Approved:
Date 5-03-04

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on March 11, 2004 in Room 241-N of the Capitol.

All members were present.

Committee staff present:
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Chris Clarke, Legislative Post Audit
Senator Stephen Morris
Randy Hearrell KS Judicial Council
Bill Lucero
Kevin O'Connor, Sedgwick County

Others attending:
See Attached List.

Chris Clark, Legislative Post Audit, gave a briefing on Costs Incurred for Death Penalty Cases. (Copies of 2003 Performance Audit Report are located in the Legislative Division of Post Audit) She stated that Kansas has had a death penalty law three times, but hasn't executed anyone since 1965. Kansas is one of 38 states that currently have the death penalty. In 1972, The US Supreme Court struck down the death penalty laws in 40 states, including Kansas after several attempts to enact a death penalty law Governor Joan Finney in 1994 allowed the death penalty to become law without her signature.

Kansas doesn't have a separate "death row"and 7 inmates currently sentenced to death are housed in the maximum security prison in El Dorado, with other prisoners who are in administrative segregation.

To seek the death penalty a crime several things have to occur:

- the circumstances of the crime have to fit the criteria set out in State Law
- the prosecutor's office must file formal capital murder charges
- the prosecutor's office must file formal declaration to seek the death penalty within 5 days of the preliminary hearing.

Crimes eligible for the Death Penalty in Kansas:
- Kidnaping or aggravated kidnaping for ransom
- Contract murder
- Murder committed by an inmate in a correctional facility
- Murder of a rape or sodomy victim
- Murder of a law enforcement officer
- Murder of more than one person during the same act
- Murder of a child under 14 with the intent to kidnap or commit sex offenses

Execution of defendants who are juveniles, insane, or mentally retarded is prohibited.

The US Supreme Court has stated that "death is different" which leads to more review and a lengthier process for those cases in which the death penalty is sought.

Costs for Death Penalty cases are incurred at both the state and local levels. Cases in which the death penalty was sought and imposed could cost about 70% more than cases in which the death penalty wasn't sought.

SB 422 - Capital murder, if sentence of death not imposed, imprisonment for life without the possibility of parole

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE at 1:30 p.m. on March 11, 2004 in Room 241-N of the Capitol.

Chairman Loyd opened the hearing on **SB 422**.

Senator Stephen Morris appeared in support of the bill. He stated that this bill was recommended by the Judicial Council Committee that studied several aspects of the death penalty law. The most important recommendation from the committee is to change the death penalty statute to allow juries in death penalty cases the option of choosing life without parole or the actual death penalty. (Attachment 1)

Randy Hearrell, Kansas Judical Council, spoke in favor of the bill. One of the recommendation by the Council is that if the defendant is found guilty of capital murder and the death penalty is not imposed, that the alternative sentence be life without the possibility of parole. (Attachment 2)

The prosecutors might be less likely to seek the death penalty if a plea would result in a sentence of life without possibility of parole. This would eliminate both trial and appeal costs. Currently in Kansas, if a defendant is convicted of capital murder and the jury decides not to impose the death penalty, the defendant is sentenced by the judge to either life in prison with parole eligibility in 25 years (life in prison) or to life in prison with parole eligibility in 50 years (the hard 50). Every defendant that has been convicted of capital murder but spared the death penalty has been sentenced to the "hard 50" or its predecessor the "hard 40" (life with parole eligibility in 40 years).

Because the "hard 50" sentence is not a "true" life sentence, and is not automatically imposed, jurors are left with uncertainty as to when the defendant might become eligible for parole. Establishing life without parole as the alternative sentence should end this uncertainty.

Bill Lucero, appeared before the committee to ask support for the passage of the bill. He felt that as a murder victim's family this bill offered the opportunity for healing and closure that cannot be achieved by the legal process. The viewpoint that life without parole sentence would prevent the individual from ever having the opportunity to return to society and killing again. (Attachment 3)

Kevin O'Connor, Deputy District Attorney Sedgwick County, stated that their office had no objection to a sentence of life without the possibility of parole option in capital murder cases. Their office believes that as the bill is currently written will not accomplish the stated goals and there should be changes, amendments were attached. (Attachment 4)

Pat Scalia, Executive Director of State Board of Indigent Defense Services was available for questions.

