosecutor Survey 5-1-10.doc

Ms. Graham,

Thank you very much for your response below. We welcome the opportunity to meet with the members of the Prosecutors' Advisory Council (PAC). Now that we have a possible date, I will check availability on our end. And I understand that you are very busy, particularly given the budget constraints facing the Commonwealth, so if there is someone else in your office with whom we should be communicating, please just let me know.

In the interim, I wonder if you (or if you could point us to someone who) could be of assistance in our data collection efforts. I do not want our inability to meet in June to foreclose the possibility of the Assessment Team's reaching out to prosecutors across the Commonwealth. As you may know, a few months ago we sent letters of introduction to all the elected Commonwealth Attorneys in the Commonwealth to explain the assessment process. We also stated that we would follow up with a questionnaire about each office's policies, procedures, and practices in handling capital cases. This questionnaire is similar to what we have asked of defense attorneys, particularly DPA, about their practices in handling capital cases from trial through clemency. A draft copy of the questionnaire is attached.

First, do you have any suggestions for how we can go about distributing this questionnaire electronically to the Commonwealth Attorney of each judicial district? We would like to make it as easy as possible for the Commonwealth Attorneys to respond. And while we could send it via US Mail, we suspect we are also much more likely to receive responses if recipients are able to fill in their responses and provide any additional comments electronically. However, we have not been able to find email addresses for all Commonwealth Attorneys. Second, we would welcome the Office of the Attorney General's support in the effort to encourage responses to the questionnaire. If you find the questionnaire unobjectionable, would you be willing to let the Commonwealth Attorneys know that you've reviewed it and that the questionnaire will be coming their way? The purpose of the Assessment Report on the Kentucky Death Penalty is to explain how the Commonwealth is successfully ensuring fairness and accuracy in capital cases, as well as to uncover areas for improvement. Given the number of Commonwealth Attorneys in the state, completion of the questionnaire is the primary way that each could have input into the Assessment Report's analysis.

Thank you very much for your time and consideration. And have a good holiday!

Sincerely,

Sarah

DRAFT

Below is a list of questions related to the provision of prosecutorial services in capital cases in the Commonwealth of Kentucky. You may email your responses to assessment@staff.abanet.org or via mail to: Sarah Turberville, American Bar Association – 10th Floor, 740 15th Street NW, Washington DC, 20005.

To the extent that you can provide a detailed response to the questions below, please do so. You may also attach additional pages and feel free to provide any materials you feel appropriate to elaborate on your answers below.

Name of person completing questionnaire:

Judicial District:

Date:

General Information about the Death Penalty in your Judicial District:

1. In how many cases has the Commonwealth Attorney in your Judicial District filed a notice to seek the death penalty since capital punishment was reinstated in Kentucky (December 22, 1976)?

If you are unable to retrieve this information, please tell us the number of cases in which you know the death penalty was sought in your Judicial District.

2. How many capital cases are currently pending within your Judicial District?
3. Please list the dates, defendants' names, and disposition of all capitally-charged cases in your Judicial District since you become Commonwealth Attorney.

Training and Qualifications of Assistant Commonwealth Attorneys who Handle Capital Cases:

1. How do you determine which prosecutors in your office handle capital cases? Please describe any necessary minimum qualifications.
2. Are there policies, practices, or procedures governing the workloads of prosecutors in your office who handle capital cases? Please describe these policies, practices, or procedures.
3. Does your office receive funding specifically designated for capital cases?
 - a. If yes,
 1. How much funding has your office received that is specifically designated for capital cases each year since you became Commonwealth Attorney?
 2. What are the sources of that funding?
 - b. If no, how does your office allocate funds for capital cases?

4. What resources does your office utilize to train prosecutors to handle capital cases?
 - a. Do you feel these resources are adequate? Why or why not?
 - b. What kinds of capital training programs are offered to your attorneys? (You may provide a list of mandatory and voluntary training programs attended by attorneys who prosecute capital cases in your District).

Are Assistant Commonwealth Attorneys who handle capital cases required to attend these training programs?

Notice of Intent to Seek the Death Penalty

1. Please describe your policies, practices, or procedures for determining whether to file a notice of intent to seek the death penalty.
 - a. At what point in the case do you generally file the notice of intent to seek the death penalty?
2. Please describe your policies, practices, or procedures for withdrawing a notice of intent to seek the death penalty?
 - a. If possible, provide the names and dates of the cases in which you elected to withdraw a notice of intent to seek the death penalty since you became Commonwealth Attorney and provide an explanation as to why.
3. Does your office require the presence of physical evidence linking the defendant to the offense in order to file a notice of intent to seek the death penalty?

Has your office filed a notice of intent to seek the death penalty in cases without physical evidence linking the defendant to the offense? What kind evidence was available in these cases and what was the outcome (i.e. conviction and sentence) in these cases?

Plea Bargaining

1. What policies, practices, or procedures does your office utilize to determine whether to offer a plea bargain in capital cases?
 - a. What factors do you consider when deciding to offer a plea bargain in a capital-eligible case?
2. Are there any circumstances in which your office prohibits plea bargains?
3. In your Judicial District, how many plea bargains were offered in capital cases *and* how many were accepted since December 22, 1976 (when Kentucky reinstated capital punishment); or, if you do not know, since you became the Judicial District's Commonwealth Attorney?

