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 9, 2005 in Room 241-N of the Capitol.

All members were present except:
Kathe Decker - excused

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:
Bill Lucero, Murder Victims' Families for Reconciliation
Sister Therese Bangert, Kansas Catholic Conference
Mary Ann Slattery
Professor Jeff Jackson, WU Law

Others attending:
See attached list.

Staff provided additional information on the Kleypas decision, the bill, and the Attorney General Carla Stovall testimony and comments to the House Judiciary Committee, March 14, 1995. (Attachment 1)

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 reopened the hearing on **HB 2061**.

Testimony was presented for Nola Foulston, District Attorney Eighteenth Judicial District, in opposition of the bill, by Mike Jennings. (Attachment 2) The District Attorney strongly urged the member of the Kansas Legislature not to pursue any premature legislative action based upon the Marsh decision until the judicial review process is allowed to run its course.

Chairman Loyd closed the hearing on **HB 2061**

Bill Lucero, Kansas Coordinator of Murder Victims' Families for Reconciliation, appeared as an opponent to the death penalty. (Attachment 3) As a steadfast opponent of capital punishment, suggests that capital punishment will not provide needed closure for murder victims families and will only exacerbate their grief and make healing that much more difficult to attain.

Sister Therese Bangert, Kansas Catholic Conference, opposes the death penalty. (Attachment 4) In the name of the Catholic Bishops of Kansas, urges the committee to "end not mend" the death penalty in Kansas.

Mary Ann Slattery, presented testimony in opposition of the death penalty. (Attachment 5) Requested the committee to vote to repeal the death penalty and to put the limited financial resources where they will benefit all Kansans.

Richard Ney, provided written testimony in opposition to the death penalty. (Attachment 6)

Jeffrey Jackson, Professor Washburn University School of Law, testified as neutral on the death penalty. (Attachment 7) Information was provided on recent proposals other states have considered to enhance the

reliability of the decisions in death penalty cases and to help ensure that no innocent person is sentenced to death.

- Open file Discovery
- Safeguards for Eyewitness Testimony
- Investigation Procedures
- Informant Testimony

The proposed changes to the Weighting Equation in the proposed amendment **HB 2061** provides that death will be the result only where the aggravating circumstances outweigh the mitigating circumstances, and makes it clear that death will not be imposed where the aggravating and mitigating circumstances are equal. This language is certainly sufficient to correct the problem identified by the Kansas Supreme Court.

HB 2147 – Psychiatric reports of defendants and inmates, disclosure of.

Representative Owens made a motion to move **HB 2147** out favorably. Representative Sharp seconded the motion.

Representative Davis moved to adopt the balloon that is a clean up on lines 15 and 16 and lines 26 and 27 of removing the specific name of the correctional facilities. Representative Owens seconded the motion. The motion carried.

Representative Pauls made a motion to move **HB 2147** out favorably as amended. Representative Owens seconded the motion. The motion carried.

HB 2062 – Creating the office of district attorney in judicial districts that vote for approval.

The chairman was authorized by the committee to write a letter requesting the Judicial Council to study this issue and make recommendation to the Legislature.

The meeting was adjourned at 2:52 pm. The next meeting is February 10, 2005.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-9-05

NAME	REPRESENTING
Sister Therese Bangert	Ks. Cath. Conference
Mary Ann Slattery	self
Tom Slattery	
Bill Lass	MVFR
Donna Annenberg	Amnesty International
Julia Butler	KSC
Forrest Saucier	
Elizabeth Kirn	OSA
Pam Gundy	self
Brad Bauard	Self
J. Chadd	KGS
CJ Saindon	Kansas Gas Service
Martin Kuzma	" "
[illegible]	Kansas Gas Service
[illegible]	Kansas Gas Service
Michael White	KCDAA
Mike [illegible]	"
Jeffrey Jackson	Self
Jennifer J. Siders	self
SARA CORNETT	Mi Co Leadership Group
Judy Smith	CWA of KS
Kathy Foster	Mi. Co. Leadership Group
Haley Pollom	self