Chairman Loyd closed the hearing on **SB 422**.

The meeting was adjourned at 3:10 PM. The next scheduled meeting is March 15, 2004.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 3-11-04

NAME	REPRESENTING
Leo Haffner	Legislative Post Audit
Chris Clarke	" "
Randy Hearrell	Kansas Judicial Council
Megan Edwards	Rep. Dillmore
Pat Scalia	BIDS
Michael White	KCDAA
Kevin O'Connor	D.A.'s office - Wichita
Jared Maag	Atty Gen.
Mike Jennings	Sedgwick Co. DA

STEVE MORRIS
TOR, 39TH DISTRICT
600 TRINDLE
HUGOTON, KS 67951
(620) 544-2084

STATE CAPITOL, ROOM 120-S
TOPEKA, KS 66612
(785) 296-7378

STATE OF KANSAS

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS

CHAIRMAN: WAYS AND MEANS
LEGISLATIVE BUDGET
STATE BUILDING CONSTRUCTION

MEMBER: AGRICULTURE
PENSIONS, INVESTMENTS AND BENEFITS
ORGANIZATION, CALENDAR AND RULES
COUNCIL OF STATE GOVERNMENTS
AGRICULTURE TASK FORCE

VICE-CHAIRMAN: NATIONAL CONFERENCE OF STATE LEGISLATURES
AGRICULTURAL AND RURAL DEVELOPMENT

Testimony
by
Senator Stephen R. Morris
to
House Corrections and Juvenile Justice
Thursday, March 11, 2004

Regarding: SB 422

Chairman Loyd and members of the House Corrections and Juvenile Justice Committee. Thank you for giving me the chance to visit with you about the importance of SB 422. This bill is being recommended by the Judicial Council Committee that studied several aspects of our death penalty law. One of the most important recommendations from this committee is to change the death penalty statute to allow juries in death penalty cases the option of choosing life without parole or the actual death penalty. Currently, if the jury does not return a verdict of death, the penalty is then decided by the trial judge. I feel this change will give juries a better "feeling" on their deliberations with an option on the pending phase of the trial.

Thank you for your consideration.

House Corr & JJ
Attachment 1
3-11-04

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 262
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

Judicial.Council@ksjc.state.ks.us
www.kscourts.org/council

MEMORANDUM

TO: House Corrections and Juvenile Justice Committee
FROM: Judicial Council - Randy M. Hearrell
DATE: March 11, 2004
RE: SB 422 Relating to Life Without the Possibility of Parole

BACKGROUND

Last spring, the Legislature requested that the Judicial Council study costs in death penalty cases. The Judicial Council appointed a Committee to conduct the study and a list of the members of the Committee is attached. The Council has completed the study and one of its recommendations is that if the defendant is found guilty of capital murder and the death penalty is not imposed, that the alternative sentence be life without the possibility of parole. In its Performance Audit Report of "Costs Incurred for Death Penalty Cases" (December, 2003) Legislative Post Audit recognized that such a change could potentially help contain costs in death penalty cases.

Of the 38 states that have capital punishment (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wyoming), 35 have life without parole, (Kansas, New Mexico and Texas do not). Of the 12 states that do not have a death penalty, only Alaska does not have life without parole.

POSSIBILITY OF PLEA

The imposition of life in prison without the possibility of parole as the sentence to be given if death is not imposed has the potential to contain death penalty costs associated with trials, in that prosecutors might be less likely to seek the death penalty if a plea would result in a sentence of life without possibility of parole. This would eliminate both trial and appeal costs.

prosecutors might be less likely to seek the death penalty if a plea would result in a sentence of life without possibility of parole. This would eliminate both trial and appeal costs.

Examples supporting this position are:

- Ron Evans, a member of the Judicial Council Committee, stated that in plea negotiations prosecutors have told him they could not take the risk that the defendant would ever threaten society again. It is his opinion that if the option of life without the possibility of parole had been available he may have been able to plead rather than try some cases.

