

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 8, 2005 in Room 241-N of the Capitol.

All members were present except:

Kathe Decker- excused  
Mike Peterson- Absent

Committee staff present:

Jill Wolters, Revisor of Statutes Office  
Diana Lee, Revisor of Statutes Office  
Jerry Ann Donaldson, Kansas Legislative Research  
Connie Burns, Committee Secretary

Conferees appearing before the committee:

Jared Maag, Deputy Attorney General  
Ed Brancart, KCDAA

Others attending:

See attached list.

**HB 2061 – Death penalty; if aggravating circumstances outweigh mitigating circumstances, the sentence is death; if circumstances are equal, the defendant is not sentenced to death.**

Chairman Loyd opened the hearing on **HB 2061**.

Jared Maag, Deputy Attorney General, appeared before the committee as neutral and to provide information to the committee. (Attachment 1) The Attorney Generals felt it necessary to inform the committee of where the appeal of the decision in *State v. Marsh* presently stands. The AG's office is now seeking review of the Marsh decision with the United States Supreme Court. The State has 90 days to submit its petition under Supreme Court rules, and a decision on certiorari should be delivered on or before the ending of the Court's term in the third week of June.. On average the United States Supreme Court dockets between 8,000 and 9,000 cases a year and hear about 80 cases a year, which is about 1% of cases seeking review are granted. Mr. Magg noted, in his testimony, that a review of the capital cases on which the Supreme Court has granted cert for the fall term, there is a probability the Marsh case will be accepted, so that the Court might bring a finality issues in capital cases. The Attorney General's office appreciates the opportunity to present the time-line concerning the appeal of the *Marsh* decision.

Ed Brancart, Kansas County & District Attorneys Association, recommended to the committee not to pursue any legislative action concerning the Kansas Death Penalty Statute until the judicial review process is allowed to run its course. (Attachment 2) It is believed that if the Kansas Legislature takes any action to "fix the problem" of equipoise in *Marsh*, then it is very unlikely the United States Supreme Court would grant review. If the Kansas Supreme Court reconsiders the *Marsh* decision and reverses itself, or if the United States Supreme Court grants review and reverses the *Marsh* decision, then the seven death penalty sentences would remain in full force and effect.

The question was raised regarding passing something with a legislative fix which would not take effect until after the grant of certiorari was resolved. A clarification on the question will be forthcoming.

Kansas Legislative Research Department provided to the committee a history of the Death Penalty from the Kansas Legislator Briefing Book 2005. (Attachment 3)

Chairman Loyd continued the hearing on HB 2061 until February 9.

**HB 2034 – Judicial review and civil enforcement of agency actions.**

Representative Pauls made a motion to move HB 2034 out favorably. Representative Owens seconded the motion. The motion carried.

**HB 2130 – Confidential mental health records; exchange of information between treatment facilities.**

Representative Sharp made a motion to move HB 2130 out favorably. Representative Horst seconded the motion. The motion carried.

**HB 2128 – Expansion of SRS access to criminal history records.**

Representative Owens made a motion to move HB 2128 out favorably. Representative Horst seconded the motion.

Representative Pauls made a motion to make a technical amendment in line 23 adding after Kansas Bureau of Investigation “employee or individual”. Representative Huntington seconded the motion. The motion carried.

Representative Huntington made a motion to amend lines 30 and 31 subsection (d) to provide that the Secretary of SRS shall pay the cost of the records. Representative Davis seconded the motion. The motion carried.

Representative Crow made a motion to amend where it uses the term individual so as not to broaden. Representative Swenson seconded the motion. The motion was withdrawn.

Representative Yoder moved to table HB 2128. Representative Crow seconded the motion. The motion carried.

The Chairman will announce tomorrow a subcommittee to look at this bill.

**HB 2122 – Increasing from \$500 to \$1,000 the misdemeanor felony distinction in crimes involving a type of theft or loss of value.**

Representative Owens made a motion to move HB 2122 favorably for passage. Representative Crow seconded the motion. The motion carried.

The meeting was adjourned at 2:30 pm. The next meeting is February 9, 2005.





STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE  
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.KSAG.ORG

February 8, 2005

TESTIMONY  
BEFORE THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

JARED S. MAAG  
DEPUTY ATTORNEY GENERAL  
CRIMINAL LITIGATION DIVISION

CONCERNING HB 2061

Chairman Loyd and Members of the Committee:

Given the recent decision in *State v. Marsh* and the immediate call to consider amending our death penalty law, the Office of the Attorney General felt it necessary to inform the committee of where the appeal of that decision presently stands.

