Approved: 10-09-05
Date

MINUTES OF THE HOUSE CORRECTIONS & JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 P.M. on February 7, 2005 in Room 241-N of the Capitol.

All members were present except:
Kathe Decker- excused
Oletha Faust Goudeau- excused
Mike Peterson- excused

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Diana Lee, Revisor of Statutes Office
Jerry Ann Donaldson, Kansas Legislative Research
Becky Krahl, Kansas Legislative Research
Reagan Cussimanio, Kansas Legislative Research
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Barbara Hinton, Division of Post Audit
Randy Hearrell, KS Judicial Council

Others attending:
See attached list.

The Chairman welcomed and introduced the newest member of the committee, Representative Charlie Roth, from Salina, District 71.

Jill Wolters, Office of Revisor of Statutes, provided the committee an overview of the Kansas death penalty statutes and a brief of *State v. Kleypas* and *State v. Marsh*, specifically the weighing equation "equiporse"set forth in KSA 21-4624(e). (Attachment 1)

Kansas enacted the current capital murder/death penalty statutes in 1994. Capital murder is an off-grid person felony. The crime of capital murder is limited to seven specific crimes:

1. Intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;
2. intentional and premeditate killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;
3. intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;
4. intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, criminal sodomy or aggravated criminal sodomy or any attempt thereof;
5. intentional and premeditated killing of a law enforcement officer;
6. intentional and premeditated killing of more than one person as a part of the same act pr transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
7. intentional and premeditated killing of a child under the age of 14 in the commission of kidnaping or aggravated kidnaping when the kidnaping or aggravated kidnaping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense. "Sex offense" means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution or sexual exploitation of a child.

The sentencing procedures provide that a person under 18 or a mentally retarded person can not be

sentenced to death or to life without the possibility of parole. KSA 21-4622 and KSA 2004 Supp. 21-4623.

State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001)

The central issue is whether the weighing equation set forth in KSA 21-4624(e) violates the Eighth and Fourteenth Amendments to the United States Constitution because it mandates death when aggravating and mitigating circumstances are equal. In *Kleypas*, a majority of the Kansas Supreme Court said that in order to satisfy the Eighth Amendment, the legislature must narrow the class of murders who are eligible for the death penalty by guiding the jury's decision making process through the specification of aggravating factors and give the jury the discretion to consider and give effect to the mitigating factors it finds. The Court said that the weighing equation in KSA 21-4624(e) did not meet the latter requirement. In other words, in a tie between aggravating and mitigating factors, the jury has no discretion because the result is always imposition of a death sentence. If the jury has no discretion, it is unable to give effect to the mitigating factors it finds, which is a violation of the Eighth Amendment. The Court concluded KSA 21-4624(e) as applied in this case is constitutional and stated supporting case law which allows the Court "...to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad" thus "avoiding" a result which might otherwise require a finding of unconstitutionally.

Justice Davis wrote a dissenting opinion joining the majority with the exception of issue of equipoise. He believes "the majority invades the province of the legislature" by adopting the language exactly opposite of the statute.

State v. Marsh, No. 81,135, Supreme Court of Kansas (December 17,2004)

Marsh is the second death penalty case to be reviewed by the Kansas Supreme Court. In regard to the weighing equation, *Marsh* holds the KSA 21-4624(e) is unconstitutional on its face and that the portion of *Kleypas* which made the statute constitutional by judicial construction must be overruled. The majority in *Marsh* agree.

The Court notes that case law makes it "plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overboard. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, not rewrite it.

Barb Hinton, Legislative Division of Post Audit, (Attachment 2) provided the committee audit information on costs incurred for death penalty cases:
Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, December 2003, (copies are available in Post Audit and Legislative Research Department). The main audit question was, "How does the cost of death penalty cases in Kansas compare with the costs of cases involving non-death sentences?" During the audit 22 cases at both the state and local levels were obtained and compared estimated cost information. Actual cost for death penalty and non-death penalty cases in Kansas don't exist. The findings:

1. 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.
2. Death penalty cases tend to have higher costs at the trial and appeal stages.

The second audit question was "Are there steps Kansas could take to reduce overall costs in capital punishment cases?" The findings:

1) Because much of the process involved in trying a death penalty case is prescribed by law or the US Supreme Court, there are no opportunities for eliminating steps in the process.
2) The following could save costs:
   a) Providing for a true life sentence without the possibility of parole (the 2004 Legislature took this action)
   b) Creating a specialized group of judges or law clerks who may be able to more efficiently handle death penalty cases
   c) Ensuring that the State Board of Indigents' Defense Services has adequate staffing to avoid hiring contract attorneys at much higher cost

Randy Hearrell, Kansas Judicial Council, provided a briefing on "Report of the Kansas Judicial Council Death Penalty Advisory Committee on certain Issues Related to the Death Penalty" November 12, 2004. (Attachment 3). There were six issues addressed in the report:

1. Whether capital murder cases are charged and prosecuted similarly in all areas of the state.
2. Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor
3. Whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining. (2 and 3 were combined)
4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death?
5. Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence?
6. Whether states that have the death penalty treat murder victims' families who oppose the death penalty the same as murder victims' families who favor the death penalty.

Background information used for the basis of the report was provided, committee membership and the Kansas Death Penalty Statistics updated as of January 1, 2005, were also included.

The meeting was adjourned 2:30 pm. The next meeting is February 8, 2005.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-7-05

NAME	REPRESENTING
Richard Samaniego	Kearney & Assoc.

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MEMORANDUM

To: House Committee on Corrections and Juvenile Justice

From: Jill Ann Wolters, Senior Assistant Revisor and Diana Lee, Assistant Revisor

Date: February 7, 2005

Subject: The Death Penalty, from *Kleypas* to *Marsh*

This memo is an overview of the Kansas death penalty statutes and a brief of *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) and *State v. Marsh*, No. 81,135, Supreme Court of Kansas (December 17, 2004), specifically the weighing equation set forth in K.S.A. 21-4624(e). This memo does not cover other issues discussed in either decision.

Kansas Death Penalty Statutes

Kansas enacted the current capital murder/death penalty statutes in 1994. Capital murder is an off-grid person felony. The crime of capital murder is limited to seven specific crimes:

(1) Intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;

(2) intentional and premeditated killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;

(3) intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;

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Attachment 1

(4) intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, criminal sodomy or aggravated criminal sodomy or any attempt thereof;

(5) intentional and premeditated killing of a law enforcement officer;

(6) intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or

(7) intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense. "Sex offense" means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution or sexual exploitation of a child.

The sentencing procedures provide that a person under 18 or a mentally retarded person can not be sentenced to death or to life without the possibility of parole. K.S.A. 21-4622 and K.S.A. 2004 Supp. 21-4623.

If the county or district attorney (DA) intends to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death, the DA shall file written notice. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than five days after the time of arraignment. If such notice is not filed and served as required by this subsection, the DA may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and not to a sentence of death. K.S.A. 2004 Supp. 21-4624 (a).

The Court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a

special jury of 12 persons which shall determine the question of whether a sentence of death shall be imposed. The jury at the sentencing proceeding may be waived. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court. K.S.A. 2004 Supp. 21-4624 (b).

In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and any mitigating circumstances. The aggravating circumstances are limited by statute to the following:

(1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(4) The defendant authorized or employed another person to commit the crime.

(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

Mitigating circumstances shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under extreme distress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(7) The age of the defendant at the time of the crime.

(8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.

(9) A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument. K.S.A. 2004 Supp. 21-4624 (c).

At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations. K.S.A. 2004 Supp. 21-4624 (d).

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances in K.S.A. 21-4625 exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, 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. K.S.A. 2004 Supp. 21-4624 (e).

Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a 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. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record. K.S.A. 2004 Supp. 21-4624 (f).

A conviction resulting in a sentence of death is subject to automatic review by and appeal to the supreme court. The review and appeal shall be expedited and given priority. The supreme court shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby. With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(2) whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances. K.S.A. 21-4627.

