Approved: April 30, 2004
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35a.m. on Tuesday, February 10, 2004, in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of the Revisor Statutes
Helen Pedigo, Office of the Revisor Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Senator John Vratil
Matt Bretz, Kansas Trial Lawyers Association
Ron Wurtz, Kansas Judicial Council
Rocky Nichols, Kansas Advocacy & Protective Services
Jane Rhys, Kansas Council on Developmental Disabilities
Patrick Poull, The Brain Injury Association of Kansas & Greater Kansas City
Paige Nichols, Kansas Association of Criminal Defense Lawyers
Jim Clark, Kansas Bar Association

Others attending: See attached list.

SB 337 - Repealing the crime of hypnotic exhibition
Chairman Vratil called for discussion and final action on **SB 337**.

Senator Haley made a motion to amend the bill by making it effective upon publication in the Registrar and report the amended bill favorably for passage. Senator O'Connor seconded the motion, and the motion carried.

SB 420 - Costs of a civil action; offer of judgment
Chairman Vratil opened the hearing on **SB 420**. He said that he was the sponsor of the proposed bill. He explained that there was a current statute on the books entitled "Offer of Judgement" which is designed to facilitate settlement of cases by allowing parties to make an offer of judgment at least 15 days before trial. If an offer is made and accepted, then the case is resolved and it goes away, but if the offer is not accepted and the case goes to trial, and the judgment is less favorable then the offer of settlement hence the party who made the offer gets court costs. If the judgment is more favorable, court costs can be awarded to the party making the offer settlement. Chairman Vratil said that **SB 420** ups the ante a bit, because court costs in most cases are a $100 or $200, a fairly nominal sum. He stated what **SB 420** does is allow for attorney's fees to be awarded to one party or another depending upon whether the ultimate judgment is more or less favorable then the offer of settlement.

Chairman Vratil gave an example of a case if **SB 420** becomes law. The plaintiff makes an offer of settlement of $100,000, it is rejected by the defendant, and then ultimately there is a $200,000 judgment rendered by the court or a jury. The plaintiff, in this situation, would be entitled to recover attorney's fees in addition to the $200,000. He explained the purpose of the bill is to encourage parties to evaluate the merit of their case or defense at an early stage in the proceedings, and to encourage those parties to settle without requiring the court to conduct a trial. It does that through the award of attorney's fees.

Committee discussion followed the Chair's explanation of the bill. Concern was expressed that the bill possibly favored "big guys" with lots of money. This bill is an attempt to level the playing field and encourage the plaintiff to make a reasonable settlement proposal. If the defendant rejects that proposal and the verdict is ultimately in favor of the plaintiff then the plaintiff can get attorney's fees. Senator Goodwin stated that she agreed with the proposed legislation, and some of these cases needed to be mediated outside the courtroom. She added that if Kansas does not provide an incentive to do that, then she sees lots of lawyer fees escalating, and the "little guy" runs up many hours that it is not even worth it

to him to pursue his case because of the escalating costs that may be incurred. Senator Donovan commented that currently the court sets a limit on reasonable attorney fees, and every case that can be mediated fairly before it goes to court is a step forward.

Matthew Bretz, representing the Kansas Trial Lawyers Association (KTLA), testified in opposition to **SB 420**. He said that KTLA has no objection to the substantive provisions of KSA 60-2002 in its present state, but there were concerns that the amendments proposed in **SB 420** would require the courts to assess the prevailing party's attorneys fees against the losing party, violating longstanding principles of American law. The bill would effect the right of individuals to access the judicial system. Mr. Bretz stated that SB 420 is one sided. It provides a person with insurance a bigger hammer against the person who does not have insurance. He concluded by saying the American Rule, in which both parties are responsible for their own attorney's fees, was a longstanding principle of American law, and KTLA respectfully requested that the provision assessing attorney's fees be stricken. (Attachment 1)

Following brief Committee discussion, the Chair closed the hearing on **SB 420**.

SB 355 - Changes requirements for determining mental retardation for purposes of applying the death penalty

Chairman Vratil opened the hearing on **SB 355**, and asked Randy Hearrell, Kansas Judicial Council (KJC), to explain the proposed bill and introduce Ron Wurtz who testified on behalf of KJC and as a member of its Criminal Law Advisory Committee. Mr. Hearrell said the bill sets out how the state determines mentally retardation, and that the issue was studied by the Criminal Law Advisory Committee upon the request of the Legislature. Mr. Wurtz testified in favor of **SB 355**.

Mr. Wurtz explained the U. S. Supreme Court's ruling on the case of Atkins v. Virginia, in which the Supreme Court held that capital punishment of persons with mental retardation is cruel and unusual punishment under the Eighth Amendment, thus being unconstitutional. Prof. James Ellis of the University of New Mexico School of Law, argued the *Atkins* case before the U.S. Supreme Court. Prof. Ellis came to Topeka in October of 2003, and spoke to the Criminal Law Advisory Committee. He outlined for the Committee his concerns with Kansas' current statute, including his recommended changes. His primary concern with the current statute was the definition of "mentally retarded" as set forth in KSA 21-4623(e). Prof. Ellis said the U.S. Supreme Court did not define "mentally retarded" in the *Atkins* opinion, but it did reference the clinical definitions of both the American Association of Mental Retardation (AAMR) and the American Psychiatric Association. (Attachment 2)

Prof. Ellis described two potential problems with Kansas' definition. First, it is so different from the other states, one could argue that the definition does not conform to the "national consensus" and its constitutionality could be called into question. Second, Prof. Ellis believed the current definition could be challenged as unconstitutional on its face or as applied. He recommended that removing the causation clause would be sufficient to cure the constitutional matter, and updating the clinical definition with AAMR's most recent (2002) definition. Mr. Wurtz said the Committee was in agreement that the second half of the current definition, which seemed to come from the insanity defense, should be deleted. However, the Committee had many concerns about whether and how the clinical portion of the definition should be changed.