Discovery

1. Please describe your office's policies, practices, or procedure on discovery by the defense in capital trials.
 - a. How does your office identify and disclose evidence favorable to the defense?

 - b. Do you provide all prior statements of witnesses to the defense? If so, how long before trial do you do so?

2. How do you ensure that the prosecutors and other personnel under their direction (i.e. police, experts, etc.) are meeting their discovery obligations?

3. Explain your office's policies, practices, or procedures on providing discovery in capital post-conviction cases.
 - a. What kind of discovery do you provide to the defense in capital post-conviction cases?

 - b. Do you require defense counsel to request specific discovery or do you accept a general discovery request in capital post-conviction cases?

Are there any aspects of the capital punishment system in Kentucky that you believe the Assessment Team should focus on?

We also welcome any additional comments from you on Kentucky's capital punishment system and/or any feedback you may have.



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

July 15, 2010

Sarah E. Turberville, Esq.
Project Director
Death Penalty Moratorium Implementation Project
American Bar Association
740 15th Street, N.W.
Washington D.C. 20005

Dear Ms. Turberville:

Thank you for your correspondence regarding the ABA Assessment on Kentucky Death Penalty. As part of my duties as Executive Director of the Prosecutors Advisory Council, I have informed the Council regarding this Assessment. As you may be aware, the Prosecutors Advisory Council is the statutory body that deals with the administration of the Unified Prosecutorial System, and the Attorney General, by statute, is Chairman of the Prosecutors Advisory Council.

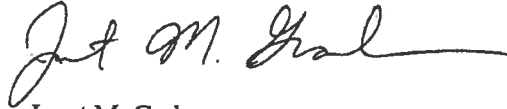
As noted in your correspondence and recent telephone conversations, you requested that I circulate a series of questions prepared by the ABA to Kentucky prosecutors. In order to properly address your request, this matter was taken up by the Prosecutors Advisory Council at its June meeting. Following a discussion at the June meeting, which included a discussion regarding pending litigation in capital cases, the Prosecutors Advisory Council 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. The Council made this decision, *inter alia*, because of the existence of pending litigation in capital cases which is currently being conducted by Kentucky prosecutors in and the Office of the Attorney General in Kentucky's trial and appellate courts. Should you need an example of the type of litigation at issue, please review litigation in *Commonwealth v. Marion Parker*, Case No. 09-CR-00188-001, Kenton Circuit Court, in which a subpoena was issued by the Department of Public Advocacy for information and testimony which is strikingly similar to that requested by the ABA.

AN EQUAL OPPORTUNITY EMPLOYER M/F/D



Your email correspondence indicated that members of the ABA study group also wished to meet with some Kentucky prosecutors and/or members of the Prosecutors Advisory Council regarding the ABA assessment. To my knowledge, no firm date and time has been given to me for the proposed meeting. Should you still wish to conduct this meeting, please let me know possible dates and times, and I will attempt to facilitate this meeting.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet M. Graham", with a long horizontal flourish extending to the right.

Janet M. Graham
Assistant Deputy Attorney General
Exec. Dir. Office of Prosecutors Advisory Council

Cc: Prosecutors Advisory Council

Turberville, Sarah

From: Turberville, Sarah
Sent: Thursday, July 15, 2010 1:57 PM
To: Graham, Janet (KYOAG)
Cc: Chris Cohron; Edwards, Jeff (MRSCO); G.L. Ovey; Gina Carey; Hans, Jennifer (KYOAG); John Estill; Margaret Daniel; Melissa Quillen; Mike Foster; Rob Sanders; Linda S Ewald; Michael Mannheimer
Subject: RE: see attached letter

Dear Mrs. Graham,

Thank you for your response. I do appreciate that you have seriously considered our request for your input. Our team has a call next week in which we can determine possible dates to meet with you (and other PAC members) and I welcome your offer to help facilitate such a meeting.

While we can respond to the letter from the PAC more fully after our call next week, I must clarify one issue immediately: In the event that there is any confusion on this matter, the Assessments Project has had no involvement with and no connection to any litigation involving the death penalty in Kentucky. The survey questions we asked you to review were drafted in an effort to determine if the Commonwealth is in compliance with various ABA benchmarks relative to prosecutors' treatment of capital cases. The complete list of ABA benchmarks is on our website, available to any individual or organization.

We have sought to be as open and inclusive as possible in our data collection efforts. If there is any other information you require to determine the purpose or methodology of the Project, please let us know. Thank you again for your consideration and we will be in touch soon.