Office of Revisor of Statutes

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MEMORANDUM

To: Committee on Corrections and Juvenile Justice

From: Jill Ann Wolters, Senior Assistant Revisor

Date: February 8, 2005

Subject: Referring documents

Attached are the documents referred to in the Kleypas decision:

"It is important to note that on March 14, 1995, the attorney general analyzed the statute and recommended in the House Judiciary Committee of the Kansas Legislature that the statute be amended to require that aggravating circumstances outweigh mitigating circumstances, stating: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense . . . ." Unfortunately, the legislature did not follow the attorney general's recommendation."

House C & JJ
3-9-05
Attachment 1

HOUSE BILL No. 2529

By Committee on Judiciary

2-15

AN ACT concerning crimes, punishment and criminal procedure; relating to capital murder; amending K.S.A. 1994 Supp. 21-3439, 21-4622, 21-4624 and 21-4625 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1994 Supp. 21-3439 is hereby amended to read as follows: 21-3439. (a) Capital murder is the:

(1) Intentional and premeditated killing of any person in the commission *or attempted commission* of kidnapping, as defined in K.S.A. 21-3420 and amendments thereto, or aggravated kidnapping, as defined in K.S.A. 21-3421 and amendments thereto, when the kidnapping or aggravated kidnapping was committed *or attempted* 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;

(4) intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, as defined in K.S.A. 21-3502 and amendments thereto, criminal sodomy, as defined in subsections (a)(2) or (a)(3) of K.S.A. 21-3505 and amendments thereto or aggravated criminal sodomy, as defined in K.S.A. 21-3506 and amendments thereto, or any attempt thereof, as defined in K.S.A. 21-3301 and amendments thereto;

(5) intentional and premeditated killing of a law enforcement officer, as defined in K.S.A. 21-3110 and amendments thereto;

(6) intentional and premeditated killing of ~~more than~~ one person *during the commission or attempted commission of the killing of one or more other persons* 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

tencing 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. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be applicable to the selection of such special jury. The jury at the sentencing proceeding may be waived in the manner provided by K.S.A. 22-3403 and amendments thereto for waiver of a trial jury. 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.

(c) 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. 1994 Supp. 21-4625 and amendments thereto and any mitigating circumstances~~ *any mitigating or aggravating circumstances otherwise authorized by law and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere*. 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.

(d) 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. *In considering its verdict, the jury shall consider all evidence previously admitted relating to the crime, any mitigating or aggravating circumstances otherwise authorized by law, supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere of the defendant.*

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A.

(7) intentional and premeditated killing of a child under the age of ~~14~~ *16* in the commission *or attempted commission* of kidnapping, as defined in K.S.A. 21-3420 and amendments thereto, or aggravated kidnapping, as defined in K.S.A. 21-3421 and amendments thereto~~, 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~~.

~~(b) For purposes of this section, "sex offense" means rape, as defined in K.S.A. 21-3502 and amendments thereto, aggravated indecent liberties with a child, as defined in K.S.A. 21-3504 and amendments thereto, aggravated criminal sodomy, as defined in K.S.A. 21-3506 and amendments thereto, prostitution, as defined in K.S.A. 21-3512 and amendments thereto, promoting prostitution, as defined in K.S.A. 21-3513 and amendments thereto or sexual exploitation of a child, as defined in K.S.A. 21-3516 and amendments thereto.~~

~~(c)~~ *(b)* Capital murder is an off-grid person felony.

~~(d)~~ *(c)* This section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. K.S.A. 1994 Supp. 21-4622 is hereby amended to read as follows: 21-4622. Upon conviction of a defendant of capital murder and a finding that the defendant was less than ~~18~~ *16* 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.