- Cathie Abookire, a spokeswoman for Philadelphia District Attorney Lynne M. Abraham, noted: "When someone wants to plead guilty to the crime of murder, and we know that life means life in Pennsylvania, then we are all for it. It gives the family some peace of mind, because it is over. There are not going to be 20 years of appeals." (Associated Press, October 3, 2003)

- The number of death sentences pursued in Pima County, Arizona has decreased by a third. "We've made a conscious effort to limit the death notices to the worst cases. We have a fuller discussion about can we - and should we - pursue death. It's a more thoughtful process," said prosecutor Rick Unklesbay. The policy shift was embraced by victim advocate Gail Leland, who stated, "I think the process and the options that we have now regarding sentencing have really been improved." (Associated Press, October 5, 2003)

JURY LESS LIKELY TO IMPOSE DEATH

Further, even if prosecutors continue to seek the death penalty in such cases, there is some evidence that jurors are less likely to impose the death penalty if life without parole is an option.

- "There are two factors, however, that more than anything else may help explain the decline in death-penalty sentences. One is the increasing availability of life without parole as an option, which all but three death-penalty states now offer. In polls, three fourths of Americans say they believe in the death penalty. But when asked whether they'd support capital punishment if life without parole was an option, the number is reduced to half." (Alex Kotlowitz, New York Times Magazine, July 6, 2003).

- "The Texas Senate recently rejected legislation to provide juries with the sentencing option of life in prison without the possibility of parole. Passage was opposed by some prosecutors who feared the sentencing option would discourage juries from giving death sentences." (Houston Chronicle, April 23, 2003)

- The following finding is based on interviews completed with 916 jurors from 257 capital trials in 11 states as a part of the Capital Jury Project[1]:

> "The empirical evidence, especially the accounts jurors give of their own punishment decision-making, reveals that the absence (real or imagined) of an LWOP option figured prominently in the decisions of many jurors to impose death. Jurors explained that they voted for the death penalty because the available alternative did not rule out parole; they chose the death penalty not because they thought it was the most appropriate punishment, but because it was preferable to what they believed the alternative would be. The jurors imposed death not as the appropriate, but as the least inappropriate of the available punishment options. In such cases, defendants are sentenced to death and executed because their jurors believe they cannot impose the punishment they deem most appropriate." (Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, William J. Bowers and Benjamin D. Steiner, 77 Tex. L. Rev. 605, February, 1999.)

CONCLUSION

Currently, in Kansas, if a defendant is convicted of capital murder and the jury decides not to impose the death penalty, the defendant is sentenced by the judge to either life in prison with parole eligibility in 25 years ("life in prison") or to life in prison with parole eligibility in 50 years ("the hard 50"). In practice, every defendant in Kansas that has thus far been convicted of capital murder but spared the death penalty has been sentenced to the "hard-50" or its predecessor the "hard 40" (life with parole eligibility in 40 years).

As a result, the default sentence is in practical effect already life without the possibility of parole. However, because even the "hard 50" sentence is not a "true" life sentence, and further is not automatically imposed, jurors are left with uncertainty as to when the defendant might become eligible for parole. Establishing life without parole as the alternative sentence should end this uncertainty.

---

[1]The Capital Jury Project was a national study of capital jurors' sentencing decisions in fifteen states. Capital jurors were selected for interviews in a three-stage sampling procedure: (1) fifteen states were chosen to reflect the principal variations in guided discretion capital statutes; (2) within each state, 20-30 full capital trials conducted since 1987 were selected to representboth life and death sentencing outcomes; and (3) for each trial a target sample of four jurors were systematically selected for three to four hour personal interviews. This research was initiated in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation.

JUDICIAL COUNCIL DEATH PENALTY

ADVISORY COMMITTEE

The Kansas Judicial Council appointed the following persons to serve on its Death Penalty Advisory Committee:

Stephen E. Robison, Chairman, Wichita, practicing lawyer in Wichita, Kansas and member of the Kansas Judicial Council.

Ron Evans, Topeka, Chief Defender, Kansas Death Penalty Defense Unit.

Jeffrey D. Jackson, Lawrence, consultant on death penalty issues to the Kansas Supreme Court.

Michael Kaye, Topeka, Professor at Washburn University School of Law.

Stephen Morris, Hugoton, State Senator from the 39th district and Chair of the Senate Ways and Means Committee.