Sincerely,
Sarah

Sarah E. Turberville, Esq.
Project Director
Death Penalty Moratorium Implementation Project
American Bar Association
740 15th Street NW
Washington DC 20005
t. 202/662-1595
f. 202/662-1031
<http://www.abanet.org/moratorium>

From: Graham, Janet (KYOAG) [mailto:janet.graham@ag.ky.gov]
Sent: Thursday, July 15, 2010 11:17 AM
To: Turberville, Sarah
Cc: Chris Cohron; Edwards, Jeff (MRSCO); G.L. Ovey; Gina Carey; Graham, Janet (KYOAG); Hans, Jennifer (KYOAG); John Estill; Margaret Daniel; Melissa Quillen; Mike Foster; Rob Sanders
Subject: see attached letter

Please see attached letter sent on behalf of the Prosecutors Advisory Council. Thanks.

Janet M. Graham
Assistant Deputy Attorney General
Kentucky Attorney General's Office

Turberville, Sarah

From: Graham, Janet (KYOAG) [janet.graham@ag.ky.gov]
Sent: Monday, November 22, 2010 5:02 PM
To: Turberville, Sarah
Cc: Linda S Ewald; Michael Mannheimer
Subject: RE: November meeting?
Follow Up Flag: Follow up
Flag Status: Red

Ms. Turberville, I was not sure if I had provided you with a response to your meeting request. The Prosecutors Advisory Council reexamined this issue and determined that the same issues present in the Kenton County subpoena will no doubt become issues that are propounded upon appeal. Our office is statutorily designated to handle all cases involving felony appeals. Therefore, we must respectfully decline the request for a meeting. Thank you.

Janet M. Graham
Assistant Deputy Attorney General
Kentucky Attorney General's Office
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
Phone (502) 696-5300
Fax (502) 564-2894

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From: Turberville, Sarah [mailto:turbervs@staff.abanet.org]
Sent: Tuesday, October 05, 2010 7:39 PM
To: Graham, Janet (KYOAG)
Cc: Linda S Ewald; Michael Mannheimer
Subject: November meeting?

Dear Ms. Graham,

The Kentucky Assessment Team on the Death Penalty will be meeting in November in Kentucky. While I am unaware of the current status of the litigation described below, I thought it prudent to attempt to seize the opportunity presented by our November schedule and wonder if there may be possible to meet with you and/or members of the Prosecutors Advisory Council on November 10 or 12 to discuss prosecutors' policies and practices in capital cases. I reiterate that lethal injection is not within the scope of the Team's inquiry.

Many thanks for your consideration.

Sincerely,
Sarah Turberville

Sarah E. Turberville, Esq.
Project Director

Death Penalty Moratorium Implementation Project
American Bar Association
740 15th Street NW
Washington DC 20005
t. 202/662-1595
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<http://www.abanet.org/moratorium>

From: Graham, Janet (KYOAG) [mailto:janet.graham@ag.ky.gov]
Sent: Monday, September 20, 2010 11:31 AM
To: Turberville, Sarah
Cc: ctcochron@kyprosecutors.com; Edwards, Jeff (MRSCO); G.L. Ovey; John Estill; Mike Foster; Rob Sanders; Mayton, Dana (KYOAG); Ray Larson; R. David Stengel; Harry Rothgerber
Subject: RE: see attached letter

Ms. Turberville, you and I have been corresponding back and forth regarding the ABA Death Penalty Moratorium Implementation Project and your request for a meeting regarding same. Since we began this correspondence, Governor Steve Beshear has signed a death warrant for Gregory Wilson, who was sentenced to death October 31, 1988 in Kenton County for kidnapping and murdering Debbie Pooley, whom Wilson also raped. The execution was initially scheduled for September 16th, 2010, and the Office of the Attorney General and the Kentucky Department of Corrections have both filed pleadings in the Kentucky Supreme Court regarding this case. We are awaiting the filing of a response by the Louisville Metro Public Defender's Office so that the Kentucky Supreme Court can issue a ruling on this matter. Because of this active and ongoing litigation, we do not believe that it would be prudent to schedule a meeting until this ongoing litigation is resolved. Thank you.

Janet M. Graham
Assistant Deputy Attorney General
Kentucky Attorney General's Office
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
Phone (502) 696-5300
Fax (502) 564-2894

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Under Kentucky Rule of Evidence 503, this communication is confidential and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to or on behalf of the Office of the Attorney General.

Kentucky Clemency Materials

2010-2011

AMERICAN BAR ASSOCIATION

**Kentucky Assessment Team
on the Death Penalty**
740 15th Street, NW
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Louis D. Brandeis School of Law
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Michael J. Z. Mannheimer, Co-Chair
Northern Kentucky University
Salmon P. Chase College of Law
Highland Heights, KY

Hon. Michael Bowling
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Prospect, KY

Hon. James Keller
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Frank Hampton Moore, Jr.
Cole & Moore, P.S.C.
Bowling Green, KY

Marcia Milby Ridings
Hamm, Milby & Ridings
London, KY

Hon. Gordie Shaw
Commonwealth's Attorney
Fourteenth Judicial Circuit
Versailles, KY

PROJECT STAFF
Washington, DC

Sarah E. Turberville
Project Director

Kirstin Ramsay
Senior Staff Attorney

Mark Pickett
Project Attorney

Paula Shapiro
Project Attorney

April 6, 2011

Governor Steve Beshear
Office of the Governor
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

Dear Governor Beshear:

We write to follow up on the letter submitted to you in January 2010 explaining the American Bar Association's Assessment on the Kentucky Death Penalty. As we described to you last year, the Assessment covers several components of the administration of the death penalty in the Commonwealth, from arrest to execution. One of these areas is the clemency process in death penalty cases in which the Governor, pursuant to Section 77 of the Kentucky Constitution, plays a most critical role.