As you are aware, on the 17<sup>th</sup> of December, the Kansas Supreme Court found that K.S.A. 21-4624(e) was unconstitutional as it provided for a sentence of death in the unlikely event that the aggravating and mitigating circumstances were equally balanced. The Court stayed the filing of the mandate upon our request. On the 29<sup>th</sup> of December, our office filed a Motion for Rehearing arguing that the Court failed to address the applicability of the severability provision of K.S.A. 21-4630. That motion was denied on February 2, 2005.

Our office is now seeking review of the *Marsh* decision with the United States Supreme Court.

Under Supreme Court rules, the State has 90 days to submit its petition for certiorari. Our office will file well within the 90 day limit and anticipate submitting the brief on or before the

House C & JJ  
2-8-05  
Attachment 1

Page 2

1<sup>st</sup> of March. As this is a capital case, a response to our petition is required. The Appellate Defender's Office (ADO) will have 30 days from the day the case is placed on the Court's docket to submit a response brief. Once a response brief is filed by the ADO, the Clerk, in no less than 10 days, distributes the case to the justices for their consideration. The case will ultimately be calendared for conference where the Court will determine if certiorari should be granted. A minimum of four justices must agree that certiorari is warranted in order for the case to be heard. Barring any unforeseen events, we believe that a decision on certiorari will be delivered on or before the ending of the Court's term in the third week of June.

On average the United States Supreme Court docketed between 8,000 and 9,000 cases a year. On average they hear about 80 cases a year. In short, 1% of cases seeking review are granted.

If certiorari is denied, the mandate in the Marsh case will then issue. If certiorari is granted, a second round of briefing will occur and the case will be scheduled for argument. Depending on the number of cases granted by the Court before the third week of June, argument could be as early as October or as late as December. Following argument, the case is submitted to the Court. The decision in this case could be handed down any time between argument and the third week of June, 2006.

The Office of the Attorney General appreciates the opportunity to be able to present to the committee this time-line concerning our appeal of the *Marsh* decision. I hope that it will assist you in your decision-making process. Our office stands ready to answer any questions over the coming months that this committee and other legislators might have concerning the appeal of this case.

Jared S. Maag  
Deputy Attorney General  
Criminal Litigation Division



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Thomas Stanton  
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## Kansas County & District Attorneys Association

1200 S.W. 10th Avenue  
Topeka, Kansas 66604  
(785) 232-5822 FAX: (785) 234-2433  
[www.kcdaa.org](http://www.kcdaa.org)

February 8, 2005

Chairman Loyd and Members of the Corrections and Juvenile Justice Committee:

The Kansas County and District Attorneys Association (KCDA) is recommending the Kansas Legislature not pursue any legislative action concerning the Kansas Death Penalty Statute until the judicial review process is allowed to run its course. On December 17, 2004, the Kansas Supreme Court in State v. Marsh declared the Kansas Death Penalty Statute unconstitutional. The reason cited was for violation of "equipoise", which is a result of mandating the death sentence if the mitigating circumstances do not outweigh the aggravating circumstances (ties go in favor of the State, rather than the defendant). The Marsh court ruled the weighing equation set forth in K.S.A. 21-4624(e) violates the Eighth and Fourteenth Amendments of the United States Constitution. In State v. Kleypas (2001), the Kansas Supreme Court found that although the statute did violate "equipoise", the problem is solved: "By simply 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 put to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment."

The Kansas Attorney General's Office is asking the Kansas Supreme Court to reconsider its decision in striking down the Kansas Death Penalty Statute. If this is denied, the Kansas Attorney General will then seek review by the United States Supreme Court. It is believed that if the Kansas Legislature takes any action to "fix the problem" of equipoise in Marsh, then it is very unlikely the United States Supreme Court would grant review. If the Kansas Supreme Court does not reconsider its decision, or if the United States Supreme Court does not grant review, or if the United States Supreme Court grants review and upholds the Kansas Supreme Court ruling in Marsh, then the seven people sentenced to death in Kansas since 1994 would have to be re-sentenced to a sentence other than death. If the Kansas Supreme Court reconsiders the Marsh decision and reverses itself, or if the United States Supreme Court grants review and reverses the Marsh decision, then the seven death penalty sentences would remain in full force and effect.

House C & JJ  
2-8-05  
Attachment 2

The Marsh decision puts the Kansas Legislature on the horns of the dilemma. Any action to “fix the Marsh problem” may keep the case from being reviewed by the United States Supreme Court, in which case the seven death penalty sentences would have to be reviewed with no existing death penalty. If the Legislature does not “fix the Marsh problem” and review is not granted by the United States Supreme Court, then Kansas likely could not reinstate the death penalty until the 2006 legislative session.