Mr. Wurtz explained that in an effort to understand the clinical terms and the differences between the evolving AAMR definitions, the Committee invited Prof. Rud Turnbull to meeting in November, 2003. Prof. Turnbull is the Chairman of the Special Education Department, University of Kansas, and current President of AAMR. Prof. Turnbull talked about various updates to the AAMR definition which all meet a three prong test: (1) substantial intellectual impairment; (2) impact of that impairment on everyday life; and (3) appearance of the disability at birth or during the person's childhood. He said that a person must meet all three requirements in order to fall within the definition of mental retardation. He stated that the second component, i.e. the impact on the individual's life was the one that wasn't worded exactly the same in the different versions, but he emphasized that the various formulations describe the same group of individuals.

Mr. Wurtz said that the Criminal Law Advisory Committee struggled with the "age of onset" issue. Prof. Ellis had informed the Advisory Committee that a few states that had changed their laws "post-*Atkins*" had chosen not to include an age of onset provision in their definition of mentally retarded. The Advisory Committee was not satisfied with that option. The Advisory Committee was unanimous in its desire to amend the definition of KSA 21-4623 so that it would apply to all persons having a cognitive impairment such that they met the first two prongs of the three prong AAMR definition of mentally retarded. Mr. Wurtz stated that the Advisory Committee chose to substitute the words "cognitive disability" for mentally retarded to clarify that the class of people protected from capital punishment in Kansas is larger than the class of mentally retarded people. Mr. Wurtz talked about other recommended amendments Prof. Ellis suggested and issues brought to the Committee's attention by Prof. Ellis as outlined in the written testimony submitted.

Rocky Nichols, Executive Director for Kansas Advocacy and Protective Services (KAPS), testified in support of **SB 355**. He said that the proposed bill only involved whether the death penalty can be imposed on persons with significant cognitive disabilities, and does not involve determinations of mental illness, capacity to stand trial, or guilt or innocence. He explained that the high court found it unconstitutional to execute a person with significant cognitive disabilities because they have "diminished capacities to undertake and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Mr. Nichols added that the two reasons to execute criminals are retribution and deterrence, and that those reasons were absent when persons with significant cognitive disabilities were sentenced. (Attachment 3)

Mr. Nichols briefly spoke about **SB 355**. He said it was the result of an interim study and serious deliberations by the Kansas Judicial Council. He outlined several significant improvements in the Kansas death penalty statutes as a result of the research and information gathering done by the KJC's Advisory Committee. He expressed his appreciation to the KJC for its extensive work and for the effective job it did in crafting the public policy. He asked that the Judiciary Committee adopt KJC's new version of the bill.

Jane Rhys, Kansas Council on Developmental Disabilities, spoke in support of **SB 355**. She stated that people with cognitive disabilities should be punished when they break the law and they should be held responsible for their actions; however, the death penalty would not be considered an appropriate punishment based on the facts of their disability. She said the Council firmly believes that people who have cognitive disabilities, regardless of how and when that disability occurred, should not be executed. (Attachment 4)

Patrick Poull, The Brain Injury Association of Kansas and Greater Kansas City, testified in support of **SB 355**. Mr. Poull's written testimony included a handout, "The Consequences of Brain Injury", which noted the vast range of impacts that a survivor and family may face. Mr. Poull explained that egocentricity, impulsivity, low frustration tolerance, anxiety, depression, and mood swings are the everyday challenges that some families and individuals confront. He said that while not mental retardation by definition, these sometimes overwhelming impacts have similar effects on a person's ability to control their behavior. Mr. Poul stated that holding a person with a cognitive disability to a different standard than a person with a developmental disability is plainly discriminatory. He concluded by saying this bill would provide an objective standard upon which prosecution and defense could depend. (Attachment 5)

Paige Nichols, Kansas Association of Criminal Defense Lawyers (KACDL), spoke in favor of **SB 355**, and strongly supported the Judicial Counsel Criminal Law Advisory Committee's Report. (Attachment 6)

Jim Clark, Kansas Bar Association, submitted written testimony in support of **SB 355**. (Attachment 7)

There being no opponents appearing to testify in opposition to **SB 355**, the Chair closed the hearing.

Final Action:
SB 299 - Concerning Kansas surety agents

MINUTES OF THE SENATE JUDICIARY COMMITTEE at 9:35a.m. on Tuesday, February 10, 2004, in Room 123-S of the Capitol.

Chairman Vratil called for discussion and final action on **SB 299**.

Senator Oleen made a motion to report **SB 299** favorably for passage as amended, seconded by Senator Betts, and the motion carried.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is February 11, 2004.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: ~~Tues, Feb. 10, 2004~~

NAME	REPRESENTING
Paige A. Nichols	Kansas Assoc. of Criminal Defense Lawyers
Donna Schneweis csj	Amnesty International
Bill Lucas	Murder Victims' Families for Reconciliation
Jaclyn Reish	SRS/HCP/CSS
Emily Watson	Sen. Barbara Allen
Erin Lord	Sen David Adkins
Michael White	KCDAA
Rocky Nichols	KAPS
Jane Rhys	KCDD
Patrick Poull	Brain Injury Assn. of KS
Brenda Harmon	KSC
Patricia Biggs	KSC
Julia Butler	KSC
Jeff Bottenberg	State Farm
Mark Wells	Dept. on Aging
Jim Clarke	KBA
Judy M. Hearne	KJC
Ron Wurtz	KJC
Matt Bretz	KTLA

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SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues, 2-10-2004

NAME	REPRESENTING
Barb Conrad	KTLA
Kirk Lowry	KAPS
Jeremy S Barclay	KDOC

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senate Judiciary Committee

From: Matthew L. Bretz, Vice President of Membership
Kansas Trial Lawyers Association

Re: 2004 SB ~~240~~ 420

Date: February 10, 2004

Chairman Vratil and members of the Senate Judiciary Committee. Thank you for the opportunity to submit comments in opposition to SB ~~240~~ 420. My name is Matt Bretz and I currently serve as Vice President of Membership for the Kansas Trial Lawyers Association, KTLA. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system.

