Approved: Feb 22 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:16 a.m. on February 17, 1999 in Room123-S of the Capitol.

All members were present.

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research (excused)
Mary Blair, Secretary

Conferees appearing before the committee:
Dave Debenham, Office of Attorney General
Tom Bartee, Kansas Association of Criminal Defense Lawyers
Bill Lucero, Murdered Victims Families for Reconciliation
Attorney General Karla Stovall
Ron Smith, Kansas Bar Association
Sara Jane Russell, Douglas County Rape Victim-Survivor Services
Alicia Mason, Wichita Area Sexual Assault Center

Others attending: see attached list

The minutes of the February 16 meeting were approved on a motion by Senator Vratil and seconded by Senator Bond. Motion carried.

SB 165–concerning crimes; relating to capital murder; discovery

Conferee Debenham testified in support of **SB 165.** He discussed the purpose of the bill which addresses the issue of the use of expert witnesses in capital murder cases and reviewed it's provisions. (attachment 1)

Conferee Bartee testified in opposition to **SB 165.** He identified and expounded on several areas in the bill which concern him: it's unconstitutionality; it's lack of fairness; it's lack of safeguards for the defendant; and it's violation of the self-incrimination clause. (attachment 2)

SB 166–concerning crimes; relating to sentencing upon conviction of capital murder, victim impact evidence

Conferee Debenham testified in support of **SB 166.** He stated this bill would allow the jury "to consider the admission of victim impact evidence, in certain limited situations, during the penalty phase of a capital murder trial." He reviewed how victim impact evidence would be implemented and cited it's benefits. (attachment 3)

Conferee Bartee testified in opposition to **SB 166.** He stated that the bill permits the prosecution to present victim impact evidence (VIE) if the defendant offers any mitigating evidence and that it is "unnecessary and confusing" and would expand the reach of the death penalty. He argued that VIE would: deny murder victims equal justice; discourage the presentation of all evidence relevant to sentencing; be admitted under the guise of rebuttal, yet lack logical tendency to rebut mitigation evidence; and increase the likelihood of a court finding that the Kansas death penalty sentencing scheme is unconstitutional. He further stated that the bill fails to provide for necessary procedural aspects of introducing VIE. (attachment 4)

Conferee Lucero testified in opposition to **SB 166.** He stated that he agreed with VIE in most cases but felt that in a death penalty trial there should be an exception. He cited two primary reasons for not allowing VIE in a death penalty case: concern about the victim's emotional well being following the execution of a criminal against whom he/she testified and who, upon further evidence, is found innocent; and concern about a victim's statements being used to obtain a death penalty sentence without the victim's right to testify he/she opposes the death penalty. (attachment 5) He referenced two published articles relating to his testimony,

suggested the Committee enact **SB 297** to abolish the death penalty and urged them to not pass this bill. ((see The Topeka Capital Journal, Feb. 15, 1999, "Give victims a voice" and The San Francisco Examiner, Feb 7, 1999, "Closure is elusive for the grieving").

SB 164–concerning crimes; relating to failure to report a crime

Conferee Stovall testified in support of **SB 164.** She reviewed the bill which she stated would make it a Class B, "nonperson" misdemeanor to not report a crime immediately when it is known that a attempted or actual unlawful sexual act or an attempted or actual inherent felony occurs to a child under the age of 18. She cited an incident which occurred in Las Vegas, Nevada (see The New York Times, Monday, August 24, 1998) which she stated provided the impetus to propose this legislation. (attachment 6)

Conferee Russell testified as an opponent of **SB 164** stating that her organization offers confidential support to victims of sexual violence and she explained why she fears the passage of the bill may jeopardize their confidential services. (attachment 7)

Conferee Mason testified very briefly as an opponent of **SB 164** stating that she opposes the bill for the same reasons stated by Conferee Russell. (no attachment)

Conferee Smith briefly summarized his opposition to **SB 164** revealing how it affects the Model Rules of Professional conduct and attorney-client privilege. He offered an amendment to the bill. (attachment 8)

Written testimony supporting **SB 165 and SB 166** was submitted by Nick Tomasic, District Attorney, 29th Judicial District of Kansas, Kansas City, Kansas. (Attachment 9)

The meeting adjourned at 11:00 a.m. The next scheduled meeting is Thursday, February 18, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 17, 1999

NAME	REPRESENTING
Stephanie Buchanan	DOB
Barbara Bunting	Parent of page
Linda Hwa Davis	Parent of page
Carolyn Zimmerman	MVFR
Bill Lucas	MVFR
Barb Jones	KSC
Kevin A. Ill	KSC
Amy C. Kelly	OJA
James Clark	KCDAA
Sandy Barnett	KCSDV
Alicia Mason	Wichita Area Sexual Assault Ctr.
Diane Dolzer	Wichita Area Sexual Assault Ctr.
Alynn Jackson	RVSS - Lawrence
Sarah Jane Russell	RVSS - Lawrence
Nancy Lindberg	AG office

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TESTIMONY OF
DEPUTY ATTORNEY GENERAL DAVID B. DEBENHAM
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: SENATE BILL 165
FEBRUARY 17, 1999

Mr. Chairman and Members of the Committee:

I appear before you today on behalf of Attorney General Carla J. Stovall, to ask for your support of Senate Bill 165. The subject of this bill concerns the limited situation when a defendant is charged with capital murder and the defendant's mental condition is relevant, as a mitigating factor, in the capital sentencing hearing.