In order to gain an accurate and comprehensive understanding of the clemency process in Kentucky, we have prepared a series of questions for the Office of the Governor, which is attached to this letter. We would sincerely appreciate your cooperation in providing responses to the attached questionnaire. Should you prefer to respond to the questions electronically, please do not hesitate to contact us at the phone numbers or email addresses listed at the end of this letter.

As it has been some time since our last correspondence, we would like to remind you that the Kentucky assessment is currently being conducted by a state-based assessment team that includes:

- **Ms. Linda S. Ewald**, Co-Chair, Professor of Law, Louis D. Brandeis School of Law
- **Michael J. Z. Mannheimer**, Co-Chair, Professor of Law, Salmon P. Chase College of Law
- **Honorable Michael Bowling**, Steptoe & Johnson PLLC
- **Don Cetrulo**, Knox & Cetrulo PLLC
- **Allison Connelly**, Director, Legal Clinic, University of Kentucky College of Law
- **Honorable Martin E. Johnstone**, Kentucky Supreme Court (Retired)

- **Honorable Gordie Shaw**, Commonwealth's Attorney, 14th Judicial Circuit,
Bourbon, Scott, Woodford

While we are diligently accumulating information about statutes, cases and rules that govern the death penalty process in Kentucky, the experiences and practices of individuals within the Kentucky legal system are critical elements to our examination. Should you have any questions or comments about the attached questionnaire, please contact Assessment Team co-chairs Michael Mannheimer (859-572-5862; mannheimem1@nku.edu) or Linda Ewald (502-852-7362; lsewald@louisville.edu); or Project Staff Director Sarah Turberville (202-662-1595; sarah.turberville@americanbar.org).

Thank you again for your time and consideration.

Sincerely,



Linda S. Ewald, Co-Chair
Kentucky Assessment Team



Michael J. Z. Mannheimer, Co-Chair
Kentucky Assessment Team

AMERICAN BAR ASSOCIATION

Below is a series of questions related to the provision of clemency in capital cases in the Commonwealth of Kentucky. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary. If you prefer an electronic copy of this survey please email or call Project Director Sarah Turberville at sarah.turberville@americanbar.org or 202-662-1595. You may also mail your responses to: Sarah Turberville, American Bar Association – 9th Floor No. 950, 740 15th Street NW, Washington DC, 20005.

Name: M. Holliday Hopkins

Title: General Counsel

Date: 7/7/11

The Governor's Clemency Powers and Authority:

1. Pursuant to Section 77 of the Kentucky Constitution, the Governor possesses the sole authority to consider and grant clemency petitions. Please describe how the Governor makes clemency decisions in death penalty cases.

Governor Beshear has received no clemency petitions in death penalty cases nor has he rendered any decisions concerning death penalty clemency petitions during his term as Governor. Section 77 of the Kentucky Constitution grants the Governor full discretion in relation to clemency issues. He may investigate any and all matters related to a clemency petition and determine the scope of that investigation.

- Does the Governor personally review the clemency petition and any and all supporting documents? He has discretion to do so.
- Does the Governor independently investigate the petitioner (inmate) and his/her case beyond that which is contained in the clemency petition? He has discretion to do so.
- Does the Governor interview and/or meet with the inmate and/or the inmate's defense counsel? (If yes, please answer the Section entitled, **Clemency Petitions and Clemency Interviews, Meetings, and/or Hearings**, below). He has discretion to do so.
- Does the Governor discuss the case with the inmate's family or other individuals who support a grant of clemency on behalf of the inmate? He has discretion to do so.
- Does the Governor discuss the case with the victim's family and friends? He has discretion to do so.

- Does the Governor discuss the case with the prosecutor and/or defense attorneys? He has discretion to do so. In addition, written statements, documents and other supporting materials concerning the parties' respective positions may be submitted to the Governor for review and consideration.
2. Since your state reenacted the death penalty, how many clemency petitions in death penalty cases have been filed? Governor Beshear has received no clemency petitions since taking office. To obtain information concerning the number of clemency petitions filed in death penalty cases with the Office of the Governor since the death penalty was reenacted in this state, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.
 3. How many clemency petitions in death penalty cases, whether its pardon, reprieve, or commutation have you received since you became Governor? None
 4. Please provide a copy of each clemency petition filed with the Governor's Office since 1976, where available. If unavailable, please inform the Assessment Team where it may obtain a copy of the petition. To obtain information concerning the number of clemency petitions filed in death penalty cases with the Office of the Governor since the death penalty was reenacted in this state, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.