Donald R. Noland, Pittsburg, District Court Judge in 11th Judicial District.

Steven Obermeier, Olathe, Assistant district attorney in Johnson County.

Kim T. Parker, Wichita, Assistant district attorney in Sedgwick County.

Rick Rehorn, Kansas City, practicing attorney in Wyandotte County and State Representative from the 32nd district.

Fred N. Six, Lawrence, retired Kansas Supreme Court Justice.

Ron Wurtz, Topeka, Deputy Federal Public Defender. Previously Chief Defender, Kansas Death Penalty Defense Unit.

56.00-D-1 CAPITAL MURDER - DUTY TO INFORM JURY OF ALTERNATIVE SENTENCE ABSENT DEATH SENTENCE

The Committee wishes to alert trial judges that, if requested, they must instruct the jury regarding the number of years in prison which a defendant will serve if not sentenced to death. The Committee has not attempted to draft such a pattern instruction, as each case will vary on its facts. However, trial judges will need to fashion such an instruction themselves if requested.

Notes on Use

"Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court." *State v. Kleypas*, 272 Kan. ___, 40 P.3d 139 (2001) (Slip op. at 258).

This is State v Scott
THE S/Ct Kansas said this meets
Kleypas Requirement, but I think
it will pass muster NO. 9

IF YOU DO NOT UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE STATE OF KANSAS' AGGRAVATING CIRCUMSTANCES HAVE BEEN ESTABLISHED AND ARE NOT OUTWEIGHED BY ANY MITIGATING CIRCUMSTANCES FOUND TO EXIST, I WILL IMPOSE A SENTENCE AS PROVIDED BY LAW. I CAN IMPOSE THE FOLLOWING SENTENCES FOR THE FOLLOWING CRIMES.

1. AGGRAVATED BURGLARY–A SENTENCE RANGING FROM 46 TO 51 MONTHS IN PRISON.
2. THEFT–A SENTENCE RANGING FROM 5 TO 7 MONTHS IN PRISON.
3. CRIMINAL POSSESSION OF A FIREARM–A SENTENCE RANGING FROM 7 TO 9 MONTHS.
4. FIRST DEGREE PREMEDITATED MURDER OF DOUG BRITTAIN–A LIFE SENTENCE IN PRISON. MR. SCOTT WOULD BE REQUIRED TO SERVE A MINIMUM OF 25 YEARS BEFORE HE WOULD BE FIRST CONSIDERED FOR PAROLE.
5. CAPITAL MURDER OF ELIZABETH BRITTAIN–A LIFE SENTENCE IN PRISON. MR. SCOTT WOULD BE REQUIRED TO SERVE A MINIMUM OF 25 YEARS BEFORE HE WOULD BE FIRST CONSIDERED FOR PAROLE.

IF CERTAIN FACTORS ARE SHOWN TO EXIST, I MAY DOUBLE THE AGGRAVATED BURGLARY, THEFT AND CRIMINAL POSSESSION OF A FIREARM SENTENCES.

IF CERTAIN FACTORS ARE SHOWN TO EXIST, I COULD IMPOSE A SENTENCE OF LIFE IN PRISON WITH NO CHANCE OF PAROLE FOR FORTY (40) YEARS FOR EACH OF THE MURDER CONVICTIONS. I COULD ORDER THAT SOME OR ALL OF THE SENTENCES BE SERVED CONCURRENT WITH EACH OTHER OR CONSECUTIVE TO EACH OTHER.

22-3728. Functional incapacitation release; procedures; notice; conditions; supervision upon release. (a) (1) Upon application of the secretary of corrections, the Kansas parole board may grant release to any person deemed to be functionally incapacitated, upon such terms and conditions as prescribed in the order granting such release.

(2) The Kansas parole board shall adopt rules and regulations governing the procedure for initiating, processing, reviewing and establishing criteria for review of applications filed on behalf of persons deemed to be functionally incapacitated. Such rules and regulations shall include criteria and guidelines for determining whether the functional incapacitation precludes the person from posing a threat to the public.