In the event a sentence of death or any provision of this act (1994 House Bill No. 2578) authorizing such sentence is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law.

Article 40 of Chapter 22 of the Kansas Statutes Annotated provide for the execution of death sentences. The statutes cover how the death penalty is executed (intravenous injection); where the death penalty is inflicted (Lansing Correctional Facility, designated by the Secretary of Corrections); who will witness the execution; the Governor's use of military force, if necessary; notification by the Secretary to the district court when sentence of death has been carried out; a

procedure to determine if the convict is sane, if sanity is in question; a procedure to postpone execution if the convict is pregnant; a procedure to reissue the warrant if the convict has escaped and is gone at the time of the original execution; the issuance of the death order; the execution of the death sentence; the suspension of a death sentence and the execution thereafter. These statutes were amended in 1999 upon the request of the Secretary of Corrections to update and clarify the procedures.

***State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001)**

State v. Kleypas was the first death penalty case to be reviewed by the Kansas Supreme Court. In *Kleypas*, the Court affirmed the convictions of Kleypas and found no reversible error occurred in the guilt phase of the trial. However, the death sentence was vacated because of instructional error and remanded for another separate sentence proceeding to determine whether Kleypas should be sentenced to death.

The central issue to be reviewed in this memo is whether the weighing equation set forth in K.S.A. 21-4624(e) violates the Eighth and Fourteenth Amendments to the United States Constitution because it mandates death when aggravating and mitigating circumstances are equal.

K.S.A. 21-4624(e) states;

" If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that **the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death**; otherwise, the defendant shall be sentenced as provided by law."

In Kleypas, a majority of the Kansas Supreme Court said that in order to satisfy the Eighth Amendment, the legislature must narrow the class of murderers who are eligible for the death penalty by guiding the jury' s decision making process through the specification of aggravating factors and give the jury the discretion to consider and give effect to the mitigating factors it finds. The Court said that the weighing equation in K.S.A. 21-4624(e) did not meet the latter requirement because a jury can find that one or more mitigating factors exists, but if the aggravating factors favoring death are equal to the mitigating factors favoring an alternate punishment (a result known as "equipoise"), death is imposed. In other words, in a tie between

aggravating and mitigating factors, the jury has no discretion because the result is always imposition of a death sentence. If the jury has no discretion, it is unable to give effect to the mitigating factors it finds, which is a violation of the Eighth Amendment.

After an exhaustive review of the pertinent case law, the Court concluded K.S.A. 21-4624(e) as applied in this case is unconstitutional.

"Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its "reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise." *Kleypas*, 272 Kan. at 1015, 1016.

The Court states supporting case law which allows the Court ". . .to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad." *Kleypas*, 272 Kan.1016. And further states ". . . that a statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature." *Kleypas*, 272 Kan. 1017.

The Court held that by ". . .invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist,

the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner." The case was remanded for the jury to reconsider imposition of the death penalty.

Justice Davis wrote a dissenting opinion joining the majority with the exception of the issue of equipoise. He believes "the majority invades the province of the legislature" by adopting the language exactly opposite of the statute.

Justice Davis further states " More importantly, however, I respectfully dissent from the majority's conclusion that the weighing equation contained in K.S.A. 21-4624(e) is unconstitutional. Thus, I would conclude that there is no need to change the weighing equation in that it is constitutional under the Eighth Amendment as expressed by the Kansas Legislature in accordance with Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)." *Kleypas*, 272 Kan. 1125.

The dissent further states " While the Court has imposed numerous requirements on the guiding and channeling of the sentencer's discretion, the actual weighing of aggravating and mitigating circumstances has been left up to the states. In Zant v. Stephens, 462 U.S. 862, 890, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983), the Court stated that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Similarly, in Franklin v. Lynaugh, 487 U.S. 164, 179, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988), the Court stated: "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." " *Kleypas,* 272 Kan. 1126, 1127.

The dissent refers to the United States Supreme Court decision in *Walton* which held "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 497 U.S. at 651-52., *Kleypas,* 272 Kan. 1130.

In Justice Davis's opinion "the Court's decision in *Walton* settles the question of equipoise of aggravating and mitigating circumstances under the United States Constitution. Contrary to the majority, *Walton* makes it clear that as long as the statute does not preclude the sentencer from considering relevant mitigating evidence, the specific method of balancing the

aggravating and mitigating circumstances is left up to the States. See 497 U.S. at 650-52. *Kleypas,* 272 Kan. 1130. Thus, Justice Davis finds the weighing equation does not violate the United States constitution.

***State v. Marsh*, No. 81,135, Supreme Court of Kansas (December 17, 2004)**

Marsh is the second death penalty case to be reviewed by the Kansas Supreme Court. In regard to the weighing equation, *Marsh* argues that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of *Kleypas* which made the statute constitutional by judicial construction must be overruled. The majority in *Marsh* agree.

In the opinion, the Court notes since the *Kleypas* decision, " there have been no persuasive Eighth or Fourteenth Amendment cases helpful to a resolution of the facial constitutionality questions." *Marsh,* p. 11.

The Court in *Marsh* is not persuaded that the *Kleypas* Court's ruling to uphold the constitutionality of the statute by reading the necessary judicial requirements into the statute, often referred to as the avoidance doctrine, is appropriate.

"In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save a legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. 'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.' *Salinas v. United States*, 522 U.S. 52, 59-60, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). 'We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.' *United States v. Locke*, 471 U.S. 84, 96, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001)." *Marsh,* p. 13.

The Court notes, that case law makes it "plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an

unambiguous statute. The court's function is to interpret legislation, not rewrite it. State v. Beard, 197 Kan. 275, 278, 416 P.2d 783 (1966); Patrick v. Haskell County, 105 Kan. 153, 181 Pac. 611 (1919)." *Marsh*, p. 13.

Further, the Court states, "We agree with Justice Davis' reasoning and conclusion that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it. Chief Justice McFarland's dissent, which argues that the legislature apparently did not mind the interference misses the point. (It also reads too much into its inaction when the court had removed its incentive to act.) Justice Davis had it exactly right: The appropriate, limited judicial response to the problem identified for the first time in Kleypas was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." *Marsh,* p. 14.

"Our holding that K.S.A. 21-4624(e) is unconstitutional on its face presumptively requires that we overrule that portion of Kleypas upholding the statute through application of the avoidance doctrine. The only contrary argument left for our consideration is that the doctrine of stare decisis should prevent us from doing so." *Marsh,* p. 15.

In *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541(1990), *overruled on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), the Kansas Supreme Court stated:

"It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity– demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law." *Marsh,* p. 15, 16.

The *Marsh* Court concludes, "that the second holding of Kleypas--that the equipoise

provision could be rescued by application of the avoidance doctrine--is not salvageable under the doctrine of stare decisis. That holding of Kleypas is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. Kleypas' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature.

"Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, not ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do." *Marsh,* p. 17.

Justice Davis, in his dissenting opinion, writes, "I begin with the majority's conclusion that in order for the death penalty to be constitutional in Kansas, *a tie in the aggravating circumstances and mitigating circumstances must go to the defendant* under the Eighth Amendment. I agree with the majority that the Kansas Legislature consciously chose the weighing equation but strongly disagree that the language used is unconstitutional under the Eighth Amendment. I may personally disagree with the legislature's policy decision that a tie goes to the State but I cannot conclude that its enactment is unconstitutional because of that language unless the United States Constitution, as interpreted by the United States Supreme Court, supports such a conclusion. An analysis of the United States Supreme Court jurisprudence, as well as other decisions addressing this point, does not support such a conclusion and, in fact, supports the opposite conclusion." *Marsh*, p. 20.

As reviewed above in *Kleypas*, Justice Davis again concludes, " that K.S.A. 21-4624(e), as passed by the Kansas Legislature in 1994, was and is today constitutional under the Eighth Amendment to the United States Constitution." *Marsh* , p. 29.

Chief Justice McFarland and Justice Nuss joined the Davis dissent.