At this time there is no provision for interviewing or evaluating the defendant when the defendant relies on a mental state, which would not amount to a defense in the guilt phase, as a mitigating factor in the penalty phase of a capital trial. This provision would provide for the examination of a defendant in a capital case when the defense intends to use expert testimony regarding the mental state of the defendant in the penalty phase of the case. The results of the examination would only be admissible in rebuttal, when relevant to the defendant's mental condition which has been raised as a mitigation issue by the defendant.

The results of the court ordered evaluation would be submitted to the court and sealed. The report, and the findings and opinions of the experts would be deemed confidential and not available to the prosecuting attorney until such time as the jury reaches a verdict of guilt. By sealing the report until such time as the jury reaches a verdict of guilt, the defendant is protected against the use of this information by the prosecuting attorney in the guilt phase of the trial. Additionally, the prosecuting attorney would not be able to communicate with the experts who conducted the court ordered evaluation or have access to the report until this time. As a further restriction, no evidence obtained as a result of this examination could be introduced or used by the prosecuting attorney in the guilt phase of the trial or for the purpose of proving any aggravating circumstance in the penalty phase of the trial.

The changes in this section are based upon Virginia Code Ann. § 19.2-264.3:1. However, the

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changes are also more restrictive to the State than those permitted under the Virginia statute as they do not provide that the court can bar the defendant from presenting this type of expert evidence should the defendant refuse to cooperate with the court ordered evaluation. Further, unlike the Virginia statute, the court ordered reports and the findings and opinions of the experts performing the court ordered evaluation are sealed and considered confidential until such time as the defendant has been found guilty.

The changes sought in this section are provided for through a line of cases that have held when a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination or he may be required to submit to an evaluation conducted by the prosecution's own expert. *Buchanan v. Kentucky,* 483 U.S. 402, 422-23, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); *Estelle v. Smith,* 451 U.S. 454, 465, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Additionally, a defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. A defendant waives his right to remain silent, but not his right to notice, by indicating that he intends to introduce psychiatric testimony. *Powell v. Texas,* 492 U.S. 680, 684-85, 109 S.Ct.3146, 3149-50, 106 L.Ed.2d 551 (1989).

These changes will allow the prosecuting attorney to effectively prepare for expert mitigating evidence offered by the defendant in the penalty phase of a capital trial while at the same time insuring that the information received by the experts conducting the court ordered evaluation are not available to the prosecution until such time as the jury has returned a verdict of guilt. This provision also insures that this information is not available to the prosecuting attorney during the guilt phase of the trial or for use in proving any of the aggravating factors.

This bill will more aptly allow the parties to engage in a search for the truth and at the same time provide the jury with the necessary credible evidence to return a decision based upon the evidence. This will take us away from the trial by ambush type of combat that has no place in our judicial system when the defense can offer expert witnesses whose identities and opinions have not been previously disclosed to the prosecuting attorney

On behalf of Attorney General Stovall, I would urge your favorable consideration of Senate Bill 165.

Testimony Before the Kansas Senate
Judiciary Committee
re: Senate Bill No. 165
February 17, 1999

Thomas W. Bartee
on behalf of the
Kansas Association of Criminal Defense Lawyers

Senate Bill No.165 would impose duties on a capital defendant who seeks to offer expert testimony regarding mental illness, including providing notice to the prosecution of the intent to do so, and submitting to a court-ordered mental evaluation. This proposal would saddle the trial judge with the responsibility of sponsoring crucial evidence in death penalty trials. The proposal fails to provide procedural safeguards during the mental evaluation, and it is not sufficiently tailored so as to withstand constitutional scrutiny. For these reasons, the Kansas Association of Criminal Defense Lawyers opposes Senate Bill No. 165.

I. THE NOTICE REQUIREMENT OF SECTION 1(a) IS UNCONSTITUTIONAL IN THAT IT FAILS TO REQUIRE THE PROSECUTION TO DISCLOSE REBUTTAL EVIDENCE.

Section 1(a) of the proposal requires the capital defendant to provide notice of his or his intent "to present testimony of an expert witness to support a claim in mitigation ... relating to the defendant's history, character or mental condition ... ." The proposal fails to clearly set forth the required content of the notice. For example, would a notice which merely tracks the language quoted above suffice, or would various courts insist that the notice detail the nature of the proposed testimony, or provide the name, address, and qualifications of the defense expert? The vague notice requirement will undoubtedly create litigation on these issues. The portion of the bill authorizing the court to impose such sanctions which, "in the court's discretion ... are appropriate under the circumstances," would also create difficult legal issues to be resolved on an ad hoc basis, such as whether the court could constitutionally bar defense evidence as a sanction for violating the notice provision.

The most obvious defect with the proposal, however, is that the notice requirement imposes no reciprocal duty on the prosecution to provide disclosure of the evidence it will introduce to rebut the testimony of the defendant's expert witness. Enforcement of a notice statute, which fails to require reciprocal disclosure, violates the Due Process Clause. Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). Furthermore, under Wardius, the lack of reciprocity renders the statute facially unconstitutional. 412 U.S., at 479. This defect cannot be remedied on a case-by-case basis through court-ordered reciprocity. The proposal's notice requirement provisions are fatally flawed.

II. THE PROVISION REQUIRING THAT THE DEFENDANT SUBMIT TO A COURT-ORDERED MENTAL EVALUATION VIOLATES THE SELF-INCRIMINATION CLAUSE.

A "fundamental fairness" theory has generally been relied upon to justify compelling a defendant to submit to a mental evaluation. See, e.g., United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984). Under this theory, it would be unfair to permit the defendant's expert to offer opinions based upon an interview with the defendant while denying the prosecution the right to interview.[1] The proposal would deny the defendant his privilege against self-incrimination in circumstances well beyond those justified under the fundamental fairness theory.