(3) Subject to the provisions of subsections (a)(4) and (a)(5), a functional incapacitation release shall not be granted until at least 30 days after written notice of the application has been given to: (A) The prosecuting attorney and the judge of the court in which the person was convicted; and (B) any victim of the person's crime or the victim's family. Notice of such application shall be given by the secretary of corrections to the victim who is alive and whose address is known to the secretary, or if the victim is deceased, to the victim's family if the family's address is known to the secretary. Subject to the provisions of subsection (a)(4), if there is no known address for the victim, if alive, or the victim's family, if deceased, the board shall not grant or deny such application until at least 30 days after notification is given by publication in the county of conviction. Publication costs shall be paid by the department of corrections.

(4) All applications for functional incapacitation release shall be referred to the board. The board shall examine each case and may approve such application and grant a release. An application for release shall not be approved unless the board determines that the person is functionally incapacitated and does not represent a future risk to public safety. The board shall determine whether a hearing is necessary on the application. The board may request additional information or evidence it deems necessary from a medical or mental health practitioner.

(5) The board shall establish any conditions related to the release of the person. The release shall be conditional, and be subject to revocation pursuant to K.S.A. 75-5217, and amendments thereto, if the person's functional incapacity significantly diminishes, if the person fails to comply with any condition of release, or if the board otherwise concludes that the person presents a threat or risk to public safety. The person shall remain on release supervision until the release is revoked, expiration of the maximum sentence, or discharged by the board. Subject to the provisions of subsection (f) of K.S.A. 75-5217, and amendments thereto, the person shall receive credit for the time during which the person is on functional incapacitation release supervision towards service of the prison and postrelease supervision obligations of determinate sentences or indeterminate and off-grid sentences.

(6) The secretary of corrections shall cause the person to be supervised upon release, and shall have the authority to initiate revocation of the person at any time for the reasons indicated in subsection (a)(5).

(7) The decision of the board on the application or any revocation shall be final and not subject to review by any administrative agency or court.

(8) In determining whether a person is functionally incapacitated, the board shall consider the following: (A) The person's current condition as confirmed by medical or mental health care providers, including whether the condition is terminal;

(B) the person's age and personal history;

(C) the person's criminal history;

(D) the person's length of sentence and time the person has served;

(E) the nature and circumstances of the current offense;

(F) the risk or threat to the community if released;

(G) whether an appropriate release plan has been established; and

(H) any other factors deemed relevant by the board.

(b) Nothing in this section shall be construed to limit or preclude submission of an application for pardon or commutation of sentence pursuant to K.S.A. 22-3701, and amendments thereto.

History: L. 2002, ch. 57, § 1; July 1.

Article 700.—RELEASE OF FUNCTIONALLY INCAPACITATED INMATES

45-700-1. Application for release. (a) If the secretary believes that an inmate is functionally incapacitated, an application for release may be submitted to the board by the secretary. The application shall be accompanied by documentation attesting to and describing the inmate's functional incapacity. This documentation shall be prepared by a medical doctor and, as needed, by a mental health professional. The documentation shall include a comprehensive description of the inmate's condition and prognosis.

(b) For the purposes of this article, "functional incapacitation" means that an inmate has a condition caused by injury, disease, or illness, including dementia, that is determined, to a reasonable degree of medical certainty, to permanently render the inmate physically or mentally incapacitated to the extent that the inmate lacks effective capacity to cause physical harm.

(c) The application shall include a release plan, which shall provide details about where the inmate will reside and shall identify all treatment providers and facilities to be used by the inmate. Before the inmate's release, this release plan shall be subject to review and approval by department of corrections (DOC) staff in the same manner as any other release plan.

(d) All medical and treatment records pertaining to the inmate shall be available for review by the board, upon its request. If deemed necessary by the board, a second medical opinion may be requested. (Authorized by and implementing L. 2002, Ch. 57, Sec. 1; effective, T-45-7-26-02, July 26, 2002; effective Nov. 22, 2002.)

45-700-2. Review and consideration of application for release. (a) On receipt of the secretary's application for release of a functionally incapacitated inmate, a member of the board shall review the application and, with assistance from DOC staff, shall ensure that the following steps are taken:

(1) The written notification of the application provided by the secretary to each prosecuting attorney and the judge of each court in which the inmate was convicted shall include confidential copies of each medical or mental health report documenting the incapacitating condition. The confidentiality of these reports shall be maintained.