Sec. 3. K.S.A. 1994 Supp. 21-4624 is hereby amended to read as follows: 21-4624. (a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. 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~~ *in a reasonable time before trial*. If such notice is not filed and served as required by this subsection, the county or district attorney may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced as otherwise provided by law, and no sentence of death shall be imposed hereunder.

(b) Except as provided in K.S.A. 1994 Supp. 21-4622 and 21-4623, and amendments thereto, upon conviction of a defendant of capital murder, the court, upon motion of the county or district attorney, 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 sen-

1994 Supp. 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. 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 imprisonment as provided by law and shall commit the defendant to the custody of the secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

(f) 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 as otherwise provided by law, and no sentence of death shall be imposed hereunder. 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.

Sec. 4. K.S.A. 1994 Supp. 21-4625 is hereby amended to read as follows: 21-4625. Aggravating circumstances shall be limited 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~~ *has one or more serious assaultive convictions.*

(2) The defendant knowingly or purposely killed, *attempted to kill* 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.

Sec. 5. K.S.A. 1994 Supp. 21-3439, 21-4622, 21-4624 and 21-4625 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

Approved: April 28, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 14, 1995 in Room 313-S of the Capitol.

All members were present except:
Representative Clyde Graeber - Excused
Representative Belva Ott - Excused
Representative Joel Rutledge - Excused
Representative Candy Ruff - Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Gene Johnson, Kansas Alliance on Alcohol & Drugs
Wanda Stewart, Mothers Against Drunk Drivers
Roger Carlson, Director of Health & Environment Laboratory
Dave Hanson, National Association of Independent Insurers
John Smith, Department of Revenue, Division of Motor Vehicles
Jim Keller, Department of Revenue, Division of Motor Vehicles
Tuck Duncan, Kansas Wine & Spirits Wholesalers Association
Carla Stovall, Attorney General
Darlene Stearns, American Civil Liberties Union
Bill Lucero on behalf of Sue Norton, Murder Victim's Families for Reconciliation
David Harper Kansas Collation Against the Death Penalty
Melody Curtis Cathy, Administrative Counsel Indigent Defense Services
Ron Wurtz, Capital Defense Coordinator, Board of Indigent Defense

MAR 14

Others attending: See attached list

Hearings on **HB 2519** - Drivers under 21 blood alcohol concentration .01 or greater, drivers license suspended, were opened.

Gene Johnson, Kansas Alliance on Alcohol & Drugs, appeared before the committee as a proponent of the bill. He told the committee that the loss of driving privileges would be a deterrent to underage drinking and driving. (Attachment 1)

Wanda Stewart, Mothers Against Drunk Drivers, appeared before the committee in support of the bill. She commented that she would be in favor of lowering the blood alcohol concentration lower than .04, since they are prohibited from drinking alcohol anyway. She provided the committee with handouts from MADD and stated that 29 states have established lower alcohol limits for drivers under the age of 21. Many of these states have established .00 or .02 tolerance levels. (Attachment 2)

Roger Carlson, Director of Health & Environment Laboratory, appeared before the committee with general information and to answer questions. He stated that this bill establishes a deterrent for under age drivers. The instruments that Kansas has are designed to measure alcohol levels at approximately .01 + or - .05, which is only 50% accuracy. Therefore, .01 might be hard to defend in court. If the Department had all new instruments it would be easier to determine the .01. Impairment begins at .05 and that is the reason why the commercial drivers BAC is set at .04, so they can be stopped before the impairment begins. (Attachment 3)

Chairman O'Neal asked if it would be simpler to have a test that shows any level of alcohol, so if the testing unit shows traces it has verified the presence of alcohol. Dr. Carlson responded that this is a worthy goal. The issue is what level is defensible. The Chairman stated that he understood that the existing equipment can detect the evidence of alcohol so there can be no positive-negative. Dr. Carlson agreed that the instruments are specific in their ability to detect alcohol.