It is the position of the Kansas County and District Attorneys Association Board of Directors that the Kansas Legislature should wait to propose any legislation concerning the Kansas Death Penalty until such time as the Judicial System has been allowed to run its course. The Kansas Death Penalty Statute is very conservative, only the most heinous of crimes can result in a death penalty; only seven people have been sentenced to death since its enactment in 1994, less than one person per year. It is the position of the KCDA Board that the families of the victims killed by the seven people upon whom the death penalty has been imposed, and the prosecutors who have obtained those convictions, deserve the right to have the judicial review process be completed before there are any legislative attempts to “fix the Marsh problem”. Ultimately, there may not be a Marsh problem to fix.

We understand the dilemma faced by the Kansas Legislature in deciding whether or not to act upon the Marsh decision this legislative session. The KCDA Board hopes you accept this recommendation to allow the judicial review process to be completed prior to any attempt by the Legislature to intervene, in the spirit in which it is offered. There may not be a right answer here and the Marsh dilemma may be a lose-lose situation for the Legislature. However, we believe the families of those murdered by the seven people with death sentences, the prosecutors who secured those convictions, and the people of the State of Kansas deserve their chance to continue seeking justice through the judicial review process.

Respectfully Submitted,  
The Kansas County and District Attorneys  
Association Board of Directors,

Ed Brancart  
Wyandotte County Assistant District Attorney  
KCDA Secretary/Treasurer

Thomas J. Drees  
Ellis County Attorney  
KCDA Board President





**Judiciary**

M-3 **Death Penalty in Kansas**

**Other Judiciary reports available:**

M-1 **Grandparent Visitation Rights**

M-2 **Tort Claims Act**

**Jerry Donaldson,**  
Principal Analyst  
785-296-5181  
[JerryD@kprd.state.ks.us](mailto:JerryD@kprd.state.ks.us)

Judiciary

M-3 - Death Penalty In Kansas

Background

Kansas is one of 38 states that have a death penalty. The two following charts show the states with a death penalty and the 12 states without such a penalty.

38 States With The Death Penalty

(Source: Death Penalty Information Center)

Alabama	Florida	Louisiana	N. Hampshire*	Oregon	Virginia
Arizona	Georgia	Maryland	New Jersey*	Pennsylvania	Washington
Arkansas	Idaho	Mississippi	New Mexico	S. Carolina	Wyoming
California	Illinois	Missouri	New York*#	S. Dakota*	
Colorado	Indiana	Montana	N. Carolina	Tennessee	-Plus
Connecticut*	Kansas*	Nebraska	Ohio	Texas	U.S. Gov't.
Delaware	Kentucky	Nevada	Oklahoma	Utah	U.S. Military*

\* Indicates jurisdiction with no executions since 1976.  
# New York's death penalty statute was ruled unconstitutional on June 24, 2004.

12 States Without The Death Penalty

(Source: Death Penalty Information Center)

Alaska	Michigan	West Virginia
Hawaii	Minnesota	Wisconsin
Iowa	North Dakota	-Plus
Maine	Rhode Island	District of Columbia
Massachusetts	Vermont	Puerto Rico



## **Kansas Reenacted Death Penalty in 1994**

Kansas reenacted a death penalty in 1994 for those persons committing the crime of capital murder.

### **Kansas Capital Murder Crime**

In Kansas, the capital murder crimes for which the death penalty can be invoked include the following:

- Intentional and premeditated killing of any person in the commission of kidnaping, or aggravated kidnaping, when the kidnaping or aggravated kidnaping was committed with the intent to hold the person for ransom;
- Intentional and premeditated killing of any person under to a contract or agreement to kill person or being a party to the contract killing;
- Intentional and premeditated killing of any person by an inmate or prisoner confined to 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;
- Intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, the crime of rape, criminal sodomy, or aggravated criminal sodomy, or any attempt thereof;
- Intentional and premeditated killing of a law enforcement officer;
- 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
- 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 the intent that the child commit or submit to a sex offense.

## **Death Penalty and Minors and Mentally Retarded**

There is a provision in current Kansas law that declares conviction of a defendant of capital murder and a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder. As a result of KSA 21-4622, cited here, the death penalty or capital punishment cannot be imposed on a minor in Kansas.

According to Kansas law, upon conviction of a defendant of capital murder, there will be a separate proceeding to determine whether the defendant shall be sentenced to death. This proceeding will be conducted by the trial judge before the trial jury as soon as practicable. If the jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist and that such aggravating circumstances are not outweighed by any mitigating circumstances which are found to exist, then by unanimous vote, the defendant will be sentenced to death. The court will review the sentence and can modify such a sentence.