LEGISLATURE OF KANSAS
LEGISLATIVE DIVISION OF POST AUDIT

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Information for the House Corrections and Juvenile Justice Committee on the Death Penalty

Barb Hinton, Legislative Post Auditor
February 7, 2005

Mr. Chairman and members of the Committee, thank you for allowing me to appear before you to provide some brief information about our December 2003 audit on the costs incurred for death penalty cases. This information may be of use as you discuss death penalty legislation that may come before you this session.

The main audit question was, ***"How does the cost of death penalty cases in Kansas compare with the costs of cases involving non-death sentences?"*** During this audit, we obtained and compared estimated cost information at both the State and local levels for 22 cases. Actual cost figures for death penalty and non-death penalty cases in Kansas don't exist. Our main findings:

1. **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.** A summary of our cost analysis for the 22 cases is shown below:

Total Estimated and Projected Costs, by Case Type			
	Death Sentence Sought & Given (7 cases)	**Death Penalty Sought - Sentenced To Prison (7 cases)**	**Death Penalty Not Sought (8 cases)**
Total Costs for Group	**$10.6 million**	**$6.3 million**	**$6.3 million**
Most-Expensive Case	$2.4 million	$1.1 million	$1.0 million
Least-Expensive Case	$1.1 million	$0.7 million	$0.6 million
Median Cost for a Case	$1.2 million	$0.9 million	$0.7 million
Source: LPA survey of the parties involved in each type of case, and calculated projections.			

2. **Death penalty cases tend to have higher costs at the trial and appeal stages.** Some factors are shown in the table below:

Factors That May Make Death Penalty Cases Unique or More Expensive	
Factors That Can Increase Costs	**What We Saw in Kansas:**
Investigation Phase More extensive investigations & forensic testing	Reported costs for local police/sheriff and KBI generally were higher for the death penalty cases. Death penalty cases are usually the worst-of-the-worst crimes.

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Attachment 2

Pre-Trial and Trial Phase: More defense and prosecuting attorneys	7 different defense attorneys have worked on the trial and appeal of the 1st death penalty case.
More motion filings and hearings	More than 200 motions were filed in a single case requiring the judge to hold hearings on evenings and weekends.
Change of venue surveys and travel costs	Change of venue costs were reported on 9 of 14 death penalty cases and none of the 8 non-death penalty cases.
Extensive jury selection	Death penalty cases voir dired an average of 230 jurors compared to 89 in non-death penalty cases.
Lengthier trial, interrogations, and deliberations	Death penalty cases averaged 28 days compared to 9 days in non-death penalty cases.
More expert witnesses	Defense expert witness costs were reported in 11 of the 14 death penalty cases and only 3 of the 8 non-death penalty cases.
Separate sentencing trial	This phase added an average of 6 extra days.
Extensive investigations for mitigating evidence	Contract mitigation specialist costs were reported in 5 of 14 death penalty cases and none of the non-death penalty cases.
More psychiatric and medical evaluations	Defense psychiatric costs were reported in all 14 death penalty cases, and 2 of 8 non-death penalty cases.
Appeal-Related Phase: More appealable issues	In the direct appeal to the Supreme Court, the 1st death penalty case filed a 600 page brief. The Supreme Court normal limit is 50 pages.
More cases reversed or remanded	To-date, the first death penalty case was sent back for re-sentencing due to faulty jury instructions (Kleypas). The appeal of the second case (Marsh) resulted in the Supreme Court recently declaring the law unconstitutional.
Incarceration / Execution Phase Average 11 years until execution	The 1st death penalty case was originally sentenced in 1998, yet the defendant has not been executed.
Source: National Center for State Courts Research Model for Determining Death Penalty Costs, and LPA survey of the parties involved in each type of case.	

The second question this audit addressed was, ***"Are there steps Kansas could take to reduce overall costs in capital punishment cases?"*** Our main findings:

1. Because much of the process involved in trying a death penalty case is prescribed by law or the U.S. Supreme Court, there are no opportunities for eliminating steps in the process.
2. The following could save costs:
   a. providing for a true life sentence without the possibility of parole (the 2004 Legislature took this action)
   b. creating a specialized group of judges or law clerks who may be able to more efficiently handle death penalty cases
   c. ensuring that the State Board of Indigents' Defense Services has adequate staffing to avoid hiring contract attorneys at much higher cost

(3)

REPORT OF THE KANSAS JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE ON CERTAIN ISSUES RELATED TO THE DEATH PENALTY

November 12, 2004*

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* RELATED EVENTS SINCE APPROVAL OF REPORT

The final meeting of the Judicial Council Death Penalty Advisory Committee was held November 12, 2004 and this report was approved at that meeting. Since that time there have been several events in the death penalty area that were not considered by the Committee and are not included in the report.

On November 17, 2004, the death sentence of Stanley M. Elms of Sedgwick County was vacated and he was sentenced to the "hard 40".

On November 17, 2004, Douglas S. Belt of Sedgwick County was convicted of capital murder, and the jury found the death penalty should be imposed.

On November 18, 2004, Benjamin A. Appleby of Johnson County was charged with capital murder.

On November 24, 2004, Darrell L. Stallings of Wyandotte County was found guilty of capital murder, but the jury found the death penalty should not be imposed.

On December 17, 2004, the Kansas Supreme Court ruled 4 - 3 in the case of State v. Marsh, No. 81,135, that the weighing equation, K.S.A. 21-4624(e) of the Kansas death penalty statute, is unconstitutional.

In addition, the Board of Indigents' Defense Services has decided to count the case of Aaron Stanley of Clay County as a case in which the death penalty could have been sought. Mr. Stanley allegedly committed a crime which would have made him eligible for prosecution for capital murder, but the Kansas case was dismissed, and he was turned over to military authorities for prosecution.

With the addition of the Stanley case and the filing of the Appleby case, there have been 86 cases in Kansas in which the death penalty could have been sought, rather than the 84 cases cited by the Committee in this report.

See page 27 of this report for a chart of "Kansas Death Penalty Statistics as of January 1, 2005". This chart was prepared after this report was approved.

SUMMARY

The following is a summary of the Committee's response to the issues raised:

Issue 1. Whether capital murder cases are charged and prosecuted similarly in all areas of the state.

In potential capital cases, capital charges are brought relatively uniformly throughout the state. But there is a geographic disparity in whether these capital charges are brought to trial. Based on the two counties with the most potential capital cases, Wyandotte and Sedgwick, it is obvious that a capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte County. Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.

Issues 2 and 3. Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor and whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining.

The Committee finds no evidence which supports an inference that the race of the victim or the race of the defendant influences the charging decision of the prosecutor, plea bargaining or the ultimate disposition of a capital murder case in Kansas.

Issue 4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death?

The Committee is of the opinion that additional study would be necessary before it could conclude that current Kansas law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death. The Committee discussed the extensive studies recently conducted in Connecticut and Illinois and considered recommendations contained in those reports that have the potential to further reduce the risk that an innocent person could be sentenced to death. The question of whether it is advisable to adopt those recommendations in Kansas would require additional study. Such an additional study is recommended to adequately answer issue 4.

Issue 5: Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence?

The social science community generally agrees that the death penalty does not have a general deterrent effect on would-be murderers. There is some research that

has found a deterrent effect to the death penalty, but these studies have been heavily criticized or are very recent and have not been appropriately scrutinized. Some studies have found an increase in the homicide rate after an execution (called the "brutalization effect"). These studies are also not agreed with by the majority of social scientists.

Issue 6. Whether states that have the death penalty treat murder victims' families who oppose the death penalty the same as murder victims' families who favor the death penalty.

The Committee has found no evidence of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty. In the courtroom at a capital trial, victims' families who support and who oppose the death penalty are generally treated equally in states that have the death penalty. Outside the courtroom, in states other than Kansas, victims' families who are opponents of the death penalty appear to have been denied equal information and assistance in the capital trial process.

REPORT OF THE JUDICIAL COUNCIL
DEATH PENALTY ADVISORY COMMITTEE

BACKGROUND

In February of 2004, Senate Vice President and Judiciary Committee Chair John Vratil requested the Judicial Council study certain issues which are related to the Kansas death penalty.