Under subsection 1(a) of the act, a capital defendant would be compelled to provide notice of his intent "to present testimony of an expert witness to support a claim of mitigation ... ." The notice requirement is triggered not only when the defendant intends to present testimony of a psychologist or psychiatrist who has interviewed the defendant in preparation for the sentencing phase; the notice must be filed if the defendant will offer testimony of an "expert witness" in support of a mitigating factor. Read literally, this provision would compel the defendant to relinquish his right to remain silent if he intends to offer testimony of an expert witness who has never examined the defendant, but instead relied only on records and interviews of others. Or perhaps the expert is someone who interviewed or treated the defendant before the crime, e.g., a psychologist from a state hospital where the defendant was previously committed on an unrelated case. The proposal would apparently require the defendant to submit to a mental evaluation under these circumstances. Where the defense does not intend to offer testimony from a mental health expert who has interviewed the defendant in anticipation of trial, the defendant cannot constitutionally be required to submit to a mental evaluation.

Furthermore, the proposed procedure would apparently force the defendant to waive his privilege against self-incrimination entirely, even if the defense intends to introduce evidence concerning only a discrete mental condition. If the defendant intends to offer only evidence regarding organic brain damage resulting in low intelligence, for example, he should not be forced to submit to an evaluation which goes beyond neuropsychological testing into areas such as personality testing. See, e.g., Powell v. Texas, 492 U.S. 680, 685 n. 3, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (nothing in [Estelle v.]Smith, [451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981),] or any other decision ..., suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of the trial."). The proposal fails to narrowly tailor the scope of the defendant's mental evaluation interview to the defense evidence which the state may seek to rebut. The provision exceeds any arguable justification, i.e., the "fundamental fairness" theory, for forcing the defendant to waive his right to remain silent, thus violating the Self-Incrimination Clause.

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[1] Of course, this justification does not fit well with the proposal that the court, rather than the prosecution, be permitted to conduct an evaluation of the defendant.

III. THE JURY WOULD BE UNDULY SWAYED BY THE PRESENTATION OF ULTIMATE OPINION TESTIMONY OF AN EXPERT APPOINTED BY THE COURT.

The act would provide for the admission of evidence in a jury trial obtained from an expert selected by the court. This would create at least the appearance of an inquisitorial, rather than adversarial, system. Under our system, it is the prosecution and defendant, not the judge, who is responsible for offering evidence. It is noteworthy that the *only* situation in which the court would appoint an expert is when the criminal defendant facing the death penalty seeks to offer expert psychological or psychiatric evidence in support of a claim of mitigation. Why doesn't the court appoint an expert to examine prosecution DNA evidence, for example? And why should such defense evidence trigger the court's intrusion into the centuries-old practice of relying on the parties to present the facts to the jury? This unprecedented involvement of the trial judge in a criminal jury trial is dangerous and unjustified.

If the jury is aware that the testifying expert was appointed by the judge, the evidence would likely be given undue weight. A study by members of the staff of the Research Division of the Federal Judicial Center led the authors to conclude that "[t]he testimony or report presented by a court-appointed expert exerts a strong influence on the outcome of the litigation." Cecil & Willging, "Court-Appointed Experts," Reference Manual on Scientific Evidence, 526, 530 (1994). Some of the findings compelling this conclusion include:

> Judges who appointed an expert indicated that the final outcome on the disputed issue was almost always consistent with the testimony of the appointed expert. ... In summary, the concerns of judges and commentators that court-appointed experts will exert a strong influence on the outcome of litigation seem to be well founded. ... In almost all cases, the jury was aware of the expert's court-appointed status and seemed influenced by the expert's apparent neutrality.

Id., at 554. Under the proposal, the trial judge and the appointed expert would wield enormous power over the jury's decision whether the defendant lives or dies.

IV. SELECTING AND COMMUNICATING WITH MENTAL HEALTH EXPERT WITNESSES SHOULD BE LEFT TO THE PARTIES.

Selection of an expert will create difficult issues. Will the parties have input in the appointment? Or will the judges simply rely on an informal network of friends or acquaintances? What constitutes a "qualified expert[]?" Who will determine whether the expert is actually "qualified"? The statute fails to provide any guidance as to the determination of the qualification of a person who may determine whether a person is executed.

The court's contact with the expert is also an area of concern. Canon 3B(7) of the Code of Judicial Conduct generally prohibits ex parte contacts. Under both the Sixth Amendment and

Kansas statute, K.S.A. 22-3405, the defendant has the right to be present at all phases of the trial. It will be difficult for the court to comply with these requirements if the judge is responsible for appointing an expert. A related question is whether the parties will be permitted to communicate with the expert, whether ex parte or otherwise, or provide the expert with records or other documents. If the court-appointed expert is deprived of records and other pertinent information, the reliability of any findings would be questionable at best. The proposal ignores these thorny issues.

V. THE PROPOSAL FAILS TO SAFEGUARD THE DEFENDANT'S RIGHT TO COUNSEL AND TO A FAIR TRIAL.

The proposal offers no safeguards to the defendant during the evaluation. For example, the statute does not provide for the presence of counsel or the presence of a defense mental health expert present during the interview. Nor does the proposal provide for videotaping or other recording of the evaluation. While courts disagree whether a defendant's Sixth Amendment right to counsel is abridged if he cannot have his attorney present at the mental evaluation interview, the American Bar Association recommends that the court-ordered interview be recorded, with the recording provided to defense counsel. Standard 7-3.6(d), ABA Criminal Justice Mental Health Standards.