Representative Garner asked if mouthwash or medicine with small amounts of alcohol could be detected by the equipment. Dr. Carlson answered that this would not be an issue. The officer is required to wait 20 minutes to make sure that he is not measuring mouth alcohol but, rather, deep lung alcohol.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

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Dave Hanson, National Association of Independent Insurers, appeared before the committee in support of the bill, as is. He commented that 40% of traffic fatalities between the ages of 15 - 20 were alcohol related and by lowering the BAC it would save more lives. (Attachment 4)

John Smith, Department of Revenue, Division of Motor Vehicles, appeared before the committee with a balloon draft which would change the BAC from .01 to .04 so that the division could properly and effectively administer the legislation. (Attachment 5)

Chairman O'Neal asked how the division would feel if the balloon amendment was adopted with the exception of the .04 and instead going with a positive/negative test. Jim Keller, Department of Revenue, Division of Motor Vehicles, commented that he didn't have any problems with that but .04 is defensible and it is questionable as to whether .01 or lower would be.

Tuck Duncan, Kansas Wine & Spirits Wholesalers Association, appeared before the committee as a opponent of the bill. He stated that impairment begins at .05 and law that would have BAC under that level would not be necessary. (Attachment 6)

Hearing on **HB 2519** were closed.

Hearings on **HB 2529** - Amendments to the capital murder and sentence of death statute, were opened.

Carla Stovall, Attorney General, appeared before the committee as the sponsor of the bill and explained why the bill was needed. (Attachment 7)

Darlene Stearns, American Civil Liberties Union, appeared before the committee as an opponent of the bill. She stated that this bill goes way too far in broading the death penalty. (Attachment 8)

Bill Lucero appeared on behalf of Sue Norton, Murder Victim's Families for Reconciliation, to provide the committee with her written testimony. (Attachment 9)

David Harper, Kansas Collation Against the Death Penalty, & David Gottlieb appeared before the committee as opponents of the death penalty. (Attachments 10 & 11)

Melody Curtis Cathy, Administrative Counsel Indigent Defense Services, appeared before the committee with an estimate that it would cost $573,000 to provide defense services for three capital murder defense cases. (Attachment 12)

Ron Wurtz, Capital Defense Coordinator, Board of Indigent Defense, appeared before the committee neither as a proponent or opponent of the bill. He told the committee that this bill would increase the number of potential death cases by allowing those age 16 and over to receive the death penalty. (Attachment 13)

Elaine Mann, League of Women Voters of Kansas and Donna Schneweis, Amnesty International did not appear before the committee but requested that their testimony be included in the minutes. (Attachments 14 & 15)

The committee meeting adjourned. The next meeting is scheduled for March 15, 1995.

State of Kansas

Office of the Attorney General

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ATTORNEY GENERAL

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TESTIMONY OF
ATTORNEY GENERAL CARLA STOVALL
HOUSE JUDICIARY COMMITTEE
March 14, 1995

In 1994, the Kansas Legislature passed a death penalty statute which recognized the overwhelming desire of the public to hold society's most heinous killers accountable for their actions. I am coming to you today to discuss minor changes in the statute which, I believe, will more closely reflect the legislative intent in last years bill, as well as modify a procedure which currently rushes a prosecutor in the decision to seek a death penalty.

I must again emphasize my support for an expanded death penalty which more accurately defines the rarified class of killers for whom the possibility of execution must exist. For example, a convicted murderer who escapes and kills again; or the premeditated killing of a witness, prosecutor or judge; or the torture, execution and dismemberment of a victim.

The current law defines seven very limited areas that qualify for consideration of a death penalty. In three of those instances, the murder is a capital murder during the commission of certain crimes. While it seems clear that the legislative intent was to cover a murder during the commission or the attempt to commit the crime, that language is not included. For example, the intentional and premeditated killing of a victim during the commission of a rape qualifies for the death penalty. Clearly, if the woman did not yield and the rape was only "attempted" and the victim was killed as a result, the crime is just as heinous. We should not reward murderers whose victims, by their dying struggle, prevent the completion of the crime.