The issues which Senator Vratil requested the Judicial Council study are the following:

1. Whether capital murder cases are charged and prosecuted similarly in all areas of the state;

2. Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor;

3. Whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining;

4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death;

5. Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence; and

6. Whether states that have the death penalty treat murder victims' families who oppose the death penalty the same as murder victims' families who favor the death penalty.

COMMITTEE MEMBERSHIP

At the June, 2004 meeting of the Judicial Council, the study was assigned to the Judicial Council Death Penalty Advisory Committee whose members are:

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, former consultant on death penalty issues to the Kansas Supreme Court and visiting Professor at Washburn University School of Law.

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

Jared S. Maag, Topeka, Assistant Attorney General in the Criminal Litigation Division.

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.

SCOPE AND METHOD OF THE STUDY

The Committee met four times, beginning in August of 2004, and ending in November of 2004.

In discussing the scope of the study and the methodology to be used in the study, the Committee considered Senator Vratil's request in which he acknowledged the difficulty of answering some of the questions, requested the report be completed prior to the 2005 legislative session and stated that the report need not be lengthy.

The Committee was provided preliminary research on each of the issues and the individual issues were assigned to one or two Committee members for drafting, with the exception of issue 5 relating to deterrent value of the death penalty, which was prepared by the entire Committee. Readers of the report may note differences in the style of the report on the various questions. This is because the Committee responses to the individual issues were prepared by different members.

In addition to reviewing the preliminary research, the Committee reviewed the drafts of the responses to the questions, suggested changes and approved each of them.

Issue 1: Whether capital murder cases are charged and prosecuted similarly in all areas of the state.

The death penalty was reinstated in Kansas on July 1, 1994. As of January 1, 2004, approximately 80 homicides had been committed throughout the state that were death penalty eligible. Of those offenses, over 50 were charged as capital offenses in a total of 18 counties. Analyzing the statistics in charging and prosecution is difficult because most counties have had only one or two potential capital offenses.

The prosecution component of capital cases varies from county to county based upon the dynamics of each case and the individual methodology that prosecution and defense attorneys bring to the case. For instance, certain prosecutors may be more likely than others to explore plea-bargaining. Moreover, plea-bargaining can be expected to occur at different points throughout the process. Some prosecutors may be amenable to plea-bargaining early in the case while others may choose to wait until shortly before trial to engage in plea negotiations. Conversely, certain cases may not be resolved by plea negotiations and will accordingly proceed to trial. With regard to the actual mechanics of conducting the trial itself, the process is substantially similar throughout the state because the trial process is controlled by statutory and case law. There may be small variations in trial procedure based upon local court rules and the methodology of the parties involved, however, these differences are relatively insignificant in nature.

With respect to the charging of capital cases in Kansas, it is illuminating to examine the statistics for Wyandotte and Sedgwick counties. Wyandotte and Sedgwick counties historically have the most potential for charged capital crimes and they are indicative of the inconsistency in the way capital crimes are handled throughout the state.

The rationale for such a large disparity is difficult to explain. However, some suggestions for the disparity are as follows:

1. Relative Strength Of The Evidence. Prosecutors are typically more likely to file capital murder charges if the evidence of guilt is strong and the circumstances surrounding the commission of the murder are such that the jury would likely vote for death. The interpretation of these factors is subject to the discretion of the prosecutor(s) assigned to the case.

2. Cost and Time of Prosecution. The cost of prosecuting a death penalty case is generally quite high. Each side is more likely to employ costly expert witnesses and subsequent appeals are financially draining. It is axiomatic that the larger and more populous counties in Kansas can more readily absorb the cost of death penalty litigation because of a larger tax base. Conversely, a county attorney in a sparsely populated county in western Kansas must consider the very real financial impact upon his or her jurisdiction if a capital murder case is filed. Accordingly, a county's ability to bear the cost of capital murder litigation may factor into whether the death penalty is sought.

The amount of time that a typical death penalty case consumes is yet another factor that may be considered by the prosecution. A death penalty case will assuredly entail numerous pre-trial motions and hearings, and the trial will generally last longer than a non-capital case. Moreover, because a capital case is likely to receive significant media coverage, the defense will typically respond by filing a request for a change of venue. If the request is granted the county will bear the potentially significant additional costs that are routinely associated with a change of venue. Ironically, the least populated counties with correspondingly lesser resources are the most likely to experience a successful change of venue request because it can prove to be difficult to empanel an impartial jury when the county residents are more likely to be familiar with one another.

It also bears mention that death penalty appeals are both costly and time consuming by reason of the exhaustive scrutiny appellate courts (both state and federal) afford to capital cases. These appeals are typically quite complex and will take several years to be resolved.

3. Desire Of Victim's Family. Prosecutors will typically consult with the victim's family members in deciding whether to pursue the death penalty. Family members who are opposed to the death penalty may or may not request that the ultimate penalty be sought. Further, the desire of the victim's family will certainly be significant in deciding whether to accept a plea agreement avoiding the death penalty.

4. Miscellaneous Factors. Other, more intangible matters factor into the disparity as noted below:

   A. The inherent aggressiveness of the prosecutor and his or her subjective belief regarding the morality of the death penalty.

   B. Region of the State where the crime was committed. Based upon the demographics and philosophical bent of the local population, certain areas of the state may be more likely to impose a sentence of death.

   C. Local political climate and presence or absence of public outrage at the offense.

According to BIDS (Board of Indigent Defense Services), Sedgwick County has had 17 potential capital crimes since 1994. Wyandotte has had 25 potential capital crimes in the same time period. Of those crimes, Sedgwick has charged 8 of the 17 defendants with a capital crime, while Wyandotte has charged 15 of the 25 defendants with a capital crime. These numbers are roughly consistent with the overall state trend of approximately 64 percent of the potential capital crimes being charged as capital crimes (54/84).

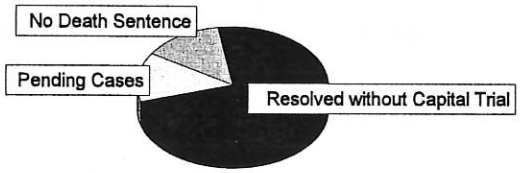
The inconsistency, however, lies in the bringing of the defendant to trial and the resulting death sentence itself. In Sedgwick County, all of the capitally charged defendants were brought to trial (8/8), while Wyandotte County brought less than one-fifth of the same defendants to trial (2/15). A capital defendant in Sedgwick County is much more likely to go to trial than a capital defendant in Wyandotte County.

Similarly, in Sedgwick County, 71 percent (5/7) of the capital trials ended in a death sentence. None of the cases in Wyandotte County ended in a death sentence. Thus, of the potential capital crimes in each county, 29 percent of the Sedgwick defendants were sentenced to death (5/17), while not one of the Wyandotte defendants was sentenced to death (0/25). The following graphs illustrate this point.

Wyandotte County Capital Cases

(as of 11/12/04)

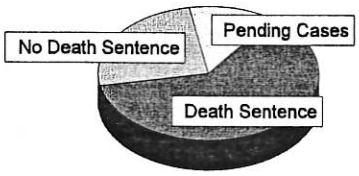
15 Capital Charges



- Cases to Capital Trial: No Death Sentence (2)
- Cases to Capital Trial: Death Sentence (0)
- Cases Pending (2)
- Cases resolved without Capital Trial (11)

Sedgwick County Capital Cases

8 Capital Charges



- Cases to Capital Trial: No Death Sentence (2)
- Cases to Capital Trial: Death Sentence (5)
- Cases Pending (1)
- Cases resolved without Capital Trial (0)

The ultimate conclusion of this data is simple. In potential capital cases, capital charges are brought relatively uniformly throughout the state. Charges are brought near a rate of approximately 60%. But there is a geographic disparity in whether these capital charges are brought to trial. Based on the two counties with the most potential capital cases, Wyandotte and Sedgwick, it is obvious that a capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte. Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.

Issues 2 and 3: Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor and whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining.

Issues 2 and 3 were combined for consideration by the Committee.