(2) The written notification of the application provided by the secretary to each victim or, if any victim is deceased, to one or more members of the victim's family with known addresses shall not include any of the confidential medical or mental health reports documenting the incapacitating condition. However, a general description of the inmate's incapacity shall be included in the written notification.

(b)(1) At the discretion of the board member reviewing the application, the final decision on the application may be entered with or without a formal hearing after considering all available information, including the following:

(A) The documentation required by subsection (a) of K.A.R. 45-700-1;

(B) any comments received from any prosecuting attorney, judge, crime victim, or member of the victim's family; and

(C) the factors identified in paragraph (a)(8) of L. 2002, Ch. 57, Sec. 1, and amendments thereto, and the following additional factors:

(i) The inmate's age and medical condition;

(ii) the health care needs of the inmate;

(iii) the inmate's custody classification and level of risk of violence; and

(iv) the inmate's effective capacity to cause physical harm.

An inmate's need for long-term care may be considered in reaching a determination that an inmate has a functional incapacitation, but shall not be determinative in itself.

(2) If a hearing is scheduled, additional information or evidence may be requested from any of the medical or mental health providers who prepared reports for the application, or from any other person or persons having relevant information or knowledge.

(c) If the board finds that the inmate is functionally incapacitated and does not represent a risk to public safety, the release of the inmate may be ordered by the board under the terms of the approved release plan and any additional terms and conditions of release deemed necessary by the board, subject to the following voting requirements:

(1) The statutory requirements for voting to parole inmates sentenced for a class A or class B felony or for off-grid crimes committed on or after July 1, 1993; and

(2) a vote to release the inmate by a majority of the members of the board under either of the following circumstances:

(A) The inmate is serving a sentence for a severity level 1, 2, or 3 felony on the sentencing guidelines grid for non-drug crimes.

(B) A formal hearing regarding the application for release, with the inmate present, has not been held. (Authorized by and implementing L. 2002, Ch. 57, Sec. 1; effective, T-45-7-26-02, July 26, 2002; effective Nov. 22, 2002.)

Bill Lucero
1176 SW Warren Av
Topeka KS 66604-1646
785-232-5958
lucerolb@earthlink.net

Testimony in support of Senate Bill 422
House Corrections & Juvenile Justice Committee
11 March 2004

Mr. Chairman and Members of the Committee:

I am Bill Lucero, speaking to you on behalf of myself as a private citizen instead of as a lobbyist for Murder Victims' Families for Reconciliation whom I normally represent. Today I ask your support for passage of Senate Bill 422 which the national MVFR takes no position on. You have already been presented with the rationale from Legislative Post Audit and the Judicial Council as to the merits in relation to cost savings, instructions to the jury clarification and appeal reductions. I would like to add two other compelling reasons for you to enact this proposed legislation:

The United States Supreme Court ruled in *Simmons v. North Carolina* that when a state has a life without parole alternative to the death penalty, then the presiding judge is obliged to inform the jury of its sentencing alternatives. This explanation was absent in at least one if not two capital cases that resulted in recent death sentences in Kansas. Enacting SB 422 would then mandate a "truth in sentencing" elucidation from the bench.

More important to me, as murder victim's family member, is the opportunity for healing that SB 422 would provide. Over the 27 Legislative sessions that I have lobbied, I have frequently had to explain that "closure" for a victim's family cannot be achieved by the legal process. Healing only occurs when the family is no longer confronted with the fate of the defendant. As a former local vice president of Parents of Murdered Children (again, an organization that takes no position on this issue) I came in frequent contact with families who favored and opposed the death penalty. But this one common ground typically united the differing viewpoints into a consensus: a life without parole sentence would prevent that individual from ever having the opportunity to return to society and kill again. And that is the most common nightmare held by victim family members.

Thank you for your attention and the time each of you made for us to visit individually with you on such short notice. Again please enact SB 422.