KTLA has no objection to the substantive provisions of K.S.A. 60-2002 in its present state. We are concerned, however, that the amendments proposed in SB ~~240~~ 420, which would require the courts to assess the prevailing party's attorneys fees against the losing party, violate longstanding principles of American law, and would have a chilling effect on the right of individuals to access the judicial system.

Ever since James Madison wrote the Constitution, and Thomas Jefferson wrote the Bill of Rights, the right to a trial by jury has been preserved. When those documents were written they were way ahead of their time, and they still are because they allow litigants – regardless of background or economic status – to access the judicial system for resolution of disputes.

Soon after those immortal documents were written, the United States did away with what was known as the "English Rule", and adopted the "American Rule", in which both parties are responsible for their own attorney's fees. In the 1796 decision in Arcambel v. Wisemen, the United States Supreme Court rejected the English Rule stating that "the general practice in the United States is in opposition to the [English Rule]." More recently, in 1967, the United States Supreme Court held in Fleischman Distilling Corp. v. Maier Brewing Co., that:

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit.

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 •

E-Mail: triallaw @ ink.org

Senate Judiciary
2-10-04
Attachment 1

SB ~~240~~ 420 abandons the American Rule and adopts the English Rule which has been disfavored for over 200 years of American jurisprudence. Essentially, under SB ~~240~~ 420, litigants would be forced to risk paying the opposing party's attorney's fees in order to access the judicial system for resolution of disputes. This effectively limits access to the judicial system to those who have the financial fortitude or insurance to allow them to take the risk of an unfavorable outcome. Those who need access to the judicial system the most – the poor, disabled or injured – would lose access to the judicial system for resolution of disputes.

The effect of SB ~~240~~ 420 would be to abrogate the protection afforded to litigants in the Constitution and Bill of Rights based on their backgrounds and economic status, and would deny a litigant the ability to obtain a trial by jury unless the litigant has the financial ability to pay not only his own attorney's fees, but also the opposing litigant's attorney's fees.

The American Rule, in which both parties are responsible for their own attorney's fees, is a longstanding principle of American law and we respectfully request that the provision assessing attorney's fees be stricken.

Thank you for the opportunity to express our concerns about SB ~~240~~ 420.

REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2003 HB 2349 AND *ATKINS V. VIRGINIA*

Approved by the Kansas Judicial Council
December 5, 2003

REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
DECEMBER 5, 2003

Background

On June 20, 2002, the United States Supreme Court decided the case of *Atkins v. Virginia*, 536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002). The Supreme Court held that capital punishment of those with mental retardation is cruel and unusual punishment under the Eighth Amendment. The full opinion is attached hereto as Appendix A, p.16.[1]

In response, HB 2349 (amending K.S.A. 21-4623 to ensure compliance with *Atkins* and attached hereto as Appendix B, p. 42) was introduced in the 2003 legislative session, but was not heard.[2] The legislature requested that the Judicial Council study the issue, and the Judicial Council assigned the study to the Criminal Law Advisory Committee. The members of the Judicial Council Criminal Law Advisory Committee are: Hon. Michael Malone, Lawrence, Kansas, Acting Chair; Prof. Ellen Byers, Carbondale, Kansas; James W. Clark, Lawrence, Kansas; Edward G. Collister, Lawrence, Kansas; Jim D. Garner, Topeka, Kansas; Patrick M. Lewis, Olathe, Kansas; Steven L. Opat, Junction City, Kansas; Debra S. Peterson, Wichita, Kansas; Loren L. Taylor, Kansas City, Kansas; Ron Wurtz, Topeka, Kansas; and Steven R. Zinn, Topeka, Kansas. Honorable Marla J. Luckert, Topeka, Kansas, Chair of the Criminal Law Advisory Committee, did not participate in the study because it related to the death penalty.

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[1] The Appendix is available for viewing in the Judicial Council office.

[2] An identical bill, HB 2439, was also introduced in 2003, and also failed to reach hearing. For simplicity, this report will refer only to the first bill introduced, HB 2349.

History of HB 2349

The *Atkins* case was argued to the U.S. Supreme Court by Prof. James Ellis of the University of New Mexico School of Law. After the Supreme Court issued its opinion, holding that it is unconstitutional to execute people with mental retardation, Prof. Ellis wrote an article to assist states with drafting legislation to comply with *Atkins*. See Ellis, James W., *Mental Retardation and The Death Penalty: A Guide to State Legislative Issues*, attached hereto as Appendix C, p. 45.

The 2003 bills amending K.S.A. 21-4623 were initiated by former Rep. Rocky Nichols, who is now the Executive Director of Kansas Advocacy & Protective Services, Inc. (KAPS). Former Rep. Nichols consulted with Prof. Ellis about Kansas' statute, and Prof. Ellis made specific suggestions for changes he believed should be made to K.S.A. 21-4623. The changes suggested in Prof. Ellis' February 7, 2003 letter to former Rep. Nichols, attached hereto at p. 70 as Appendix D, were incorporated into HB 2349.