The statute also appears to deny the defendant access to the findings and opinions, as section 1(b) states that the report "shall be filed under seal with the court prior to commencement of the sentencing phase of the trial." If the findings and opinions support a finding of a mental disease or defect, this is clearly exculpatory material which must be disclosed. The defendant must be prepared to meet inculpatory scientific evidence at trial, including the findings and opinions of a state psychiatrist or psychologist. Denying the defendant access to this report would deny fundamental due process of law.

Even a narrowly tailored law requiring a capital defendant to submit to a court-ordered mental examination raises serious constitutional problems to be resolved by the courts. This proposal, with its vagaries and lack of safeguards, will only engender additional litigation.

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TESTIMONY OF
DEPUTY ATTORNEY GENERAL DAVID B. DEBENHAM
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: SENATE BILL 166
FEBRUARY 17, 1999

Mr. Chairman and Members of the Committee:

I appear before you today on behalf of Attorney General Carla J. Stovall, to ask for your support of Senate Bill 166. This bill would amend K.S.A. 21-4624(c) and (e) by allowing the jury to consider the admission of victim impact evidence, in certain limited situations, during the penalty phase of a capital murder trial. This provision is based on New Jersey statute 2C:11-3c(6), which was found constitutional in *State v. Muhammad,* 145 N.J. 23, 678 A.2d 164 (N.J. 1996).

Prior to 1991, the United States Supreme Court had held that victim impact evidence was not admissible in capital cases. In *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court reversed itself and ruled that it was not a violation of the Eighth Amendment to admit, in a capital sentencing proceeding evidence of the murder victim's good character or the impact of the murder on the victim's family.

The *Payne* court specifically found that, "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Payne,* 501 U.S., at 825.

In 1992 we adopted a Victims' Rights provision, article 15, Sec. 15 of the Kansas Constitution, which states in pertinent part:

> "(a) Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused."

This amendment would specifically allow for the admission of the victim's character, background and the impact of the murder on the victim's survivors when a defendant has presented as mitigating evidence his character, record or the circumstances of the crime. If the jury then finds that the state has proven at least one aggravating factor and the jury finds the existence of a mitigating factor is the defendant's character, record or the circumstances of the offense, then the jury may consider the victim and survivor evidence in determining the appropriate weight to give the defendant's character, record or the circumstances of the offense evidence which were presented as mitigating evidence.

The victim impact evidence would only be used for the limited purpose of determining how much weight should be given to mitigating evidence consisting of the defendant's character, record or circumstances of the crime. It would not be weighed against any other mitigating evidence the defendant sought to introduce nor could it be used to support any of the aggravating factors set out by the state.

The ability to admit victim impact evidence in the penalty phase of a capital case, for this limited purpose, will assist in reminding the jury that when the defendant's individual mitigating factors are considered they need to be considered in light of the specific harm caused by the defendant. This provision will not change prior Supreme Court precedent which does not allow the admission of a victim's family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence on due process grounds.

This bill which would allow relevant evidence to be introduced in the penalty phase of a capital murder trial, in a limited fashion, will increase the participation of crime victims in the judicial process, thus recognizing the societal importance of the Victim's Rights Amendment.

On behalf of Attorney General Stovall, I would urge your favorable consideration of Senate Bill 166.

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Testimony Before the Kansas Senate
Judiciary Committee
re: Senate Bill No. 166
February 17, 1999

Thomas W. Bartee
on behalf of the
Kansas Association of Criminal Defense Lawyers

Senate Bill No. 166 would amend subsections (c) and (e) of K.S.A. 21-4624 to permit the prosecution to present victim impact evidence, i.e., "evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors," if the defendant offers any mitigating evidence. The bill appears to be identical to Senate Bill No. 608, defeated in the 1998 Session. The new amendment is unnecessary, confusing,[1] and would effectively expand the reach of the death penalty. The Kansas Association of Criminal Defense Lawyers opposes Senate Bill No. 166.

In the complex world of death penalty jurisprudence, few issues have caused courts more difficulty than the issue of "victim impact" evidence. In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court prohibited victim impact evidence at the sentencing phase of a death penalty case. In South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court extended the ruling to bar prosecution argument regarding victim impact. Then, in 1991, in a plurality decision, the Supreme Court reversed much of the holdings of Booth and Gathers. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Payne holds that, "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S., at 827. As noted by Justice O'Connor in her concurring opinion, "[w]e do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no per se bar." Id., at 831 (quotation omitted).

I. "VICTIM IMPACT" EVIDENCE WOULD DENY MURDER VICTIMS EQUAL JUSTICE.

The proposed amendment would validate the notion that certain victims of capital murder are more worthy than others. Under this proposal, a defendant who chooses to murder to widow, a prostitute, or a mentally ill homeless person would be less likely to face execution than one whose victim had "survivors," or whose victim had a more appealing "character" or

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[1] The proposed amendment to subsection (c) states: "If the defendant presents *as evidence mitigating circumstances of any factor* which relates to ... ." This language is convoluted and should be corrected.

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"background." The lonely, the homeless, and the mentally ill are some of the more vulnerable members of our society. The amendment would discount the value of their lives when they are murdered relative to the lives of the more fortunate, and would send a message that you are less likely to receive the death penalty if you kill someone on the fringes of society.

It is well-documented that the race of the murder victim is strongly correlated with the imposition of the death penalty, i.e., that killers of whites are much more likely to face the death penalty than those who kill blacks. See McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Victim impact evidence will likely exacerbate this inequity.

II. THE PROPOSAL WOULD DISCOURAGE THE PRESENTATION OF ALL EVIDENCE RELEVANT TO SENTENCING, AS WELL AS REWARD THE MURDERER WHO HAS NO MITIGATING EVIDENCE RELATING TO HIS CHARACTER OR THE FACTS OF THE CRIME.