The next proposed amendment addresses the unreasonable double requirement that a murderer first kill a child during a kidnapping and second that such kidnapping have been for the purpose of a sex offense. A mother of two small children asked me "Shouldn't it be enough to kidnap and execute a child? What if their only purpose was to kill my baby, or torture my baby? They must also have intended to rape my baby before qualifying for the death penalty?" So the amendment simply deletes the additional requirement that the state must prove that the reason the murderer kidnapped and killed a child was for a sexual assault. The amendment also

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Attachment 7

moves for consistency regarding the "age of innocence." It raises the age from 14 to 16. Who can argue that the kidnapping of a 14 or 15 year old isn't as outrageous. Our legislators from Kansas City are familiar with the case of Ann Harrison, a 15 year old Missouri girl kidnapped and murdered while waiting for her school bus. The community outrage was overwhelming, as it would be in Kansas, and yet 15 year old Ann Harrison would be "too old" for protection under the current statute.

Similarly, for those few 16 and 17 year olds who have killed or assaulted or raped before, we must make the ultimate penalty avaiiable to local prosecutors. Nearly seventy-percent of the states authorize capital punishment for certain murderers under the age of 18. The majority of states provide for a minimum age of 16 in recognition of the changes in America--some 16 and 17 year olds can be just as cold-blooded as their 18 year old friends. Instead of being driven by an outraged public when the first gang execution is orchestrated by a 17 year old member to avoid the death penalty, let us pro-actively recognize that some 16 and 17 year olds must be treated as adults. Safeguards remain to insure that only juveniles certified to stand trial as adults and whose crimes and backgrounds fit the statutory requirements of a capital murder would qualify.

The third amendment changes the time frame within which prosecutors must file notice of seeking death. The change moves the timetable from 5 days after arraignment until a reasonable time before trial. This change does not affect the rights of either the state or defendant, but does give the prosecutor more time to determine whether to seek death. As a practical matter, there is enormous pressure on a prosecutor immediately following a murder to seek death, and this is at a time when laboratory reports may not be completed. The amendment gives time for the prosecutor to make an informed decision, rather than rushing to judgment.

Changes in Sec 3 (c) & (d) bring our statute into compliance with U.S. Supreme Court requirements that the sentencer be given as much information as possible regarding the defendant. It also eliminates a provision which would allow a defendant to commit perjury and not be prosecuted, carving out an exception for, then, convicted murderers that does not exist for others.

OUTLINE OF REMARKS BY
ATTORNEY GENERAL CARLA STOVALL
HOUSE JUDICIARY COMMITTEE
MARCH 14, 1995

I. Slightly expanded scope
   a) add attempted kidnapping
   b) murder 1 person, while trying to murder 2
   c) add attempted kidnapping of a child and remove necessary intent to commit sexual offense

II. Increase age of protection to 15 and lower age to 16 for perpetration.
   a) Now juveniles between 15 and 17 are in "never, never land"
   b) Our goal is consistency -- 16 and under protect/16 and up are perpetrators
   c) 16 states have capital punishment for 16 and up
   d) 60% of states have under 18 and less than 1/10 of 1% of people on death row are under 18
   **e) AMEND: RAISE AGE OF CHILD TO 17 AND LEAVE 18 AS LOWEST TO BE SUBJECTED TO CAPITAL PUNISHMENT

III. Section 3a - "reasonable time before trial"

IV. Section 3c - uses United States Supreme Court test and results in defendant being able to admit more evidence

V. Section 3d - language now in Pattern Instructions but we propose making in statute.

VI.** Section 3e - AMEND TO REQUIRE AGGRAVATING FACTORS TO OUTWEIGH MITIGATING FACTORS. Now if they are equal, "tie" goes to state. We're proposing "tie" goes to defense. Single issue defense has identified they intend to challenge constitutionality.