Committee Review of HB 2349

The Committee first met on October 10, 2003. Prof. Ellis attended the meeting to explain his views of how K.S.A. 21-4623 should be changed to conform with *Atkins*. Prof. Ellis' visit to Topeka was sponsored by KAPS, and former Rep. Nichols also attended the October meeting. Prof. Ellis outlined for the Committee his concerns with Kansas' current statute, including why he recommended the changes set forth in HB 2349.

1. Definition of "Mentally Retarded"

Prof. Ellis' primary concern with the current statute is the definition of "mentally retarded" as set

forth in K.S.A. 21-4623(e):

> As used in this section, "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

The U.S. Supreme Court did not define "mentally retarded" in the *Atkins* opinion, although it did reference the clinical definitions of both the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. *Atkins*, 536 U.S. 308, n. 3 (Appendix A, p.18). Although the specific definition is left to the States, the Court makes clear that there is a "national consensus" regarding who is and who is not retarded:

> "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' *Id.*, at 405, 416-417."
>
> *Atkins,* 536 U.S. at 317 (Appendix A, p. 22)

The footnote to the above quote states that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n.3, *supra*." *Id.* at n.22.

Prof. Ellis sees two potential problems with Kansas' definition. First, since it is so different from the other states, it could be argued that the definition does not conform to the "national consensus" and its constitutionality could be called into question on that basis. At the time *Atkins* was decided, eighteen states had adopted legislation prohibiting the execution of mentally retarded persons. Of those eighteen States, seventeen define "mentally retarded" in purely clinical terms, generally using either the 1983 or 1992

versions of AAMR's definition of "mentally retarded."[3] Kansas stands alone in its use of a definition that combines the clinical definition of mental retardation with some requirement of a "causal link" as is used for the defense of insanity. In addition to being outside the national consensus, Prof. Ellis also believes that Kansas' current definition could be challenged as being unconstitutional on its face or as applied. To the extent that the current definition could be read to require a defendant to prove some causal link in addition to proving mental retardation, Prof. Ellis finds it questionable whether the definition passes constitutional muster. Prof. Ellis stated that removing the causation clause would be sufficient to cure the constitutional infirmity, but also recommended updating the clinical definition with AAMR's most recent (2002) definition. The most important reason for this change is that "it is the definition that Kansas' clinicians will be using in other contexts as they perform evaluations and provide services to people with mental retardation. If the capital punishment statute were to adopt the same terminology, it would enhance the ability of mental disability professionals to evaluate defendants and compare their findings in the same terms that they employ in other settings." See Appendix D, p. 71.

2. Committee Review of the Definition Issue

From the beginning, the Committee was in agreement that the second half of the current definition, which seemed to come from the insanity defense, should be deleted. However, the Committee had many concerns about whether and how the clinical portion of the definition should be changed. In order to better understand the clinical terms and the differences between the evolving AAMR definitions, the Committee invited Prof. Rud Turnbull to the Committee meeting of November 7, 2003. Prof. Turnbull is the Chairman of the Special Education Department at the University of Kansas and the current President of AAMR. He

[3] AAMR also updated its definition to the current version in 2002.

earned a J.D. from the University of Maryland Law School and an L.L.M. from Harvard Law School.

Prof. Turnbull explained that, in spite of the fact that the AAMR has changed its definition of "mentally retarded" three times in the last twenty years, the group of people to whom the definition applies has not changed. The updatings reflect progress in assessment tools and testing instruments that continue to refine the subjective nature of the definition. In spite of several updates to the AAMR definition, the 1983, 1992 and 2002 versions all consist of a three prong test: 1) substantial intellectual impairment; 2) impact of that impairment on everyday life; and 3) appearance of the disability at birth or during the person's childhood. A person must meet all three requirements in order to fall within the definition of mental retardation. "The variations found in the three formulations of the AAMR definition differ only in the wording of how they describe the second component, i.e. the impact on the individual's life. But it is important to emphasize that the various formulations *describe the same group of individuals,* and therefore do not differ in scope in any significant way." See Appendix D hereto, Ellis, James W., *Mental Retardation and The Death Penalty: A Guide to State Legislative Issues*, Appendix C, p.49 (Emphasis in original).

The Committee struggled with the "age of onset" issue. For purposes of the AAMR, the definition of "mentally retarded" necessarily includes a requirement that the disability manifest itself before the age of 18 because mental retardation is a developmental disability, affecting the way and extent to which a child's cognitive abilities are formed.[4] Also, services needed by someone who has never developed a normal level of cognitive ability are very different than those required by people who have had normal

[4] The age of onset is a rather arbitrary number, being 18 in some states and 22 in others. It is believed that the specific age may have been in part established to correspond with the age at which mentally retarded children were no longer eligible to receive services in the public school systems.

intelligence and then lost it, and AAMR specifically supports and advocates for people with the former type of disability. However, other types of cognitive impairments share similar characteristics to mental retardation and are equally impairing, although some of these impairments may first appear at any age. [5] The Committee was concerned that people with these other kinds of impairments would not meet the definition and would still be subject to capital punishment, even though in terms of "culpability," there was very little difference between them and mentally retarded people. Prof. Ellis had informed the Committee that a few states that had changed their laws "post-*Atkins*" had chosen not to include an age of onset provision in their definition of mentally retarded. The Committee was not satisfied with this option because if the impaired defendant satisfied the definition of mentally retarded, but was in fact not mentally retarded, it could be argued the protections were not intended to apply to him.