This committee finds no evidence which supports an inference that the race of the victim or the race of the defendant influences the charging decision of the prosecutor, plea bargaining, or the ultimate disposition of a capital murder case in Kansas. This examination of whether racial disparity exists in capital murder cases focuses only on capital eligible cases in Kansas and data collected by the Kansas Board of Indigent Defenses Services between 1994 and 2004. Observations about racial disparity in death penalty cases in other states or on a national level was not used to evaluate the question about the capital process in the State of Kansas.

In the decade since the reenactment of the death penalty in Kansas, 84 potential capital cases have been identified, of which 54 defendants were charged by Kansas prosecutors with capital murder. Of those, only 14[1] defendants were tried as death penalty cases. In those 14 cases jurors convicted all 14 of capital murder and sentenced eight of those defendants to death and six of those defendants to Life/Hard 40 or 50 sentences. No defendants have been executed.

The small numbers of cases and the lack of comprehensive data make it difficult to extrapolate trends or reach conclusions. Comprehensive statewide data has not been compiled from the various agencies involved in the capital process. The Kansas Board of Indigent Defense Services compiled some information, which has been utilized here.

Personal Experience of Committee Members

The Judicial Council Death Penalty Advisory Committee, whose membership includes several members with extensive experience defending persons accused of capital murder and several members who oppose the death penalty, discussed issues 2 and 3 at length. No member of the Committee had experienced a situation in which they believed that the race of the criminal defendant influenced the charging decision of the prosecutor, plea bargaining or the ultimate disposition of a capital murder case.

Racial Breakdown of Defendant to Victim

84 Potential Capital Cases
50% of the 84 cases were White defendants perpetrating on White victims
25% of the 84 cases were Black/Minority defendants perpetrating on White victims

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[1] This section of the report was edited by its author after the last meeting of the Committee to include the trial of Douglas S. Belt of Sedgwick County, which was underway at the time the report was finalized. Mr. Belt was the 14th person tried on capital murder charges.

25% of the 84 cases Black/Minority defendants perpetrating on Black/Minority victims

14 Defendants Tried on Capital Murder Charges
Half of the defendants or seven were White killing White victims. Three of the defendants were Black killing White victims and four defendants were Black killing Black victims.

8 Defendants received Death Sentences
Six were White defendants perpetrating on White victims and two were Black defendants perpetrating on White victims.

6 Defendants received Life/Hard40/50 Sentences, three were Black defendants, one perpetrating on Black victims, 2 were Black defendants perpetrating on White victims and 1 defendant was White perpetrating on a White victim.

These statistics indicate the majority of death sentences were imposed in capital cases where White defendants murdered White victims.

Race of Victim

Between 1994 and 2004, **120** individuals were victims of the **84** potential capital murder cases, of which **119** were murdered and **1** remains alive. Of the **120** victims **77** were White, **34** were Black and **10** were Hispanic.

In reviewing the race of the victims of the 54 defendants actually charged with Capital Murder, the numbers indicate a greater percentage of minority victims were represented in capital cases charged by prosecutors. This would suggest that Kansas prosecutors are not deciding whether to charge a capital case based on the race of the victim.

However, in the 14 of those cases that were tried by juries on capital murder the majority of the victims were White. Of the eight defendants who received death sentences all of their victims were White. Of the six defendants whose capital trials resulted in Life/Hard 40 or 50 sentences three killed white victims and three killed minority victims. This indicates a lower representation of minority victims in capital cases tried and death sentences imposed.

Nevertheless, with such a small sampling no definitive inferences or conclusions can be drawn based solely on these numerical statistics. In addition, numerous factors may affect decision makers in the capital process. These factors include facts of a case, aggravating and mitigating circumstances, legal rules, defenses, defendant's rights, desires of victim's family, history of the defendant, relationship of the parties, socioeconomic status, gender, age, juror makeup, etc.

Race of the Defendant

In reviewing the race of the defendant in the 84 potential capital cases, it was found that, **41** of the defendants are Black, **39** of the defendants are White, **3** of the defendants are Hispanic, and

1 defendant is Asian. Again, only 54 defendants were actually charged by Kansas prosecutors with capital murder. Of those fifty-four, **30** were White defendants, which represents **76%** of the total White defendants facing a potential capital case, **21** were Black defendants which represents **50%** of the total Black defendants facing a potential capital case, **2** were Hispanic defendants and **1** defendant was Asian.

These numbers would indicate that prosecutors did not exhibit racial bias against minority defendants in the charging of capital murder cases.

Of the 54 defendants charged with capital murder only **14** defendants or **25%** actually went to trial on those charges. The remaining **40** defendants or **74%** negotiated with prosecutors for sentences less than death, were tried on non-capital charges, or have cases pending. Kansas prosecutors tried **7** White defendants or **23%** of White the total white defendants charged with capital murder, and **7** Black defendants or **31%** of Black defendants charged with capital murder.

In the **14** Capital Murder trials Kansas jurors imposed **8** Death Sentences and **6** Life/Hard 40/50 Sentences. Of the **8** defendants sentenced to death **6** where white **2** were black. Of the **6** defendants sentenced to Life/Hard40/50 sentences, **5** defendants were Black and **1** defendant was white.

This small sampling of fourteen capital murder trials over a ten-year period is insufficient to draw any conclusions. However the limited data suggests that race of the defendant has not been a factor in the plea-bargaining or ultimate disposition of capital murder cases in this state.

Conclusion

Decision-making in capital prosecutions must remain free of racial bias. To allow for a fair and ongoing evaluation of the factors that are involved in the disposition of capital cases it is imperative that a uniform and comprehensive data collection system be established by all agencies involved in the capital process. Therefore, it is the recommendation of this committee that law enforcement, prosecution, defense and courts maintain and compile comprehensive and uniform data in capital eligible murder cases.

Issue 4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death?

One of the issues with which this committee is charged is exploring whether the current statutory and case law in Kansas is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death. In order to facilitate discussion of this issue, the Committee decided that it was proper to examine ways in which other states have examined and answered the same question. While it appears that current Kansas statutory and case law is sufficient to address many of the concerns identified by the recent studies made in Connecticut and Illinois, both state reports also contain additional recommendations not present in current Kansas statutory and case law that have the potential to further reduce the risk that an innocent person will be sentenced to death. However, while these measures can be identified, the question of whether it is advisable or reasonable to adopt such additional measures here in Kansas will require an in-depth study focusing on the benefits and costs of each measure.

In January of 2003, the State of Connecticut's Commission on the Death Penalty issued a report that addressed a similar question. *See* State of Connecticut Commission on the Death Penalty, Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut, 56-62 (Jan. 8, 2003) (conducting "An examination of the safeguards that are in place or should be created to ensure that innocent persons are not executed"). In its report, the Commission found that, according to the legal experts it consulted, "some of the factors that contribute to the arrest, conviction, and imposition of death sentences upon innocent people are lack of DNA testing, ineffective counsel, prosecutorial misconduct [during discovery], mistaken eyewitness testimony, false confessions and testimony from informants." *Id.* at 56. The identification of these categories is generally consistent with most of the other reports of state commissions investigating similar questions regarding the death penalty. *See* Report of the Governor's Commission on Capital Punishment for the State of Illinois, i-iii (April 15, 2002); Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Work Session Document, January 4, 2002).

The determinations of the Connecticut and Illinois Commissions are extremely valuable, as they represent the most comprehensive and detailed studies of the question regarding what appropriate safeguards are necessary and feasible.

1. DNA Testing

Currently, Kansas law provides that any person in custody upon conviction of murder or rape may petition the court for DNA testing of material that: 1) is related to the investigation or prosecution that resulted in the conviction; 2) is in the actual or constructive possession of the state, and 3) was not previously subjected to DNA testing, or can be subjected to retesting with newer techniques that provide a "reasonable likelihood of more accurate and probative results". K.S.A. 2003 Supp. 21-2512(a). The court must order such DNA testing if it determines that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the petitioner was wrongfully convicted or sentenced. K.S.A. 2003 Supp. 21-2512(c). The Kansas Bureau of

Investigation is required to maintain DNA samples from criminal investigations. See K.S.A. 2003 Supp. 21-2511(f).