VII. Section 4 - "assaultive convictions" to replace the definition of Agg. Battery. This language is used around the U.S.

(2)

Testimony by
District Attorney Nola Tedesco Foulston

February 8, 2005

To: Representative Ward Loyd and members of the
Corrections & Juvenile Justice Committee

Mr. Chairman and Ladies and Gentlemen of the Committee:

I have been the District Attorney for the Eighteenth Judicial District of Kansas for over sixteen years, and have been a practicing attorney in the State of Kansas for twenty-eight years. I serve as a member of the Kansas County and District Attorney Association and I represent the State of Kansas as a member of the Board of Directors for the **National District Attorneys Association** headquartered in Alexandria, Virginia. I was admitted to practice law by the **Supreme Court of the State of Kansas** and by the **United States District Court for the District of Kansas** in 1977. I have also been admitted as a practicing member of the bar of the **United States Supreme Court.** As District Attorney I supervise the prosecution of all capital murder cases in my jurisdiction and have served as trial counsel in the case of State of *Kansas v. Reginald and Jonathan Carr*.

My purpose today is to visit with you and from my perspective, discuss the ramifications of legislative action under consideration because of the recent decision in the case of *State of Kansas v. Michael Marsh*. What motivation should bring me before this legislative body other than the desire to protect the interest of justice? Clearly the motivation exists to secure the convictions and punishment of Reginald and Jonathan Carr, Gavin Scott, Michael Marsh, Douglas Belt and for that matter, the Johnson County conviction of John Robinson. I am also motivated by the recent killing of Greenwood County Sheriff Mat Samuels. There is no motivation to mislead or distract this well-intentioned legislative body.

As you know, in 2001, the Kansas Supreme Court upheld the Kansas Death Penalty in the case of *State of Kansas v. Gary Kleypas* and dealt with the issue of "equipoise" by ruling that the "problem" could be solved by the use of a well-crafted jury instruction. In the aftermath of the ***Kleypas*** decision, the following Kansas death penalty trials were successfully prosecuted: *State v. Reginald and Jonathan Carr* [Sedgwick County]; *State v. John Robinson* [Johnson County] and *State v. Douglas Belt*

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Attachment 2

[Sedgwick County]. Then, in 2004 the *Marsh* case came before the court and a majority of four reversed all the oars in the water, finding the Kansas Death Penalty Statute to be unconstitutional without any change of facts, circumstance or legal precedent. As Chief Justice McFarland points out, the only change at all was the composition of the court. While the *Marsh* case declared the law to be unconstitutional, a later appellate action stayed the decision until further review would determine its fate. We are now at those crossroads

The Supreme Court has "stayed" its decision in *Marsh* to allow the appeal process to take place. During this **stay**, capital cases can continue to be filed and prosecuted under the **existing statute, which we believe that the United States Supreme Court will find to be constitutional. If the United States Supreme Court agrees and finds that our current statute is constitutional, then, these existing cases [Carr, Robinson and Belt] would not be invalidated and pending or future cases** [including for example the most recent slaying of Sheriff Samuels in Greenwood County and a pending Johnson County Case] could **proceed without fear that they were brought under an unconstitutional statute.**

You should pay particular attention to the division of the **Marsh** court in its ruling. The slim majority opinion consisted of four justices. Three justices of the Supreme Court including the Chief Justice Kay McFarland wrote well-reasoned and strongly worded dissents. The dissents, particularly that of Justice Nuss, set forth point for point, how the United States Supreme Court precedents have already ruled on the same issue [in Walton v. Arizona] and found what has been interpreted as an identical statute to that of Kansas to be constitutional. **These Justices of our Supreme Court are telling you that the statute is constitutional. You must listen to them.**

Now pending before the Kansas Supreme Court is a motion by the Kansas Attorney General to reconsider its decision in striking down the Kansas Death Penalty. If this is denied, the Kansas Attorney General will then seek review by the United States Supreme Court.