This amendment would exact a cost for the admission of mitigating evidence relating to "the defendant's character or record or ... the circumstances of the crime." The Eighth Amendment requires that the defendant be permitted to offer evidence related to his character, record, and circumstances of the crime so that the death penalty is not imposed where it is not justified. The statute would punish the exercise of the constitutional right to present mitigating evidence.

Furthermore, the prosecution's right to offer such evidence would not be triggered if the convicted capital murderer chose not to "present[] as evidence mitigating circumstances of any factor which relates to the defendant's character or record or to the circumstances of the offense ... ." This scheme would reward the defendant who is the most blameworthy, i.e., the murderer without such mitigating factors. This legislation discourages the presentation of mitigating factors even as it fails to permit the introduction of victim impact evidence in the most egregious cases.

III. THE "VICTIM IMPACT" EVIDENCE WOULD BE ADMITTED UNDER THE GUISE OF REBUTTAL, YET IT LACKS ANY LOGICAL TENDENCY TO REBUT MITIGATION EVIDENCE.

The amendment purports to authorize the admission of victim impact evidence as rebuttal to mitigation evidence. The amended subsection (e) would result in juries being instructed that victim impact evidence is to be considered "in determining the appropriate weight to be given to the evidence of mitigating circumstances" presented by the defense. So, for example, a defendant who offers evidence that "[t]he defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor," K.S.A. 21-4626(4), would thereby invite the prosecution to offer evidence concerning "the murder victim's character and background." The jury would then be told that the weight of the mitigating circumstance that "[t]he defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor" could be diminished by evidence of the good character of the deceased, or the economic loss to the decedent's survivors.

Evidence of the victim's good character or the effect of the loss on survivors would only rebut mitigating evidence which focused on the victim and was offered to show that the victim would not be missed, or that the victim was not unique. No capital defendant would offer such mitigating evidence. Linking victim impact evidence to mitigation is illogical. Assuming for the sake of argument that a capital defendant might be foolish enough to attack the worth of the victim in an attempt to prove a mitigating factor, current law would allow the prosecution to rebut such evidence.

The reason prosecutors want to present victim impact evidence is to heighten the jury's emotional reaction to the crime and to increase sympathy for the victims, thereby reducing the willingness of the jury to extend mercy to the defendant. Such evidence would weigh heavily in favor of the imposition of the death penalty. Although the bill attempts to package victim impact evidence as rebuttal, the bill would in effect create a new aggravating circumstance, i.e., worth of the victim vs. worth of the defendant. This new de facto aggravating circumstance would expand the death penalty by causing juries to impose the punishment in cases where they would otherwise impose a life sentence. If harm to the victim's family is deemed a proper factor in deciding whether to impose the death penalty, the Legislature can place it in the list of aggravating circumstances. The current proposal's attempt to justify the admission of victim impact evidence under a rebuttal theory is disingenuous and unsatisfactory.

IV. THE AMENDMENT WOULD INCREASE THE LIKELIHOOD OF A COURT FINDING THAT THE KANSAS DEATH PENALTY SENTENCING SCHEME IS UNCONSTITUTIONAL, OR THAT THE RESULT IN A PARTICULAR CASE VIOLATED THE CONSTITUTION

Under K.S.A. 21-4624, the jury is instructed to impose the death penalty upon a finding that an aggravating circumstances exists unless mitigating circumstances outweigh aggravating circumstances. This draconian weighing scheme is already violative of the Eighth Amendment; further shifting the balance by instructing the jury that victim impact evidence diminishes mitigating evidence would render the scheme even more unfair and unconstitutional.

Jury instructions governing the consideration of victim impact evidence would necessarily be so confusing as to be unworkable. Jury instructions would have to impart the following: (1) the jury must determine whether an aspect of "the defendant's character or record or the circumstances of the offense" is a mitigating factor; then (2) the jury must decide how much the weight of the mitigating circumstance is diminished by the strength of the victim impact evidence. Only after adjusting the weight of mitigating circumstances due to the existence of victim impact would the jury be allowed to weigh mitigating circumstances against aggravating circumstances. The jury would also have to understand that although victim impact evidence must be considered relative to the weight of the mitigating circumstances, victim impact evidence does not constitute an aggravating circumstance. The Kansas weighing scheme is already so complicated as to be beyond the ability of juries to apply properly; addition of the victim impact overlay will make the jury instructions incomprehensible.

The proposed amendment would fail to provide any safeguards to ensure that the victim impact evidence would not violate either the Eighth or Fourteenth Amendments. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), makes clear that unduly prejudicial victim impact evidence would violate the Due Process Clause. Permitting victim impact evidence, particularly under a statute which lacks meaningful guidance as to the presentation of such evidence, will necessitate a case-by-case determination whether the evidence was so excessively prejudicial as to violate due process. Payne also limits the type of victim impact evidence which may be admissible under the Eighth Amendment. For example, Payne does not authorize the admission of opinions about the defendant, the crime, or the appropriate sentence, yet the statute fails to set forth such limitations.

V. THE AMENDMENT FAILS TO PROVIDE FOR NECESSARY PROCEDURAL ASPECTS OF INTRODUCING VICTIM IMPACT EVIDENCE.

The amendment fails to provide for pretrial notice and disclosure of the victim impact evidence. Current law requires that "[o]nly such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible." K.S.A. 21-4624(c). Victim impact evidence would not be considered an "aggravating circumstance," so the prosecution would likely assert that it need not disclose victim impact evidence pretrial. Under the amendment, the state's right to present victim impact evidence would only be triggered by defense presentation of mitigating evidence. Apparently, victim impact evidence would be admitted in a prosecution rebuttal, after defense presentation of mitigation. Under this scheme, potentially explosive victim impact evidence would be presented to the defense and the court for the first time at this point. This system will generate difficult issues that will have to be resolved while the jury waits.