This procedure is consistent with the general recommendations of the Illinois Commission, and similar to that which was recently adopted by the Illinois Legislature. *See* 725 I.L.C.S. 5/116-3. The procedure used in Kansas appears sufficient to address concerns regarding the preservation and testing of DNA evidence.

It should be noted that one additional recommendation by the Illinois Commission with regard to DNA testing that was not adopted by the Illinois Legislature was the creation of an independent state forensic laboratory not connected to a specific law enforcement agency. See Illinois Commission Report, Recommendation 20, pp. 52-53. The Illinois Commission Report states, however, that, no matter how independent the laboratory, the bulk of its work would still be done for law enforcement officials and prosecutors, and it would still be a "government" laboratory. Id. at 53.

2. Assistance of Counsel

While the lack of effective counsel has been cited as a problem in many states, such problems do not appear to exist presently in Kansas. Kansas currently uses the ABA guidelines for death qualification of counsel, including the requirement that no fewer than two attorneys litigate a capital case. *See* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 5.1 (2003).

Given recent Supreme Court decisions, however, it appears that the cost of providing constitutionally effective counsel will continue to rise in the future. *See, e.g. Wiggins v. Smith*, 539 U.S. 510 (2003). These increasing costs may require study of the funding of the Board of Indigents' Defense Services, so Kansas can continue to adhere to the ABA Guidelines.

3. Discovery

With regard to discovery, the main problem in death penalty cases arises from the alleged failure of the prosecution to reveal exculpatory evidence and investigative materials, sometimes because the materials were not turned over to the prosecutor to begin with. *See* Illinois Commission Report, Recommendation 2, p. 22; Connecticut Report at 60. The United States Constitution requires prosecutors to disclose exculpatory evidence, even in the absence of a request by the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Kansas statutory and case law acknowledges this duty. K.S.A. 2003 Supp. 22-3212; K.S.A. 22-3213; *State v. Aikins*, 261 Kan. 346, Syl. ¶ 17, 932 P.2d 408 (1997).

The Illinois Commission report recommended that police officers be required to document on a schedule all items of relevant evidence, and to turn this schedule over to the prosecutor. The Commission also recommended that prosecutors be given access to all police investigatory materials. Illinois Commission Report, Recommendation 2, p. 22. The Illinois legislature adopted this

recommendation in modified form, stating that police are required to give the prosecutor all information "that would tend to negate the guilt of the accused." 725 I.L.C.S. 5/114-13.

The Connecticut Commission report recommended that an open-file procedure be set up in all death penalty cases, with a mechanism for creating a joint inventory of items disclosed and a formal record of their disclosure. Connecticut Report at 62.

Many prosecutors in Kansas pursue an "open file" policy. However, there is no law which mandates such a policy. Further, there is no law which mandates that police keep track of evidence and give evidence to the prosecutor. Whether any statutory change is necessary in the area, however, would require further detailed investigation.

4. Mistaken Eyewitness Testimony

Both the Illinois and Connecticut reports found that mistaken eyewitness testimony was a major problem in erroneous death penalty convictions. See Illinois Commission Report, 31-40; Connecticut Commission Report, 60. The Connecticut report concluded that mistaken eyewitness testimony was a primary reason for wrongful convictions. In order to combat this problem, the Illinois and Connecticut reports made several recommendations.

Both reports recommended that lineups be done sequentially, with the person or photograph shown to the witness one at a time and the witness informing the investigator whether or not that person is the perpetrator before the next person or photograph is viewed. Illinois Commission Report, Recommendation 12, p.34; Connecticut Commission Report, 62. The idea behind this procedure is to eliminate the "relative judgment" through which the witness identifies the person who looks most like the perpetrator. Illinois Commission Report, 34. The Illinois Commission cited studies showing that this sequential procedure produces a lower rate of mistaken identifications in perpetrator-absent lineups with little loss in the rate of accurate identifications in perpetrator present lineups. *Id.* at 34-35.

Both reports also recommended that a "double-blind" lineup be conducted, in which the official conducting the lineup or photo spread is not aware of the identity of the suspect. Illinois Commission Report, Recommendation 10, p. 32-33; Connecticut Commission Report, 62. The Illinois Commission recommended that this procedure be used "[w]hen practicable", although a minority of the Commission would have recommended that it be mandatory in all cases. Illinois Commission Report, 32-33. The concern of the majority of the Commission was that the mandatory implementation of this would pose problems for smaller police departments. *Id.* at 33.

Both reports further recommended that the witness in a lineup or photo spread be specifically told that the suspect might not be in the lineup or photo spread, thus reducing the pressure on the witness to identify someone in the array. Illinois Commission Report, Recommendation 11(a), p. 34; Connecticut Commission Report, 61. The Illinois Commission further recommended that the witness be told that he or she should not assume that the person administering the array knows which person is the suspect, thus reducing the possibility that the witness will believe that the law enforcement officer is "signaling" him or her as to which person to pick. Illinois Commission

Report, Recommendation 11(b), p.34. Illinois has adopted these recommendations. 725 I.L.C.S. 5/107A-5(b).

The Illinois Commission went on to recommend that a clear written record be made of any statements made by the witness at the time of the identification as to his or her confidence that the identified person is or is not the perpetrator, and that this record be made prior to any feedback from law enforcement personnel. Illinois Commission Report, Recommendation 14, p. 37-38. The purpose behind this recommendation is to reduce the possibility of a wrongful conviction where the witness makes a tentative identification at the lineup, but makes a stronger identification in court after receiving unintentional or even intentional positive feedback from law enforcement officers. *Id.*

Another recommendation by the Illinois Commission was that "[w]hen practicable", police should videotape lineup procedures. The Illinois legislature adopted this recommendation. *See* 725 I.L.C.S. 5/107A-5(a).

5. Interrogation Procedures

Both the Illinois and Connecticut Commissions have recommended that procedures be put in place to help insure that suspects are not coerced or tricked into making an involuntary or false confession. The most controversial of these recommendations is the videotaping or sound recording of all police interviews in capital cases. In Kansas, video or audio-taping of an interrogation is not a prerequisite to allowing the statement into evidence at trial. See *State v. McIntosh,* 30 Kan.App.2d 504, Syl.¶4, 43 P.3d 837, *aff'd* 274 Kan. 939, 58 P.3d 716 (2002).

The Connecticut Commission recommended that questioning of suspects in capital cases that is conducted in police facilities should be recorded. Videotape is suggested as the preferred option, with audiotape allowed where videotape would not be practicable. Connecticut Commission Report, 61. The Illinois Commission similarly recommended that videotape of the entire interrogation at a police facility be conducted. Illinois Commission Report, Recommendation 4, p. 24. Where a statement is made in a situation where recording is not practicable, the statement should be reread to the suspect on videotape, and the suspect should either confirm or deny its accuracy. *Id.* at Recommendation 5, p. 28-29. Where videotaping is not practicable, audiotape should be used. *Id.* at Recommendation 6, p. 29. Illinois has adopted this rule in modified form, providing that, beginning in 2005, all statements must be taped and non-taped statements are presumed inadmissible unless one of nine exceptions apply. *See* 705 I.L.C.S. 405/5-401.5.

The co-chair of the Illinois Commission has reported that: "Various police throughout the country who already follow this practice report no impairment in their ability to obtain admissions and confessions, a decrease in motions to suppress based on claims of police coercion and trickery, an increase in pleas of guilty, and jury acceptance of recordings as to what was said and done at the station." Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done*, 51 Fed. Law. 37 (July 2004).

A second issue concerning interrogation techniques has to do with the time period in which a person is afforded counsel. The Illinois Commission recommended that, in death eligible cases,

the public defender be authorized to represent indigent suspects as soon as they request counsel, rather than waiting for the first appearance before a magistrate. Illinois Commission Report, Recommendation 3. Illinois has not acted on this recommendation.