The Committee was unanimous in its desire to amend the definition in K.S.A. 21-4623 so that it would apply to all persons having a cognitive impairment such that they met the first two prongs of the three prong AAMR definition of mentally retarded. The Committee chose to substitute the words "cognitive disability" for mentally retarded to make clear that the class of people protected from capital punishment in Kansas is larger than the class of mentally retarded people.

3. Time of Hearing

Prof. Ellis also suggested that K.S.A. 21-4623 be amended to provide for a hearing on the issue of cognitive disability prior to trial. He gave two reasons for this suggestion. First, there may be a

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[5] Cognitive disabilities which may have a similar functional impact as mental retardation, retardation, except as to the time of occurrence of the disability include: 1) traumatic brain injury; 2) organically caused brain injury, such as by stroke, encephalitis, meningitis, Alzheimer's, etc.; 3) extensive exposure to lead or other toxic material; and 4) true mental retardation that is not discovered until after the age of 18. *See Appendix E, p. 73, November 7, 2003 Memo from former Rep. Nichols at KAPS to the Committee.*

constitutional due process issue inherent in a system where the determination of cognitive disability is not made until after conviction of a capital offense. If a conviction is rendered by a death-qualified jury, the deck may be stacked against the defendant in such a way that a fair determination of cognitive disability would be impossible. Also, from a public policy standpoint, it simply makes sense to make the determination pretrial. "[C}apital trials are extremely costly endeavors, both in financial and human terms, for everyone involved. If a defendant has [cognitive disability], and is therefore ineligible for the death penalty, it is far preferable to make that judgment *before* those costs of a capital trial have been incurred. In addition, it is the experience of States that provide for pretrial determinations and that have had their statutes for several years, that a substantial portion of the cases can, in fact, be resolved by guilty pleas." See Appendix D, p. 72. The Committee unanimously agree with Prof. Ellis on this point.

In his visit on October 10, Prof. Ellis raised another issue that could expose Kansas to litigation and appeals. He suggests that if a judge determines that a defendant is death eligible prior to trial, and the defendant is then convicted, States would be wise to have a process in place by which the defendant could present evidence of the disability to a jury. See Appendix C, p. 60.

> "The doubt arises at the intersection of *Atkins* and the Court's most recent decision regarding the right to a jury trial. In Ring v. Arizona [122 S.Ct. 2428 (June 24, 2002)], the Court held that States are required to afford capital defendants the right to have all factual questions that are necessary preconditions to the death penalty resolved by a jury. Arizona law had provided that judges made the determination regarding the aggravating factors that could lead to a death sentence. 'Because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.' [Id. at 2443 (internal quotation omitted).] And where something has been deemed to be an element or its equivalent, the prosecution must carry the burden of persuasion 'beyond a reasonable doubt.' [*Id.* at 2439].

> It is not absolutely clear whether the post-*Atkins* question of whether a defendant has mental retardation is the 'functional equivalent' of an element of the crime, [citation omitted], but it certainly bears most of the attributes described in *Ring*. [citation omitted] If the issue proves to be a *Ring*-equivalent, then both the Sixth Amendment's right to a jury determination of the issue *and* the State's obligation to carry the burden of persuasion 'beyond a reasonable doubt' must apply. States that choose to ignore this very real possibility do so at the peril of having their new statute declared unconstitutional, and risk the necessity of re-trying capital defendants convicted and sentenced under that statute.

See Appendix C, pp. 59-60 (emphasis in original).

The Committee engaged in lengthy discussion on this issue, ultimately agreeing with Prof. Ellis that, even though it not yet completely clear whether *Ring* will apply to this situation, it is wiser to write the statute as if it does to insulate Kansas from potential litigation and appeals.

4. Retrospective Application of *Atkins*

Because *Atkins* found that mentally retarded persons have a constitutional right not to receive the death penalty, it is necessary to write into the statute provisions for any cases involving individuals already under death sentences. The Committee vigorously debated this section, ultimately drafting something quite different than what was proposed by Prof. Ellis and which then appeared in HB 2349. The Committee did not find proposed Sec. 3 of HB 2349 to be a workable process. They also believe that additional safeguards are necessary since they have extended the *Atkins* case beyond the mentally retarded. While anyone who is mentally retarded and has received a death sentence would be able to attack that sentence on constitutional grounds, the Committee's proposed statute also extends protection to other cognitively disabled defendants who do not at this time possess a constitutional right regarding the death penalty.

5. Amendments to K.S.A. 21-4634

Although not mentioned in the original HB 2349, it was brought to the Committee's attention that K.S.A. 21-4634 also contains provisions regarding "mentally retarded" defendants. The Committee has changed the term to "cognitive disability" and amended the definition to correspond with that contained in K.S.A. 21-4623. The Committee has not had a chance to talk together about the other provisions of the statute. However, two thoughtful comments that were e-mailed by Committee members warrant consideration by the Council and are attached hereto as Appendix G, pp. 75-76.

KANSAS ADVOCACY & PROTECTIVE SERVICES, INC.
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Testimony to the Senate Judiciary Committee

February 10, 2004

Chairman Vratil and members of the Senate Judiciary committee:

My name is Rocky Nichols. I am the Executive Director for Kansas Advocacy and Protective Services (KAPS). KAPS is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, KAPS is the officially designated protection and advocacy organization for Kansans with disabilities. KAPS is a private, 501(c)(3) nonprofit corporation, independent of both state government and disability service providers.