Clemency Petitions and Clemency Interviews, Meetings, and/or Hearings:

1. Please identify and explain all laws, rules, procedures, standards, and guidelines on an individual's eligibility to file a clemency petition in a death penalty case. Kentucky does not have any laws, rules, procedures, standards or guidelines concerning eligibility to file clemency petitions in death penalty cases. However, under KRS 439.450, the Governor may ask the Parole Board to "investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve of fine or forfeiture."
2. Please identify any filing deadlines for clemency petitions in death penalty cases and the relevant laws, rules, procedures, standards, and guidelines. None
3. Are death penalty clemency petitioners guaranteed interviews, meetings, and/or hearings on the merits of their petitions? In Kentucky, no clemency procedures are mandated. "Section 77 of the Kentucky Constitution grants the Governor the power to remit fines and forfeitures, commute sentences, grant reprieves and pardons. There exist only two constitutionally mandated requirements under Section 77: that the movant file an application for clemency with the Governor; and that the Governor file with each application a statement of reasons for his decision. No other constitutional provision or statute establishes specific procedures to be followed or imposes standards or criteria for the clemency decision. In short, the decision to grant clemency is left to the unfettered discretion of the Governor." *Baze vs. Thompson* 302 SW 3d 57 (KY 2010).

- a. If not, please state any instances where a Kentucky Governor has granted an interview, meeting, and/or hearing, since reinstatement of the death penalty, despite the fact that it is not required. This information is not known. However, to obtain this information, if it exists, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.
- b. How far in advance are clemency petitioners notified of their interview, meeting, and/or hearing? N/A
- c. Where are the interviews, meetings, and/or hearings conducted? N/A
- d. Are the hearings open to the public? N/A
- e. Who conducts the interview, meeting, and/or hearing? N/A
- f. What is the structure of the interview, meeting, and/or hearing? N/A
 - i. What is the role of the inmate's counsel? Is counsel for the inmate present?
 - ii. Can the clemency petitioner and/or his/her counsel make a statement?
 - iii. Can the clemency petitioner and/or his/her counsel present evidence, including live witness testimony, in support of the petition?
 - iv. Can the clemency petitioner and/or his/her counsel cross-examine witnesses?
- g. How many death penalty clemency interviews or hearings have been held since 1976, when Kentucky reenacted the death penalty? This information is not known. However, to obtain this information, if it exists, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.

The Governor's Scope of Review of Clemency Petitions

1. Please identify and explain any laws, rules, regulations, procedures, standards, guidelines, internal policies on the recommended scope of review that are to be followed when assessing death penalty clemency decisions. For example, does the Governor consider:
 - patterns of racial or geographic disparity in carrying out the death penalty?
 - age at the time of the offense?
 - mental retardation, mental illness, or competency to be executed issues?
 - evidence of the inmate's innocence not raised at trial?
 - lingering doubts regarding the inmate's conviction/guilt?
 - all mitigating evidence, regardless of whether it was raised at trial?
 - the petitioner's possible rehabilitation and performance while on death row?

Kentucky does not have any laws, rules, procedures, standards or guidelines or internal policies concerning eligibility to file clemency petitions in death penalty cases or the scope of any review of clemency petitions. However, under KRS 439.450, the Governor may ask the Parole Board to “investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve of fine or forfeiture.”

Specifically, does the Governor consider:

- a. Claims that were not necessarily previously litigated on the merits? With or without the existence of new evidence? He may consider any factors he determines to be relevant to his decision.
- b. Claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statute of limitations, or similar doctrines? He may consider any factors he determines to be relevant to his decision.
- c. Constitutional claims whose merits the federal courts did not reach because they gave deference to possibly erroneous but not “unreasonable” state court decisions? He may consider any factors he determines to be relevant to his decision.

Section 77 of the Kentucky Constitution states that the Governor “shall have power to... commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefore a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection.”¹ Please provide a copy of the clemency decision for each petition for clemency received by the Kentucky Governor in a death penalty case since 1976.

This information is not known. However, to obtain this information, if it exists, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.

Clemency Petitions and Documentation Included:

1. Please identify and explain all laws, rules, procedures, standards, guidelines, and public policies regarding the types of documents that should be provided to the Governor to assist in assessing the death penalty clemency petition. Kentucky does not have any laws, rules, procedures, standards or guidelines concerning eligibility to file clemency petitions in death penalty cases or the types of documents that should be submitted for consideration.
2. Please include a copy of the application or petition required, if any, of death row inmates seeking clemency. See Attached Application For Gubernatorial Pardon And/Or Commutation Of Sentence.

¹ KY. CONST. § 77.

3. In addition to the application, what type of documents must be provided to the Governor's Office? Please See Attached Application For Gubernatorial Pardon And/Or Commutation Of Sentence.
4. What documents, if any, cannot be provided to the Governor with a clemency application? Please See Attached Application For Gubernatorial Pardon And/Or Commutation Of Sentence.