6. Testimony from Informants

Both Commissions recognize that testimony from informants can be very troublesome. Both Commissions recommended that, before testimony can be introduced from jailhouse informants, the district court must hold a pretrial hearing to determine whether the testimony of the informant is reliable. Connecticut Commission Report, 62; Illinois Commission Report, Recommendation 51. Illinois has adopted this recommendation. 725 I.L.C.S. 5/115-21. The Illinois statute provides that, if the prosecution fails to prove by a preponderance of the evidence that the jailhouse informant's testimony is reliable, "the court shall not allow the testimony to be heard at trial." *Id.*

The Illinois Commission also recommended that the jury be specially instructed to view the testimony of a jailhouse informant with caution even if it is allowed into evidence. Illinois Commission Report, Recommendation 57. The Illinois legislature did not adopt this recommendation. Finally, Illinois law now prohibits the death penalty if the only evidence of the defendant's guilt is the uncorroborated testimony of a jailhouse informant or accomplice. See 720 I.L.C.S. 5/9-1(h-5).

Kansas has adopted a pattern jury instruction to be given regarding the testimony of an informant who receives benefits. See P.I.K. Crim. 3d 52.18-A (2003). The instruction provides that "[y]ou should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence". *Id.*

7. Other Recommendations

Both Commissions made other recommendations, such as reducing the number of factors that make a defendant eligible for the death penalty. However, Kansas has a fairly narrow statute already. The bulk of the other recommendations are also a part of Kansas law at the moment.

Conclusion

Kansas law appears sufficient to address many of the concerns identified by the recent studies made in Connecticut and Illinois. However, both state reports also contain additional recommendations, discussed above, that have the potential to further reduce the risk that an innocent person will be sentenced to death. As noted earlier, the question of whether it is advisable or reasonable to adopt additional measures here in Kansas will require an in-depth study focusing on the benefits and costs of each measure.

Issue 5: Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence?

The social science community generally agrees that the death penalty does not have a general deterrent effect on would-be murderers. There is some research that has found a deterrent effect to the death penalty, but these studies have been heavily criticized or are very recent and have not been appropriately scrutinized. Some studies have found a "brutalization effect" of the death penalty. These studies are also not agreed with by the majority of social scientists. General crime statistics can be used to support both theories and both sides of the deterrence debate.

Literature finding a deterrent effect

To this date, the most cited and influential study which found the existence of a deterrent effect to the death penalty was conducted by social scientist Isaac Ehrlich in 1975. Ehrlich, a professor of economics at the University of Chicago, was not the first to question the established notion that the death penalty was not a deterrent, however, he was the first to show a relationship between executions and murders that pro-deterrence theorists could use to support that claim.[1] Using econometrics and a mathematical technique termed "multiple regression analysis," Ehlich examined many variables simultaneously in order to determine the independent impact that each variable had on the murder rate.[2] Ehrlich concluded that the death penalty, if used rather than imprisonment, may deter eight murders for every execution actually carried out.[3] By using national homicide data from the years 1933-67 in a time series analysis, Ehrlich claimed he was the first to analytically look at the issue of deterrence.[4]

Ehrlich's study has been criticized for a number of methodological errors. Among these errors include the failure to account for several important factors in the analysis, including rural-to-urban migration, gun ownership, level of violent crime, and length of prison sentences. When these factors are taken into account, the deterrent effect found by Ehrlich goes away.[5] Similarly, when Ehrlich's data was reexamined by a panel of the National Academy of Sciences (headed by a Nobel Prize-winning economist), the data did not support the existence of a deterrent effect of the death penalty.[6]

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[1]Hook 1989, 47.

[2]Gerber, Rudolph J., "Death is Not Worth It," 28 Ariz. St. L.J. 335, 348 (1996).

[3]See Carrington, at 90.

[4] Ehrlich 1975, 397.

[5]M. Costanzo, Just Revenge 103 (1997)

[6]Supra.

Some recent studies support the existence of a deterrent effect of the death penalty. Dudley Sharp, a death penalty advocate, listed in a recent article several new studies that claim to show a deterrent effect of the death penalty.[7] Sharp cited Emory University Economics Department Chairman Hashem Dezhbakhsh and Emory Professors Paul Rubin and Joanna Shephard, who recently stated that "our results suggest that capital punishment has a strong deterrent effect. An increase in any of the probabilities – arrest, sentencing or execution – tends to reduce the crime rate. In particular, each execution results, on average, in eighteen fewer murders – with a margin of error of plus or minus 10."[8] Their database used nationwide data from 3,054 U.S. counties from 1977-1996.[9]

Similar to the results from the Emory University study, University of Colorado Economics Department Chairman Naci Mocan and Graduate Assistant R. Kaj Gottings found "a statistically significant relationship between executions, pardons and homicide. Specifically each additional execution reduces homicides by 5 to 6, and three additional pardons (commutations) generate 1 to 1.5 additional murders."[10] Their data set contained detailed information on the entire 6,143 death sentences between 1977 and 1997.[11]

Sharp noted five other studies from the last three years that found a deterrent effect to the death penalty.[12] Because these studies are recent, they have not yet been scrutinized by the social science community. Sharp also cited anecdotal evidence of criminals who allegedly were deterred from murdering because of the death penalty.[13]

Literature finding no deterrent effect

Despite the existence of studies that show a deterrent effect to the death penalty, the overwhelming mass of research on the subject concludes that the death penalty has no deterrent effect. Each study that purports to find a deterrent effect is attacked by the social science community

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[7]Sharp, The Deterrent Effect of the Death Penalty, http://mc4se.org/deteff.htm.

[8]Dezhbakhsh, Hashem, Paul H. Rubin, and Joanna M. Shephard. "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," American Law and Economics Review V5 N2 2003 (344-76)

[9]Sharp, at 1.

[10]"Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment," Journal of Law and Economics, v 46, no 2, October 2003 at www.journals.uchicago.edu/cgi-bin/resolve?JLE460202.

[11]See Sharp, at 2-3.

[12]Supra.

[13]Supra, at 4-5.

for methodological errors, and several other studies are conducted that find the opposite conclusion. As one author put it:

> Research on the lack of deterrence will continue to accumulate. And, occasionally, because of a methodological flaw or a statistical anomaly, or an unusual confluence of events, a researcher will trap the elusive deterrent effect. Later, when other researchers look at the same data, the effect will vanish. The supposed deterrent effect of the death penalty looks more and more like some mythical creature whose existence seems less and less probable.[14]

Consistent with Costanzo's view, 80% of criminologists believe existing research fails to support deterrence.[15] Former Attorney General Janet Reno concurred, stating, "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point."[16]

One recent study that is cited regularly to show there is no deterrent effect of the death penalty is that of John Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquart. This group of researchers examined executions in Texas from 1984 to 1997. They speculated that if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions within the state. Using patterns in executions across the study period and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. They concluded that the number of executions is unrelated to murder rates generally, and the number of executions was also unrelated to the felony rates.[17] This study is highly regarded, and was cited by Supreme Court Justice Breyer in his concurring opinion in Ring v. Arizona.[18]

Crime statistics generally support the notion that the death penalty is not a deterrent. A 2000 New York Times article highlighted that in the last 20 years, homicide rates in death penalty states have been 48% to 101% higher than in non-death penalty states.[19] Similarly, the abolition of the death penalty in Canada in 1976 has not led to increased homicide rates. In fact, the number of

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[14]M. Costanzo, Just Revenge 103 (1997).

[15]Radelet & Akers, Deterence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996).

[16]Reno, quoted at www.deathpenaltyinfo.org.

[17]Sorenson, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime and Delinquincy, 481-93 (1999).

[18]536 U.S. 584 (2002).