Kansas Advocacy And Protective Services supports SB 355, as endorsed by the Kansas Judicial Council, because it will bring our state's death penalty statute into full compliance with the U.S. Supreme Court decision in *Atkins vs. Virginia,* 536 U.S. 304 (2002) and it will lead the effort to ensure that no person with qualifying cognitive disabilities is sentenced to death.

The proposal to change the death penalty statutes was triggered by a 2002 U.S. Supreme Court case, *Atkins vs. Virginia*, which held that executing a person with mental retardation, type of cognitive disability, was cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

It is also important to note what SB 355 is not. It does not involve determinations of mental illness, capacity to stand trial, or guilt or innocence. It only involves whether the death penalty can be imposed on persons with significant cognitive disabilities. The high court found it is unconstitutional to execute a person with significant cognitive disabilities because they have

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"diminished capacities to undertake and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." The two reasons to execute criminals, retribution and deterrence, are absent when persons with significant cognitive disabilities are being sentenced. *Atkins*, 536 U.S. at 318-319.

SB 355 is the result of an interim study and serious deliberations by the Kansas Judicial Council and it implements several significant improvements in the Kansas death penalty statutes.

1. The decision to base the definition of "cognitive disability" on the nationally accepted definition for mental retardation developed by AAMR (American Association on Mental Retardation) fits well with the Court's guiding principle "the national consensus" with regard to execution of persons with cognitive disabilities. SB 355 is also effective because it definition of cognitive disability is not limited by age and thus ensures that persons with cognitive disabilities obtain the protections of this bill. It should not matter whether a person's cognitive disability (whether it is mental retardation, traumatic brain injury, or any other cognitive disability) manifests itself prior to age 18. The issue is whether the person's disability creates significant intellectual functioning and adaptive behavior deficits. If so, then the death penalty would be cruel and unusual punishment for that Kansan with a cognitive disability. The key is that if a person has significant cognitive disability that further significantly impacts their intellectual functioning and adaptive behavior, then they do not have the ability to form intent, premeditation and deliberation. "Capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." *Atkins*, 536 U.S. at 319. Kansas public policy should focus on the capacity of the person to function, regardless of any particular term, label or diagnosis. SB 355 does that.

2. Another positive step is that this bill ensures the opportunity to raise the question of cognitive disability is before trial, instead of only after trial, as is the case with current law. Simply put, considerable time, energy and resources can be saved by making a pretrial determination of ineligibility for the death penalty because of cognitive disability. KAPS applauds this change.

3. Section 5 of SB 355 is a technical clean up that eliminates any potential conflicts with K.S.A. 21-4634 (non-capital murder cases) by replacing the term "mental retardation" with the newly defined term, "cognitive disability." KAPS concurs.

KAPS believes that the Judicial Council did an incredible job of gathering information and conducting exhaustive legal research in preparing SB 355 for your consideration. The Judicial Council worked on SB 355 with national experts in this field, like Professor James Ellis from the University of New Mexico and Professor Rudd Turnbull from the University of Kansas Beach Center on Disability. Professor Ellis has advised the U.S. Supreme Court several times about mental retardation and death penalty issues, and actually successfully argued the *Atkins* case before the high court. Professor Ellis has offered to be available to this committee by video conference or potentially in person if this committee still has questions after hearing SB 355, however, he believed that the good and deliberative work of Judicial Council speaks for itself.

KAPS supports SB 355. The Judicial Council has done an effective job at crafting this public policy and KAPS urges the Senate Judiciary Committee to adopt this version of the bill.

Kansas Council on Developmental Disabilities

KATHLEEN SEBELIUS, Governor
DAVE HEDERSTEDT, Chairperson
JANE RHYS, Ph. D., Executive Director

Docking State Off. Bldg., Room 141, 915 Harrison
Topeka, KS 66612-1570
Phone (785) 296-2608, FAX (785) 296-2861

"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

JUDICIARY COMMITTEE

February 10, 2004
Room 123-S

Mr. Chairperson, Members of the Committee, my name is Jane Rhys and I represent the Kansas Council on Developmental Disabilities. I am in support of Senate Bill 355, an act excluding persons who have a cognitive disability from the death penalty.

The Kansas Council is federally mandated and federally funded under the Developmental Disabilities Assistance and Bill of Rights Act of 2000, we receive no state funds. It is composed of individuals appointed by the Governor, including representatives of the major agencies who provide services for individuals with developmental disabilities. At least 60 percent of the membership consists of individuals who are persons with developmental disabilities or their immediate relatives. Our mission is to advocate for individuals with developmental disabilities to receive adequate supports to make choices about where they live, work, and learn.

Our understanding is that the purpose of the death penalty is to exact justice in the form of punishment and retribution, and to act as a deterrent from future criminal acts. Given this purpose, we do not believe that people with cognitive disabilities should be subjected to the ultimate penalty. This does not mean we believe there should be no punishment. People with cognitive disabilities should be punished when they break the law, and they should be held responsible for their actions. However, the death penalty would not be considered an appropriate punishment based on the facts of their disability (i.e. they function at lower levels, both adaptively and intellectually, are often impulsive, resulting in acts that people of average abilities could refrain from).

We presented to an Interim Committee as well as the Judicial Council on this issue and appreciate the time they took to study all the ramifications. This bill is one that the State of Kansas can be proud of

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enacting. The Council firmly believes that people who have cognitive disabilities, regardless of how and when that disability occurred, should not be executed and urges passage of SB 355.

We appreciate your time and attention to this issue and I would be happy to answer any questions you may have.

Jane Rhys, Executive Director
Kansas Council on Developmental Disabilities
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Brain Injury Association
of Kansas and Greater Kansas City

(a chartered affiliate of the National Brain Injury Association, Inc.)