Furthermore, under the Constitution, the defense would be entitled to any exculpatory evidence, which would include any evidence which tended to rebut or diminish prosecution evidence related to the "murder victim's character and background and ... the impact of the murder on the victim's survivors." The prosecution must disclose any such information. The defense would also be compelled to investigate the evidence presented by the state so that it could offer evidence in rebuttal. The Constitution guarantees the criminal defendant "the right to have sufficient time to advise with counsel and to prepare a defense." Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932). This process would disrupt the orderly process of the trial. The discovery and investigation process would also likely be uncomfortable and upsetting to the victim's family and friends. The harm to the administration of justice outweighs the any justification for the admission of this evidence at the sentencing phase of a death penalty trial.

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MURDER VICTIMS FAMILIES FOR
RECONCILIATION
1176 SW Warren Ave. • Topeka, KS 66604
(785) 232-5958 (785) 296-6717

TESTIMONY IN OPPOSITION TO SENATE BILL 166

Senate Judiciary Committee
February 17,1999

Mr. Chairman and Members of the Committee:

I am Bill Lucero, Kansas State Coordinator of Murder Victims Families Against the Death Penalty. With very mixed feelings, I testify in opposition to Senate Bill #166. Most of you know how strongly I feel that victim impact statements belong in nearly all Court proceedings. Both members of my family and I have been victimized and have appreciated the ability to speak in Court as to the pain and suffering a defendant has caused by his thoughtless and/or impulsive acts of aggression. Let there be no mistake- Victim impact statements need to be allowed in most criminal trials.

But the exception is in death penalty trials as SB #166 would allow. There are two primary reasons that they should not be allowed. Mr. Bartee eloquently elaborated as to how the emotional effect of a victim impact statement could sway a jury to provide a death sentence. Unfortunately, too many prosecutorial errors have occurred, either innocently or deliberately, since Furman vs. Georgia that have resulted in innocent

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defendants being sentenced to death row. Just 2 weeks ago, Anthony Porter was released by the Illinois Supreme Court only two days prior to his execution because of recanted testimony and a confession of the actual murderer.

As of January 1, 1999, 3549 inmates were awaiting execution on death row. While 500 defendants have been executed since Furman, another 1642 sentences have been reversed- I can't tell you how many of those reversals occurred due to suspected innocence of the defendant, but this much we know for sure: since Furman, at least 76 condemned prisoners have been released due to proven innocence and several others have been executed. And all of us can agree, even 1 innocent person executed by the state is absolutely unacceptable.

Now the relevance to this Bill: Please try to imagine, if you can, the pain and suffering of a victim's family members following a murder. Then project the repeated agony of the family going through the ordeal of the long appeals process until the defendant is executed. Then after the State kills the defendant, can you imagine how the family then feels should evidence arise, post humously, that the wrong person was sentenced and executed, especially if the impact of the families statements were the obvious deciding factors in persuading the jury to opt for death. Just how much pain must they be forced to endure? First the loss of their loved one and then the guilt related to the death of another innocent person!

A second reason to oppose this bill appears before you in the person of Verne B. Horne who was kind enough to accompany me today. Perhaps

you saw B's letter to the editor of the Topeka Capital-Journal Monday in favor of victim's rights. If not, I took the liberty of attaching it to my testimony. B. was the key state witness in the prosecution of Tyrone Baker who murdered three of her neighbors (she is only alive herself by her own cunning escape from his kidnapping). If this proposal had been in place, what was she to do? For you see, B. is a steadfast opponent of the death penalty. Imagine the predicament that would have caused her: If she gave prosecutors her entire efforts, under this proposal her victim impact statement could have been used to gain a death sentence for Baker, entirely against her will. Yet without her cooperation, Baker might well have walked. B's situation could be considered hypothetical since Baker's heinous crime occurred prior to the death penalty's re-enactment. But last year many of you met or heard SueZann Bosler of Miami, FL, who experienced a similar situation. She was the eye witness who identified the murderer of her father, who had also stabbed her three times in the side of her skull and four times in her back during a botched 1986 burglary of their home. Although her victim impact statements were used in obtaining a death sentence for James Bernard Campbell, she was not allowed by the Court (it was ruled immaterial) to state her opposition to the death penalty! SueZann spent the next 10 years of her life (eventually succeeding) in getting Campbell's death sentenced changed to life imprisonment.

Again, I implore you as spokesperson, not for defendants, but for murdered families: please do not enact SB #166. A better option awaits your consideration. Instead, why not enact SB #297 and abolish capital punishment in Kansas once again, this time permanently!!

State of Kansas

Office of the Attorney General

CARLA J. STOVALL
ATTORNEY GENERAL

TESTIMONY OF ATTORNEY GENERAL CARLA J. STOVALL
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: SENATE BILL 164
FEBRUARY 17, 1999

Mr. Chairman and Members of the Committee:

I appear before you today to ask for your support of Senate Bill 164. This bill would criminally punish those persons who witness the commission of an unlawful sexual act, inherently dangerous felony or attempted unlawful sexual act or inherently dangerous felony in which the victim is a child of less than 18 years of age but fail to immediately report the crime to any local or state law enforcement agency. Any person who failed to knowingly make the required report would be guilty of a class B misdemeanor. Anyone who made such a report would be immune from any civil or criminal liability that might otherwise be incurred or imposed.