The Governor's Final Decision and its Publication:

1. Are there any time limits on the Governor's clemency determination? No
2. How long does the Governor typically take when making a final clemency determination? It's completely discretionary
3. How long after submitting the petition does the clemency petitioner typically hear about the decision on his/her petition? It's completely discretionary.
4. Section 77 of the Kentucky Constitution requires the Governor to file a statement of reasons for his decision in each clemency decision. Please explain the procedures the Governor follows when granting or denying a petition for clemency in a death penalty case.
 - a. How is the death row inmate and/or his counsel notified of the Governor's decision? How are the Attorney General, Commonwealth Attorneys, and Department of Corrections officials notified? The parties are initially telephoned immediately and told of the Governor's decision, while a copy of the Governor's written determination is being filed with the Kentucky Secretary of State. Filed stamped copies of the Governor's written determination are thereafter mailed to the other parties referenced.
 - b. Does the Governor file the clemency petition and a statement of reasons for every grant of clemency in a death penalty case? If yes, where is this filed and published? Yes, and it is filed with the Kentucky Secretary of State.
 - c. Does the Governor file the clemency petition and a statement of reasons for every grant of clemency in non-capital criminal or civil cases? If yes, where is this filed and published? If not, why not? Yes and his decision is filed with the Kentucky Secretary of State.
 - d. Does the Governor file the clemency petition and a statement of reasons for every denial of clemency in a death penalty case? If yes, where is this filed and published? If not, why not? Yes and his decision is filed with the Kentucky Secretary of State.
 - e. Does the Governor file the clemency petition and a statement of reasons for every denial of clemency in non-capital criminal or civil cases? If yes, where is this filed and published? If not, why not? Yes and his decision is filed with the Kentucky Secretary of State.

5. Where are past clemency petitions and decisions made available to the public, pursuant to Section 77 of the Constitution? The Kentucky Secretary of State and the Department of Libraries and Archives.

Clemency and the Kentucky Parole Board:

1. Since Kentucky reinstated the death penalty in 1976, has the Governor ever authorized the Kentucky Parole Board (Board) to conduct an investigation and provide a clemency recommendation in a death penalty case, pursuant to KRS 439.450? This information is not known. However, to obtain this information, if it exists, please contact the Department of Libraries and Archives, 300 Coffee Tree Road, Frankfort, Ky 40601.
 - a. If yes, is the Board given explicit instructions on what issues it must investigate? N/A
 - b. If yes, is the Board given explicit instruction on specific procedures it should take to investigate and make a recommendation? If yes, what are they? If not, how does the Board review clemency petitions? N/A
 - i. Does every member of the Board personally review the clemency petition and any supporting documents? N/A
 - ii. Does the Board possess the authority to independently investigate the clemency petition in death penalty cases? If yes, does the Board perform investigations? N/A
 - iii. Does the Board possess the authority to conduct a clemency interview, meeting, and/or hearing in death penalty cases? If yes, does the Board typically conduct a clemency interview, meeting, and/or hearing? N/A
 - iv. Does the Board collectively discuss the petition or does each member of the board individually assess the petition without discussing it with the other members? N/A
 - c. If yes, what weight, if any, does the Governor give to the Board's non-binding clemency recommendation? N/A
2. Please explain the Governor's appointment process and decision-making when appointing members of the Board.
 - a. How are members of the Board selected to serve? See KRS 439.320 attached.
 - b. Please describe any necessary minimum qualifications for Board members. See KRS 439.320 attached.

3. Please identify and explain all laws, rules, procedures, standards, and guidelines governing conflicts of interest of Board members, whether personal, professional, financial, etc.
 - a. What method does the clemency authority use to identify and resolve conflicts of interest of clemency board members/advisors? See KRS Chapter 11A

Additional Information:

1. What have been some of the most difficult challenges you or your office have faced in determining whether to grant clemency? N/A

Please do not hesitate to contact us if you have any questions or need clarification. We always welcome any additional comments or feedback you may have.

iii. Charge _____
 Court of Conviction _____ City, County & State _____
 Conviction Received _____
 Date Convicted _____
 Judge _____ Prosecutor _____ Defense Attorney _____
 Length of Sentence _____ Probated for _____ years
 Federal Sentence Yes No Federal Number _____
 Period of Incarceration _____ Place of Incarceration _____
 Institution Number _____ Date entered institution of jail _____
 Conditional Release Date _____ Date Paroled _____ Date of Final Discharge _____
 Date Probated _____ Date Probation Expired _____ Probation Number _____
 Probation/Supervising Officer's Name and County _____

11. Has the Applicant ever been found in violation of any terms or conditions of parole? Yes No. If yes, explain on extra paper.

12. Has the Applicant ever been found in violation of any terms or conditions of probation? Yes No. If yes, explain on extra paper.