Kansas Senate
Judiciary Committee
February 10, 2004
Room 123-S

Mr. Chairperson and members of the committee, my name is Patrick Poull, Chair of the Legislative Committee of he Brain Injury Association of Kansas and Greater Kansas City. We are in support of Senate Bill 355, an act excluding persons with a cognitive disability from the death penalty.

The Brain Injury Association of Kansas and Greater Kansas City represents persons with brain injury and their families, improving lives and creating a better future through prevention, research, education and advocacy. Our association is almost fully self-supporting, through the well known Amy Thompson Run to Daylight and our other fund raising efforts. We reach across the state with effective networks of volunteers and limited staff. The Support Partner Program offers emotional support and information during the early stages of the brain injury experience. Our Resource Coordination Program assists families through the difficult transitions beyond hospitalization. Family and survivor support groups across the state, from Concordia to Wichita, help end the isolation that so many experience.

As has been appropriately stated, "If you've seen one brain injury, you've seen one brain injury." Please refer to the handout " The Consequences of Brain Injury" and note the vast range of impacts that a survivor and family may face. Egocentricity, Impulsivity, low frustration tolerance, anxiety, depression, and mood swings are the everyday challenges that some families and individuals confront. While not mental retardation by definition, these sometimes overwhelming impacts have similar effects on a person's ability to control their behavior. Holding a person with a cognitive disability to a different standard than a person with a developmental disability is plainly discriminatory. Brain injury survivors should still be held responsible for their actions. However, the United States Supreme Court has ruled that the facts of their disability prohibit the death penalty for those with a developmental disability. Brain injury survivors with DD-like effects are surely entitled to that same prohibition.

The Brain Injury Association also appreciates the proposed legislation's mandates regarding assessment prior to prosecution. This provision would provide an objective standard upon which prosecution and defense could depend. This would hasten the legal process to the benefit of all.

The Brain Injury Association strongly supports passage of Senate Bill 355. We appreciate your thoughtful consideration of this issue. I would be happy to address any questions.

Patrick Poull
Chair, Legislative Committee
Brain Injury Association of Kansas and Greater KC
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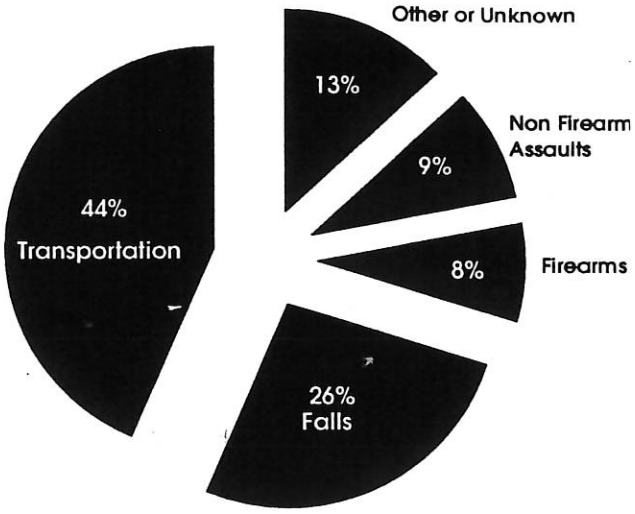
Percentage of TBI Causes[5]

1995-1996 -14 States*

* Rhode Island, New York, Maryland, South Carolina, Minnesota, Louisiana, Nebraska, Oklahoma, Utah, Alaska and California (Sacramento County Only)

Vehicle Crashes are the **leading cause** of brain injury. **Falls** are the **second leading** cause, and the leading cause of brain injury in the elderly.



The Consequences of Brain Injury

Cognitive Consequences Can Include:

- Short-term memory loss; long-term memory loss
- Slowed ability to process information
- Trouble concentrating or paying attention for periods of time
- Difficulty keeping up with a conversation; other communication difficulties such as word finding problems
- Spatial disorientation
- Organizational problems and impaired judgement
- Unable to do more than one thing at a time
- A lack of initiating activities, or once started, difficulty in completing tasks without reminders

Physical Consequences Can Include:

- Seizures of all types
- Muscle spasticity
- Double vision or low vision, even blindness
- Loss of smell or taste
- Speech impairments such as slow or slurred speech
- Headaches or migraines
- Fatigue, increased need for sleep
- Balance problems

Emotional Consequences Can Include:

- Increased anxiety
- Depression and mood swings
- Impulsive behavior
- More easily agitated
- Egocentric behaviors; difficulty seeing how behaviors can affect others

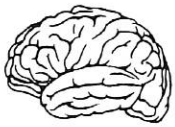
Sources:

1. Centers for Disease Control. "Traumatic Brain Injury in the United States: A Report to Congress." www: Centers for Disease Control, (January 16, 2001) http: www.cdc.gov/nclpc/pub-res/tbicongress.htm.
2. Analysis by the CDC National Center for Injury Prevention and Control, using data obtained from state health departments in Alaska, Arizona, California, Colorado, Louisiana, Maryland, Missouri, New York, Oklahoma, Rhode Island, South Carolina and Utah.
3. Annegers JF, Garbow JD, Kurtland LT et al. The Incidence, Causes and Secular Trends of Head Trauma in Olstead County, Minnesota 1935- 1974. Neurology. 1980; 30:912-919.
4. Lewin -ICF. The Cost of Disorders of the Brain Washington, DC: The National Foundation for the Brain, 1992.
5. Personal Communications with Dr. David Thurman, CDC - National Center for Injury Prevention and Control, June 29, 1999.