At the national level, the U.S. Supreme Court *Atkins v. Virginia* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed.2d 335 (2002) stated that capital punishment of those with mental retardation is cruel and unusual punishment under the Eighth Amendment of the *U.S. Constitution*. After the U.S. Supreme Court ruling, holding that it is unconstitutional to execute people with mental retardation, various states attempted to draft legislation that would comply with the *Atkins* ruling.

Currently, Kansas law defines "mentally retarded" to mean a person having significantly subaverage general intellectual functioning to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

In the *Atkins* decision there is no definition of "mentally retarded" but the Court referred to a national consensus regarding mental retardation.

In this context, there are at least two recent bill drafts that address the topic of mental retardation, in addition to other issues. In 2003 HB 2439, which did not pass, mental retardation was defined as a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills which originates before the age of 18.

In 2004 SB 355, which also did not pass, the term cognitive disability was used instead of mental retardation. Cognitive disability was defined to mean a disability characterized by significant limitations both in intellectual functioning and deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. "Significant limitations" in intellectual functioning meant two or more standard deviations below the norm.

The 2004 interim Special Committee on Judiciary examined the death penalty in view of the *Atkins v. Virginia* case and, specifically, the substance of 2004 SB 355.

## **Method of Carrying Out Death Penalty**

The method of carrying out a sentence of death in Kansas will be by intravenous injection of a substance in sufficient quantity to cause death in a swift and humane manner.

### Number of Inmates in Kansas on Death Row

Defendant's Name	County	Sought Death?	Date of Crime	Age at Time of Crime	Charges	Total Length of Consecutive Sentence(s)
Kleypas, Gary	Crawford	Y	3/30/96	40	Capital Murder, Attempted Rape, Aggravated Burglary	Death
Marsh, Michael	Sedgwick	Y	6/17/96	20	Capital Murder, 1 <sup>st</sup> Degree Murder, Aggravated Arson, Aggravated Burglary	Death
Scott, Gavin	Sedgwick	Y	9/13/96	18	Capital Murder, 1 <sup>st</sup> Degree Murder, Aggravated Burglary, Criminal Possession of a Firearm, Felony Theft	Death
Elms, Stanley	Sedgwick	Y	5/4/98	21	Capital Murder, Rape, Aggravated Burglary	Death
Robinson, John	Johnson	Y	2/29/00	56	2 Counts of Capital Murder, 1 <sup>st</sup> Degree Murder, Aggravated Kidnaping, Theft, Aggravated Interference with Parental Custody	Death
Carr, Jonathan	Sedgwick	Y	12/14/00	20	4 Counts Capital Murder, 1 <sup>st</sup> Degree Murder, Attempted Murder in the 1 <sup>st</sup> Degree, 5 Counts of Aggravated Kidnaping, and 32 other felonies including Rape, Criminal Sodomy, and Robbery	Death
Carr, Reginald	Sedgwick	Y	12/14/00	23	4 Counts Capital Murder, 1 <sup>st</sup> Degree Murder, Attempted Murder in the 1 <sup>st</sup> Degree, 6 Counts of Kidnaping, and 42 other felonies including Rape, Criminal Sodomy, and Robbery	Death

**Source:** 2003 Performance Audit Report for Death Penalty Cases: A K-Goal Audit of the Department of Corrections.

As of November 18, 2004, there are seven inmates that are held in administrative segregation since technically Kansas does not have a death row. Inmates, therefore, under sentence of death are held in administrative segregation at the El Dorado facility. One additional person, Douglas Belt, was sentenced on November 17, 2004 to death in Sedgwick County after being convicted for the crimes of capital murder, attempted rape and aggravated arson.

## Costs

Generally, costs for death penalty cases tend to be higher at the trial and appeal stages. In fact, cases in which the death penalty was sought and imposed could cost about 70 percent more than cases in which the death penalty was not sought.

### Costs By Case Type

	Death Sentence (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: 2003 Performance Audit Report for Death Penalty Cases: A K-Goal Audit of the Department of Corrections.

For more information, please contact:

Jerry Donaldson, Principal Analyst  
[JerryD@klrd.state.ks.us](mailto:JerryD@klrd.state.ks.us)

Mike Heim, Principal Analyst  
[MikeH@klrd.state.ks.us](mailto:MikeH@klrd.state.ks.us)

Kansas Legislative Research Department  
300 SW 10<sup>th</sup>, Room 545-N, Statehouse  
Topeka, Kansas 66612  
Phone: (785) 296-3181  
Fax: (785) 296-3824

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