This proposal arises from the sexual assault and death of a 7-year-old girl in Las Vegas, Nevada. The young girl was followed into the women's restroom by a man who then sexually assaulted and strangled her. A friend of the perpetrator initially followed him into the restroom but left after he saw his friend struggling with the young girl. The second man never reported the incident to anyone. Authorities were unable to charge the second man with any crime because he was nothing more than a witness to the crime and there was no requirement that a person witnessing a crime report it to the authorities.

Similarly, Kansas has no requirement that a person witnessing a crime report it to authorities. This proposal requires persons to report violent crimes happening in their presence when the victim is a child. The report may be made to any local or state law enforcement agency. A report of the crime, made while the crime is in progress, may permit the authorities to intervene in the crime before its completion and save the life of the child or lessen the amount of harm incurred by the child. It also provides for immunity in the good faith report of a crime.

Thank you for your support and favorable consideration of Senate Bill 164.

301 S.W. 10TH AVENUE, TOPEKA, KANSAS 66612-1597 ■ PHONE: (785) 296-2215 ■ FAX: 296-6296

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Douglas County
Rape Victim - Survivor Service

RVSS
A·S·A·P

Advocacy · Support · Awareness · Prevention

2518 Ridge Court #236
Lawrence, Kansas 66046
Office 785.843.8985
Fax 785.843.3728

THOUGHTS on SENATE BILL No. 164

Douglas County Rape Victim-Survivor Service, Inc., formed in 1973, is a non-profit organization serving survivors of sexual assault in the Douglas County community.

We offer confidential support to anyone, including teens, who have been victimized by sexual violence.

While we applaud efforts to hold people who witness violent assaults against children accountable for not reporting these crimes, we have concerns that Senate Bill No. 164 as it is currently worded may jeopardize our confidential services.

- Young adults and teenagers need to know that they can come to our agency and talk about sexual violence without fearing that we will report the incident to law enforcement

- Agencies which offer confidential communications provide a safe haven for victims to discuss their options, including reporting to law enforcement. It is our experience that teenagers should have the choice about reporting these crimes on their own terms. To report a crime without the victim's permission is often seen as re-victimization.

- Part of protecting teenagers from violence is assuring them that they can discuss their experience in a safe and non-judgmental environment. The most vulnerable ages for sexual assault are 15 to 24 years. *American Medical Association*.

- Douglas County Rape Victim-Survivor Service encourages teens to report sexual assault and we accompany victims to law enforcement to make reports if they wish.

- Douglas County Rape Victim-Survivor Service informs all victims of their rights under Kansas law by providing them with a copy of the Crime Victim's Bill of Rights. K.S.A. 74-7333

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VICTIMS' BILL OF RIGHTS UNDER KANSAS LAW

K.S.A. 74-7333

1. Victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.

2. Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.

3. Information regarding the availability of criminal restitution, recovery of damages in a civil cause of action, the crime victims' compensation fund and other remedies and the mechanisms to obtain such remedies should be made available to victims.

4. Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.

5. The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process.

6. When the person interests of victims are affected, the views or concerns of the victim should, when appropriate and consistent with criminal law and procedure, be brought to the attention of the court.

7. Measures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation.

8. Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines should be developed for this purpose.

9. Victims should be informed of the availability of health and social services and other relevant assistance that they might continue to receive the necessary medical, psychological, and social assistance through existing programs and services.

10. Victims should report the crime and cooperate with law

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KANSAS BAR ASSOCIATION

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Legislative Testimony

by the
Kansas Bar Association

TO: **Members, Senate Judiciary Committee**

FROM: **Ron Smith, General Counsel**
Kansas Bar Association

SUBJ: **SB 164**

DATE: **February 17, 1999**

The Kansas Bar Association typically opposes legislation that affects the Model Rules of Professional Conduct, and we believe SB 164 falls in that category. Its impact on the Model Rules is perhaps unintended but we believe it is nevertheless there. If enacted, this bill becomes an exception to the attorney-client -- and other statutory -- privileges. We are afraid that you are catching dolphins with the tuna.

In the old Soviet Union, it was the duty of defense attorneys to help the KGB make its case against the defendant. They had to turn over things that they might uncover, whether it helped or hurt the case. Our view of the citizen-state relationship is different. Our bills of rights are intended to protect people from government. Central to that difference is the attorney-client privilege.

By law, most persons who know of facts relevant to a criminal matter have a duty to testify. The duty to testify is different from the duty to report a crime.

As public policy, Kansas law requires certain professionals who work with children to make certain reports of "suspected abuse." That is very different, however, from reporting suspicions. Usually a report under this act is based on actual observations. In addition, the report is not made "immediately."

SB 164 goes much further than our child abuse reporting. Ironically, our current child abuse reporting law does not require parents of children to make reports. Or lawyers. Or priests. This requires "any person" who knows "or has reason to know" to make reports of certain crimes in certain instances. In testifying in court there are existing statutory privileges against revealing certain information -- information relayed between spouses (under certain circumstances), attorney-client privileges, doctor-patient and priest-penitents. The privileges being general, and this statute being specific to these crimes involving children, this law would appear to control the privilege statutes.

For example, KSA 60-429 is the Penitential communication privilege. Subpart (a) makes certain definitions, and subpart (b) states:

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> (b) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he or she claims the privilege and the judge finds that (1) the communication was a penitential communication and (2) the witness is the penitent or the minister, and (3) the claimant is the penitent, or the minister making the claim on behalf of an absent penitent.

Clearly, the privilege applies at trial. However, SB 164 says that if in confession a priest hears information that he knows an inherently dangerous felony is being perpetrated on a child less than 18, the priest has a duty to report the crime "immediately." This requirement -- without consulting the person asking for confession -- destroys the penitential privilege in a certain class of crimes.