13. Are you under Indictment? Yes No Explain: _____

14. Do you have any Outstanding Fines? Explain: _____

15. Do you have any Unpaid Restitution? Yes No Explain: _____

16. If ever incarcerated, state each instance the Applicant was incarcerated. (Include the basis for the action and discipline received) _____

17. Conviction(s) for which relief is sought: _____

18. Education – Complete for the highest grade or year completed at all levels of school below.

i. High School
 Name and Address of School _____
 Dates Attended _____ to _____ Date of Graduation _____ Diploma Yes No

ii. Under Graduate College or University
 Name and Address of School _____
 Dates Attended _____ to _____ Date of Graduation _____ Degree _____

iii. Graduate College or University
 Name and Address of School _____
 Dates Attended _____ to _____ Date of Graduation _____ Degree _____

iv. Vocational, Business or Technical School
 Name and Address of School _____
 Dates Attended _____ to _____ Date of Graduation _____ Degree _____

v. GED Yes No Date _____

19. Applicant's five most recent employers (begin with most recent)

- i. Employer's Name _____
Employer's Address _____
Supervisor's Name _____
Period of Employment _____ Reason for Leaving _____
- ii. Employer's Name _____
Employer's Address _____
Supervisor's Name _____
Period of Employment _____ Reason for Leaving _____
- iii. Employer's Name _____
Employer's Address _____
Supervisor's Name _____
Period of Employment _____ Reason for Leaving _____
- iv. Employer's Name _____
Employer's Address _____
Supervisor's Name _____
Period of Employment _____ Reason for Leaving _____
- v. Employer's Name _____
Employer's Address _____
Supervisor's Name _____
Period of Employment _____ Reason for Leaving _____

20. Military record (include branch of military, date of service, and type of discharge): _____

21. Names, addresses and relationship of three non-family references:

- 1) _____
- 2) _____
- 3) _____

22. Has the Applicant ever previously applied for a pardon/commutation? Yes No
If yes, in what year was application made? _____ (Provide copy)

23. Has the Applicant ever received a pardon/commutation? Yes No

24. **In a separate letter, which must accompany the Application**, please describe in your own words the reason(s) you are seeking relief and state the extenuating circumstances supporting the basis for the request.

25. **A minimum of three (3) letters of recommendation in support of the request for relief must accompany the Application.** Additional letters are recommended and may be submitted from all sources, including but not limited to the following: neighbors, employers, co-workers, pastors, church members, elected officials, judges, prosecutors, family members, etc.

26. Name, address and phone number of person(s) to contact if we need to contact you on an emergency basis.

I hereby authorize the Office of the Governor and any of its representatives to make all necessary investigations of my work, character, personal history, and financial, credit, and other records through investigative or credit agencies, or through communication with persons including, but not limited to, the following: (a) anyone connected with my current employer, (b) any former supervisor, official, or co-worker at my prior employers, (c) my neighbors, friends, or others with whom I am acquainted, or (d) individual references, schools, or other organizations, including law enforcement agencies, named in this application. I hereby authorize all parties referenced in the preceding sentence to release in any manner any and all information which may be pertinent to my application, whether such information is public record or not. I also hereby release all persons, employers, agencies, schools, companies, or other parties from any damages resulting from furnishing such information.

I swear or affirm that the information reported in this application and any accompanying material is complete and accurate.

Date

Signature

Additional responses may be required of an applicant.

COMPLETION OF THE APPLICATION FOR GUBERNATORIAL PARDON AND/OR COMMUTATION OF SENTENCE, WHICH MUST BE IN FULL, MEANS ONLY THAT THE APPLICANT MAY BE CONSIDERED FOR A PARDON AND/OR COMMUTATION, NOT THAT ONE WILL BE GRANTED.

Promptly notify us concerning any change of address or change in telephone listing.

Return completed Application for Gubernatorial Pardon and/or Commutation of Sentence **with required attachments** to:

Office of the Governor
700 Capitol Avenue
Frankfort, Kentucky 40601
ATTN: Office of the General Counsel



**PAUL E. PATTON
GOVERNOR**

EXECUTIVE ORDER

2003 - 1243

December 8, 2003

Secretary of State

**Frankfort
Kentucky**

COMMUTATION OF DEATH SENTENCE

TO ALL PEACE OFFICERS OF THE COMMONWEALTH OF KENTUCKY:

WHEREAS, Kevin Nigel Stanford, #32700, (“Stanford”) was tried and convicted in the Jefferson Circuit Court for the crime of capital murder and his punishment fixed at death, judgment being regularly and properly entered by the Jefferson Circuit Court; and

WHEREAS, Stanford was granted an appeal to the Supreme Court of Kentucky, the highest court in the Commonwealth of Kentucky, which sustained and affirmed the judgment of the Jefferson Circuit Court; and

WHEREAS, the Supreme Court of the United States has denied certiorari and review of an original petition for writ of habeas corpus; and

WHEREAS, Stanford has not obtained any stay of execution from the Supreme Court of Kentucky or any other Court having jurisdiction; and

WHEREAS, Stanford was only 17 years old at the time of the commission of the crime for which he was sentenced to death; and

WHEREAS, as early as October 2001, I stated publicly that I do not support capital punishment for juvenile offenders and that I would sign legislation abolishing the death penalty for those persons who were under the age of 18 at the time of their crime, although the legislature failed to enact any such measure; and

WHEREAS, my opposition to the death penalty for juvenile offenders is supported by international law, 29 states and the federal government as well as many respected organizations including the American Bar Association, the distinguished bipartisan blue ribbon committee of the Constitution Project, the American Psychiatry