[19]Bonner & Fessenden, Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, p. A1.

homicides in Canada in 2001 (554) was 23% lower than the number of homicides in 1975 (721), the year before the death penalty was abolished. In addition, homicide rates in Canada are three times lower than homicide rates in the U.S., which uses the death penalty.[20] However, death penalty advocates note the jump in the U.S. murder rate during the death penalty moratorium of the 1970's to counter the argument that statistics do not support deterrence theory.[21]

Some empirical research exists to support the theory that the death penalty increases the number of murders because executions make people more inclined to commit violent acts. This is known as the "brutalization effect." One study, reviewing the homicide rate in New York over a more than 57 year period, concluded that the homicide rate increased by one per month after an execution.[22] Some researchers believe that the brutalization effect is more consistent with the evidence than is the deterrent theory.[23] However, "[t]he few studies which report that capital punishment may actually incite killings (Bowers & Pierce 1980; Bowers 1984; Cochran, Chamlin, and Seth 1994) have not been subjected to detailed scrutiny."[24] The "brutalization" studies have not accounted for factors such as age, gender, race, economic status, and access to an attorney for redress.[25]

Conclusion

Ultimately, some studies show a deterrent effect of the death penalty, including a handful of recent studies. These recent studies have still yet to be examined by the social science community. Most social research concludes there is no deterrent effect, and the social science community generally agrees with this conclusion. The research for a brutalization effect of the death penalty is not conclusive.[26] On deterrence theory, some noteworthy social researchers recently concluded, "based on our assessment of the literature, we feel quite confident in concluding that in the United States a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist.[27]

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[20]Facts About Deterrence and the Death Penalty, www.deathpenaltyinfo.org, at pg. 3.

[21]See Sharp, at 6.

[22]See W. Bowers and G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* In V. Streib (Ed.), A Capital Punishment Anthology 86 (1993).

[23]Costanzo at 110.

[24]William C. Bailey and Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, In Hugo A. Bedau (Ed.), The Death Penalty in America, Current Controversies, 153 (1997).

[25]Supra

[26]Peterson and Bailey at 153.

[27]Peterson and Bailey at 153.

Issue 6. Whether states that have the death penalty treat murder victim's families who oppose the death penalty the same as murder victims' families who favor the death penalty.

Thirty-one states have victims' rights provisions in their constitutions.[1] The question is whether victims' families who oppose the death penalty are afforded the same rights as those who favor it.

Inside the courtroom at the trial level, victims' families who favor and who oppose the death penalty appear generally to be treated equally. At later proceedings and outside the courtroom literature on the question suggests that victims' families who oppose capital punishment are sometimes treated as second-class victims, and may not be given the same rights and assistance as victims' families who support capital punishment.[23]

The Committee has found no evidence of discriminatory treatment in Kansas of murder victim's families who oppose the death penalty.

Kansas has both a Victims' Rights Amendment to the Constitution, Art. 15, Sec. 15, and a statutory Bill of Rights for Victims of Crime. K.S.A. 74-7333 et seq. The Kansas Constitutional provision says, in 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 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."

K.S.A. 74-7333 (a)(5) and (6) provide that: "The views and concerns of victims should be ascertained and appropriate assistance provided throughout the criminal process" and "When the personal interests of the 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." The term "victim" is defined in K.S.A. 74-7333(b) as "any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person".

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[1]See Douglas E. Beloof, The Third Model of Criminal Process: The Victim Participation Model, 1999 Utah L. Rev. 289, 289 (1999).

[2]Dignity Denied, The Experience of Murder Victims' Family Members Who Oppose the Death Penalty, published by Murder Victims' Families for Reconciliation, (MVFR) Cambridge, MA. (2002)

In *State v. Parks, 265 Kan. 644, 648 (1998)* the Kansas Supreme Court said:

> "The purpose of the bill of rights for victims of crime is to ensure the fair and compassionate treatment of such victims. See K.S.A. 1997 Supp. 74-7333 (a). In order to do so the bill of rights ensures that victims will receive certain minimum rights. The same is true with the Victims Rights Amendment. See Kans. Const. Art 15, Sec. 15. The purpose of these enactments is to guarantee rights, not restrict rights."

Parks held that the trial court did not abuse its discretion in admitting statements of a nonvictim, the sister in law of the victim, at the sentencing hearing.

Mr. Bill Lucero, Kansas Coordinator of the all-volunteer Murder Victims Families For Reconciliation (MVFR), appeared before the Committee on September 10, 2004. Mr. Lucero spoke of his association with MVFR; his father's murder in New Mexico, and his concern that murder victim families who oppose the death penalty receive the same support and treatment from prosecutors and courts as that extended to victims' families supporting the death penalty. Mr. Lucero has appeared before the Kansas Legislature opposing the death penalty.

Mr. Lucero was not aware of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty.

K.S.A. 74-7337 requires the attorney general to appoint a victims' rights coordinator. Mr. Lucero favored victims' rights programs administered by a fully independent agency dedicated solely to serving the needs of all victims of crime. See, Dignity Denied, MVFR, Recommendation #3, p. 33.

Testimony at Post-Trial Proceedings

There have been documented instances when victims' family members who opposed the death penalty were not allowed to testify at post-trial proceedings while supporters of the death penalty in the same family were allowed to testify, See, Dignity Denied, MVFR, pp. 10-13. for a discussion of the denial of the Lamm family's right to testify in a Nebraska capital case.[3]

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[3]*State ex rel, Lamm v Neb. Bd. Of Prisons et al,* 260 Neb. 1000, 1004 620 N.W. 2d 763 (2001). The Lamms, a husband and daughter of the victim advanced a moot claim. The death sentence imposed on the killer, Reeves, had been vacated. *State v. Reeves,* 258 Neb. 511, 604 N.W. 2d 151 (2000). The victims rights provision of the Nebraska Constitution was not self executing. The legislature is required to provide for implementation of the rights established by the constitutional provision. It had not done so. The Nebraska Supreme Court considered the Lamms' claim, although moot, under a public policy exception. 260 Neb. At 1004.

Not all victims' families who oppose capital punishment are treated unfairly. For example, the parents of Matthew Shephard were allowed to effectively request mercy for their son's killers against the wishes of the prosecutor.[4]

Conclusion

The Committee has found no evidence of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty.

In the courtroom at a capital trial, victims' families who support and who oppose the death penalty are generally treated equally in states that have the death penalty. Outside the courtroom, in states other than Kansas, victims' families who are opponents of the death penalty appear to have been denied equal information and assistance in the capital trial process.

In Kansas, Mr. Lucero knows of no instances of discriminatory treatment of victim's families who oppose the death penalty. Mr. Lucero told the Committee that MVFR did not seek out families of death penalty victims to learn of the families' views on the death penalty. MVFR is available if other family members of victims wish to seek MVFR's counsel. Mr. Lucero also indicated that MVFR would be available to speak to Kansas prosecutors concerning the views of MVFR. The Committee recommends that a dialogue be opened between MVFR and The Kansas Association of County and District Attorneys.

Committee members have extensive experience with capital prosecutions in Kansas. None of the Committee members are aware of any instances of discriminatory treatment of Kansas's death penalty victims' families who oppose the death penalty.

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[4] See, Tom Kenworthy, "I'm Going to Grant You Life, "Parents of Slain Gay Student Agree to Prison for His Killer, Wash. Post, Nov. 5, 1999, at A2.

KANSAS DEATH PENALTY STATISTICS

AS OF JANUARY 1, 2005

	Potential Seeking Death	Not Charged Capital	Charged with Capital Murder	Tried for Capital Murder	Life/ Hard 40/ Hard 50	Death[1] Penalty	Pending Charges
Sedgwick	17	9	8	7	2[2]	5	0
Wyandotte	25	10	15	3	3	0	1
All Others	44	12	32	5	3	2	4
Total	86	31	55	15	8[2]	7[3]	5

[1]On December 17, 2004, the Kansas Supreme Court held the Kansas death penalty unconstitutional in the *State v. Marsh* case. The decision has been appealed to the United States Supreme Court. The Kansas Supreme Court has stayed its mandate in the *Marsh* case.

[2]Stanley M. Elms is included in these numbers. He was originally sentenced to death, but on November 17, 2004 his sentence was vacated and he was sentenced to the "hard 40."

[3]Defendants Kleypas, Scott and Marsh are included in this number, but depending on the decision by the United States Supreme Court, Kleypas and Scott may receive a retrial on the sentencing phase. Defendant Marsh will receive a new trial on the guilt phase.