Attorney-Client Privilege

Model Rules of Professional Conduct require everything that a lawyer learns while representing a client to be held confidential unless ordered by a court to reveal it and they have exhausted all appeals. If a client walks in the law office and indicates that they tried to kill their child, under this bill there is a question whether the lawyer would have to report it. Lawyers have a duty to try to talk their client out of such action. But they do not report it. It is a difficult area to try to codify in a statute.

What is the standard for a lawyer or any citizen to have "reason to know" that a crime is taking place? First hand knowledge? Suspicions? Hunches? Lawyers and other professionals who fall in the orbit of reporting under this bill must report in order to save them from facing a crime. Must they act on what their client tells them? Or must they do some independent investigation? Either way, the time frame -- report "immediately" -- is a problem.

To prevent problems, lawyers who talk with clients will have to give their own client a Miranda-style warning, that "before we discuss what you want to discuss, let me warn you that if you tell me of information about the following list of crimes and if those crimes are or have been perpetrated on a child under 18, then I may be required to report you to the police." What kind of relationship do you think the attorney and client would have at that point?

A lawyer who must be a witness is not allowed by the Model Rules of Professional Conduct to be the advocate. That is the problem this bill raises. Attorneys can help clients only when there is full and frank disclosure of what happened, and the information is kept confidential except as authorized for disclosure to help the client. Clients who lie to their attorney usually pay the price. Attorneys with full facts can often help minimize the issue and work with prosecutors on a plea bargain. That role is far more important than the duty to report a crime in this bill. That is why we ask for our amendment. As the comment to MRPC 1.6 says,

> In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. <u>The public is better protected if full and open communication by the client is encouraged than if it is inhibited</u>.

8.2

Inherently Dangerous Felony

If a client is going to kill someone, that is one inherently dangerous crime. But if the client is possessing two ounces of cocaine which the adult is sharing with his 17-year-old child (there are parents out there who do this!), such possession is an inherently dangerous felony under KSA 21-3301 and 21-3436. If the lawyer learns of this activity, is the lawyer required to "immediately" call the police? Is the other spouse?

Suggested Amendment

The law of privileged communications is much more complex than we have time to discuss today. If you desire to enact this new reporting requirement and crime, we suggest at a minimum that you add to line 13 behind the "(a)" the following amendment:

> Section 1. (a) ***Except where a communication is or may be privileged under other state law or rules of the Kansas supreme court, any*** ~~Any~~ person, other than the victim, who knows or has reason to know that an attempted unlawful sexual act or an unlawful sexual act, as defined in K.S.A. 21-3301 and 21-3501 and amendments thereto, or an attempted inherently dangerous felony or an inherently dangerous felony, as defined in K.S.A. 21-3301 and 21-3436 and amendments thereto, is taking place in which the victim is a child of less than 18 years of age shall immediately report such crime to any local or state law enforcement agency.

This amendment preserves the current statutory and case law privileges, and supports Model Rule regulation of attorney-client confidences. Otherwise, we end up with a Soviet style criminal defense system.

The phrase "is taking place" in line 18 is vague. Lawyers reviewing this bill indicate you may want to consider an amendment in line 20, something to the effect that, "'Reason to know' does not mean knowledge of the commission of a past crime by any other person."

I will leave you with a short statement by then Secretary of War William Howard Taft. In 1904 Taft visited Kansas as the speaker for the 50th anniversary of the enactment of the Kansas-Nebraska Act. He stated on that occasion a better summation of this bill than I can:

> "[T]here is a limit to the making or keeping of people good by law, and that when the law essays more than it can really effect, public morals are not improved, and the authority and sacredness of enacted law suffer."

Office of The

DISTRICT ATTORNEY

Of The 29th Judicial District of Kansas

Criminal Division
Wyandotte County Justice Complex
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DISTRICT ATTORNEY
Nick A. Tomasic

February 12, 1999

Senator Tim Emert
Chairperson, Senate Judiciary
State Capitol Bldg.
Topeka, KS. 66612-1597

RE: Senate Bills 165-166-168

Dear Senator Emert:

I am presenting this as my written support of the subject bills.

Informal exchanges of information with other attorneys, friends or foes, offer a quick, inexpensive alternative to formal discovery.

Unfortunately, the reality is that many times information is not exchanged absent a court order or state law.

The aim of these statutes is to take the surprise out of the case, to allow the jury or judge to be well informed after all the testimony is presented.

These proposed changes do nothing more than provide that if an expert is to be used, the opposition should have the right to rebut that evidence with testimony from another expert.

SENATE BILL 165

Senate Bill 165, a new section on discovery, provides that if the defendant is to present testimony relating to the defendant's mental condition, the defendant must give notice to the District Attorney, 21 days prior to the trial, to allow the District Attorney to have the defendant examined.

The proposal calls for a continuance if the notice provision is not followed. I would suggest that the penalty for non-compliance be that the defendant would not be allowed to present any evidence on that issue at the sentencing phase.

SENATE BILL 166

This is an amendment to K.S.A. 21-4624 which provides that at the sentencing phase, the state is given the opportunity to present evidence of the murder victims character and background and the impact on the survivors, if the defendant presents evidence of the defendants character or the impact on the defendant's family.

This needs to be the law ---- because some judges will not allow the victims families to present any testimony

SENATE BILL 168

The amendment provides for reciprocal discovery of the proposed testimony of expert witnesses. This allows each side to obtain a copy of the written report prepared by the expert,

Yours truly,

NICK A.TOMASIC
District Attorney

NAT/sc