**PAUL E. PATTON
GOVERNOR**

EXECUTIVE ORDER

2003 - 1243

Secretary of State

**Frankfort
Kentucky**

December 8, 2003

Association and numerous Kentucky organizations such as the Kentucky Domestic Violence Council, the Mental Health Association of Kentucky, the Kentucky Child Abuse Council and Kentucky Youth Advocates; and

WHEREAS, five of Kentucky's neighbors, Ohio, Indiana, Tennessee, Illinois and West Virginia, do not permit the execution of their citizens for murders committed under the age of eighteen; and

WHEREAS, my opposition to the death penalty for juvenile offenders is also supported by recent research, including that of Dr. Ruben C. Gur, PhD., a neuropsychologist at the University of Pennsylvania, concerning adolescent brain development, which demonstrates that the human brain is not fully mature before reaching adulthood, and that the brain regions that are the most important for regulating impulse control, planning, consideration of consequences, abstract reasoning and, most probably, moral judgment, are the very regions of the brain that mature last; and

WHEREAS, Kentucky last executed a juvenile offender in 1946, and today nearly 80% of Kentuckians believe a sentence other than death is most appropriate for juveniles convicted of murder; and

WHEREAS, as a society, we do not allow adolescents to vote, drink, enter into contracts, or even to use tobacco, it is my belief therefore that adolescents and juveniles should not then be subjected to the ultimate penalty of death for their actions; and

WHEREAS, David Buchanan, Stanford's co-defendant in this heinous crime, received a life sentence, the maximum sentence available at the time other than death, and continues to be denied parole and is not eligible to meet the Kentucky Parole Board again until January 2007:

NOW, THEREFORE, I, Paul E. Patton, Governor of the Commonwealth of



PAUL E. PATTON
GOVERNOR

EXECUTIVE ORDER

2003 - 1243

Secretary of State

Frankfort
Kentucky

December 8, 2003

Kentucky, acting pursuant to the authority vested in me by Section 77 of the Constitution of the Commonwealth of Kentucky do hereby commute Kevin Nigel Stanford's death sentence to life in prison without any possibility of parole. It is my express intent by this Order that Kevin Nigel Stanford shall remain in confinement as an inmate at a state penal institution until the date of his death.

Done at the Capitol, in the City of Frankfort,
this 8th day of December, 2003

A handwritten signature in black ink that reads "Paul E. Patton".

PAUL E. PATTON, Governor
Commonwealth of Kentucky

A handwritten signature in black ink that reads "John Y. Brown III".

JOHN Y. BROWN III
Secretary of State

20-8-21

Handwritten initials in black ink, possibly "AJ".



ERNIE FLETCHER
GOVERNOR

EXECUTIVE ORDER

2007-1175
December 10, 2007

Secretary of State
Frankfort
Kentucky

COMMUTATION OF DEATH SENTENCE

TO ALL PEACE OFFICERS OF THE COMMONWEALTH OF KENTUCKY

WHEREAS, Jeffrey Devan Leonard was sentenced under the name James Earl Slaughter to death by the Jefferson Circuit Court in Slaughter v. Commonwealth, Jefferson Circuit Indictment No. 1983-CR-0387 on December 2, 1983; and

WHEREAS, Jeffrey Devan Leonard was an 18 year old at the time the offense occurred, and was 19 years of age at the time of trial; and

WHEREAS, Jeffrey Devan Leonard's defense attorney did no investigation and preparation for the penalty phase of the capital trial, violating minimum standards of practice at that time for a capital defense; and

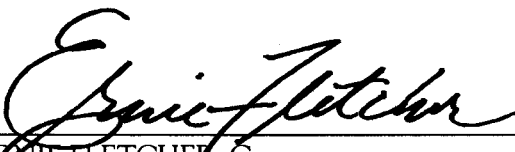
WHEREAS, both the United States District Court and the United States Court of Appeals for the Sixth Circuit found that defense counsel's failure to investigate and present available mitigating evidence was constitutionally deficient; and

WHEREAS, as a result of that failure by defense counsel, the jury who sentenced Mr. Leonard, did not hear from his mother, brothers and other witnesses including competent experts who would have related an accurate, mitigating portrait of Jeffrey Leonard's background; and

WHEREAS, it is in the interests of this Commonwealth that Jeffrey Devan Leonard not be executed since he was not afforded the basic tools that insure a fair, thorough and just consideration by a jury before the death sentence is given; the most basic of these tools being the assistance of counsel.

NOW, THEREFORE, by the virtue of the authority vested in me by Section 77 and related provision in the Constitution of the Commonwealth of Kentucky, I, ERNIE FLETCHER, Governor of the Commonwealth of Kentucky, do hereby commute the death sentence imposed by the Jefferson Circuit Court on Jeffrey Devan Leonard (also known as James Earl Slaughter) in James Earl Slaughter v. Commonwealth, Jefferson Circuit Court Indictment No. 1983-CR-0387 to a life sentence without the possibility of parole.

Done at the Capitol, in the City of Frankfort, this 10th day of December, in the year of our Lord Two Thousand and Seven and in the year of the Commonwealth the Two Hundred Sixteenth.



ERNIE FLETCHER, Governor
Commonwealth of Kentucky



TREY GRAYSON
Secretary of State