Brain Injury Association

Brain Injury

An Estimated 5.3 Million Americans - a little more than 2 percent of the U.S. population - currently live with disabilities resulting from traumatic brain injury.[1]



Every 21 Seconds, One Person in the U.S. Sustains a Traumatic Brain Injury

Traumatic brain injury (TBI) Definition:

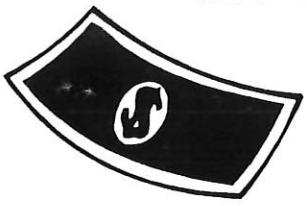
An insult to the brain, not of degenerative or congenital nature caused by an external physical force that may produce a diminished or altered state of consciousness, which results in an impairment of cognitive abilities or physical functioning. It can also result in the disturbance of behavioral or emotional functioning.

Acquired brain injury (ABI) Definition:

Injury to the brain which is not hereditary, congenital or degenerative that has occurred after birth. (Includes anoxia, aneurysms, infections to the brain and stroke.)

- 1.5 Million Americans sustain a traumatic brain injury each year[1]
- Each year, 80,000 Americans experience the onset of long-term disability following TBI.[1]
- More than 50,000 people die every year as a result of TBI.[1]
- The risk of TBI is highest among adolescents, young adults and those older than 75.[2]
- After one brain injury, the risk for a second injury is three times greater; after the second injury, the risk for a third injury is eight times greater.[3]

The Cost of Brain Injury



The cost of traumatic brain injury in the United States is estimated to be $48.3 billion annually. Hospitalization accounts for $31.7 billion, and fatal brain injuries cost the nation $16.6 billion each year.[4]

Creating a better future through brain injury prevention, research, education and advocacy

105 North Alfred Street • Alexandria, VA 22314 • (703) 236-6000

Family Helpline: 1-800-444-6443 • www.biausa.org

March 2001

Kansas Associatio[illegible]
Criminal Defense Lawyers
PO Box 484, Olathe, KS 66051-0484

February 10, 2004

To: Senate Judiciary Committee
From: Kansas Association of Criminal Defense Lawyers (KACDL)
By: Paige A. Nichols, KACDL Legislative Chair
Re: SB 355 (regarding cognitive disabilities and the death penalty)

The Kansas Association of Criminal Defense Lawyers supports the proposed legislation relating to cognitive disabilities and the death penalty. KACDL applauds the careful work of the Judicial Counsel Criminal Law Advisory Committee on this bill. The December 5, 2003, Committee Report is well-supported, and KACDL adopts its reasoning in support of the bill.

One further reason to provide a pretrial procedure for determining whether the defendant suffers from a cognitive disability is deserving of mention. The pretrial procedure will help guard against ineffective assistance of counsel at capital sentencing proceedings insofar as it obligates counsel to explore mental-health issues *prior to trial*. Other jurisdictions have seen extensive postconviction litigation in the face of counsel's failure to investigate mental-health issues and prepare for sentencing prior to trial. In many of these cases, counsel neglected to prepare for sentencing because of overconfidence in winning the guilt phase; in other cases, counsel was simply inexperienced in capital litigation. Obviously, in a system where the sentencing phase follows directly after the guilt phase, it is incumbent upon counsel to prepare for sentencing prior to trial. A pretrial procedure for determining the existence of a cognitive disability will help guard against this all-too-common form of ineffectiveness.

The following is just a small sampling of cases in which capital sentences were overturned after much postconviction litigation because counsel failed to explore mental-health evidence relevant to sentencing:

Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003) (counsel relied on jury's doubt about guilt and failed to investigate defendant's functional brain impairment); *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir. 2001) (counsel failed to investigate client's mental-health history because he was two years out of law school and "overwhelmed" by the capital case); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995) (counsel failed to investigate defendant's mental deficiencies); *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) (counsel failed to prepare for capital sentencing because of "grandiose, perhaps even delusional" belief that she would win acquittal for client); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (counsel failed to investigate mental history of client with low intelligence); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1990) (counsel failed to investigate client's head injury and mental retardation); *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986) (counsel failed to present evidence of client's mental retardation at sentencing); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (counsel failed to prepare for sentencing because he believed client would be found not guilty).

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KANSAS BAR ASSOCIATION

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Testimony in Support of
SB 355
Presented to the Senate Judiciary Committee on February 10, 2004
by Jim Clark, KBA Legislative Counsel

The Kansas Bar Association supports Senate Bill 355 for two reasons:

1. The Kansas death penalty procedure needs revision in order to conform with the constitutional requirements set by the U.S. Supreme Court in Atkins v. Virginia, 122 S.Ct. 2242 (2002), which held that execution of a person with mental retardation violates the Eight Amendment prohibition of cruel and unusual punishment. The changes to the death penalty procedure in SB 355 meet constitutional requirements.

2. More importantly, the bill implements a policy decision that makes application of the Kansas death penalty procedure more equitable and more efficient. First, the bill extends the ban on imposition of death penalty from persons with mental retardation (required by the Atkins decision) to include all persons who suffer a cognitive disability. As a matter of policy or basic fairness, is there a difference between a person with an I.Q. of 60 who is mentally retarded and a person with an I.Q. of 60 who suffered a brain injury while riding a motorcycle on his or her 18th birthday? Second, the bill allows the issue of mental disability to be raised prior to the sentencing phase; specifically, whenever defense counsel gains a good faith belief that the defendant has a cognitive disability. If the disability is recognized early in the case, the time and expense of trial and appeals is avoided, as is the distress to the victims' families. Coincidentally, by broadening the exclusion from mental retardation to all cases of cognitive disability, it is also likely that more cases will be disposed of at an early stage, with increased savings in expense and victim anguish.

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