(4)

Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Kevin O'Connor
Deputy District Attorney

Testimony to House Committee on Corrections and Juvenile Justice

To: Chairman Ward Loyd and members of the House Committee on Corrections and Juvenile Justice

From: Kevin O'Connor, Deputy District Attorney, Office of the District Attorney, Eighteenth Judicial District of the State of Kansas, Wichita, Kansas

RE: SB 422

Date: March 11, 2004

Thank you for the opportunity to address the Committee. Our office has no objection to a sentence of life without the possibility of parole option in capital murder cases.

Our office supports the bill for reasons other than those being promoted. A life without the possibility of parole will not necessarily lead to more plea agreements or less jury verdicts of death. Statements that a life without the possibility of parole option will result in more pleas or less death verdicts ignores the reality and sheer heinousness of capital murder cases. A recent study for the Journal of Empirical Legal Studies, published by Cornell Law School, found that the availability of a life sentence without the possibility of parole did not appear to decrease the chance that juries would impose death sentences. The study did find that the structure of a state death penalty law seemed to affect the likelihood of a death sentence. For example, States, like Kansas, which require findings of particular aggravating factors before a death sentence can be imposed tend to have lower death sentence rates.

Our office supports the bill because the only other sentencing option in capital murder cases should be life without the possibility of parole.

Our office believes that the bill as currently written will not accomplish the stated goals. Prosecutors in our office with experience in capital murder cases suggest the following changes to properly effectuate the goals of the bill. The goals include the exclusion of individuals under the age of 18 and the mentally retarded from the life without the possibility of parole option, and to insure that defendants that enter a plea pursuant to a plea agreement will, in fact, receive a sentence of life without the possibility of parole.

Our office believes that the following changes to the criminal law statutes should be made:

Sec. 21-4622. Upon conviction of a defendant of capital murder as provided in K.S.A. 21-4624, as amended, or in K.S.A. 21-4624a, as amended, and upon a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death ***or life without the possibility of parole*** shall be imposed hereunder.

Sec. 21-4623. . . . (d) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death ***or life without the possibility of parole*** shall be imposed hereunder.

Sec. 21-4624. (e) . . . the defendant shall be sentenced to death; ***otherwise, the defendant shall be sentenced to life without the possibility of parole.*** . . . If, after a reasonable time, the jury is unable to reach a verdict, the judge shall dismiss the jury, and impose a sentence of ***life without the possibility of parole*** and shall commit the defendant to the custody of the secretary of corrections. . . .

(f) . . . If the court determines that the imposition of such sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant ***to life without the possibility of parole*** , and no sentence of death shall be imposed hereunder. . . .

(g) A defendant who is sentenced to imprisonment for life without the possibility of parole shall spend the remainder of the defendant's natural life incarcerated and in the custody of the secretary of corrections. . . . . The provisions of K.S.A. 22-3728 do not apply to defendants sentenced to death or life without the possibility of parole.

Sec. 21-4625. No changes.

Sec. 21-4626. No changes.

Sec. 21-4627. No changes.

Sec. 21-4628 [Repealed].

Sec. 21-4629. No changes.

Sec. 21-4630. No changes.

Sec. 21-4631. No changes.

Sec. 21-4632. No changes.

Sec. 21-4633. No changes.

Sec. 21-4634. No changes.

Sec. 21-4635. ***(a) Except as provided in K.S.A. 21-4622, 21-4623, and K.S.A. 21-4634, if a defendant is convicted of capital murder and no sentence of death is imposed pursuant to K.S.A 21-4624(e) or requested pursuant to K.S.A. 21-4624(a) or (b), the defendant shall be sentenced to life without the possibility of parole.***

(b) [delete Except as ..., if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed] If a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.

[(b) deleted] ***(c)*** In order to make such determination, . . .

[(c) deleted] ***(d)*** If the court finds that one or more of the aggravating circumstances . . .

Sec. 21-4636. No changes.

Sec. 21-4637. No changes.

Sec. 21-4638. No changes.

Sec. 21-4639. No changes.

Sec. 21-4640. No changes.

Sec. 21-4641. No changes.

Sec. 22-3717 add K.S.A. 21-4624

Thank you for your consideration.

Sincerely,

Kevin O'Connor
Deputy District Attorney
Office of the District Attorney
Eighteenth Judicial District of the State of Kansas
Wichita, Kansas
(316)383-8119
koconnor@sedgwick.gov