There is a grave problem. Any attempt by the Kansas Legislature to "repair" the existing Kansas Death Penalty Act could be the death knell for review by the United States Supreme Court. *Certiorari is* a discretionary writ of the US Supreme Court.. In consultation with US Supreme Court criminal law experts from around the United States, including the Department of Justice, the Association of Government Attorneys in Capital Litigation, the National District Attorneys Association and the National Association of Attorneys General, it is extremely

unlikely that the United States Supreme Court would exercise its discretion and grant the writ if the legislature acts in the manner proposed. Your proposed "fix" would eliminate and obviate the need for the court to intervene. Therefore, it leaves those cases discussed [Carr et al] left without a remedy they deserve and one that can never be again asserted. There are rules of the US Supreme Court that might come into play that would have the effect of denying consideration for these pending death penalty cases, including those from Sedgwick County, that may never again have their day in court. This would be a travesty for the victims of those crimes, for our community, and impose a nullification of the verdicts of those juries who with full faith and confidence in our jury system imposed their verdicts based upon the law and the evidence.

Our careful legal review of the ***Marsh*** decision, in light of existing United States Supreme Court precedent and the Kansas Supreme Court 's 2001 decision in ***State v. Kleypas***, and the dissenting opinions in Marsh, make it abundantly clear that the ***Marsh*** case requires appellate review to the United States Supreme Court upon a *writ of certiorari.*

Therefore, as District Attorney, I strongly urge that all members of the Kansas Legislature not pursue any premature legislative action based upon the Marsh decision until the judicial review process is allowed to run its course. To do so at this time would cause irreparable harm to the verdicts imposed by Sedgwick County juries in pending cases where the death penalty has already been imposed upon Michael Marsh, Gavin Scott, Jonathan and Reginald Carr and Douglas Belt, and to the Johnson County case of State v. John Robinson.

Respectfully submitted,

Nola Tedesco Foulston

District Attorney Nola Tedesco Foulston
18th Judicial District of Kansas
Sedgwick County, Kansas

(3)

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House Corrections and Juvenile Justice Committee
Testimony in Opposition to HB 2061
9 February 2005

Mr. Chairman and Members of the Committee:

I am Bill Lucero, Kansas Coordinator of Murder Victims' Families for Reconciliation. My father was a homicide victim in 1972 in Santa Fe, New Mexico. After 5 years of struggling with depression, grief, anger, guilt and so many more emotions, I eventually became a steadfast opponent of capital punishment. Those of you who know me realize that I am *neither* a moralist nor some sort of bleeding heart apologist. As far as capital punishment is concerned I hope to prove that I am simply a pragmatist and realist.

A friend who knows my views on this subject well was recently surprised by my response when he asked me, "Bill, could you ever conceive advocating for the death penalty?" I replied unequivocally, "YES! *Providing* that it is fairly applied, both racially and without arbitrariness; that no innocent defendant would ever be executed; that it truly brought closure and healing to victims' families and that it would deter the likelihood of all future murders." Notice that I said nothing about cost- that is *your* issue, not mine!

I have lobbied against the Death Penalty at the Statehouse for the past 28 years. Although I am a Licensed Masters Level Psychologist, my purpose in testifying is not to get deeply involved in data but to suggest that capital punishment will not provide needed closure for murder victims' families. Instead it will only exacerbate their grief and make healing that much more difficult to attain. Members of Murder Victims' Families for Reconciliation typically have joined the organization long after the murder of their loved ones. They need time to heal and come to an understanding about the criminal justice system from a distance of their loved one's murder and subsequent trial of the defendant.

Now that the death penalty has been ruled unconstitutional by the Kansas Supreme Court, the affected families are going to be substantially challenged to make sense of the proceedings. If the US Supreme Court rejects the Certiorari petition offered by our Attorney General or they subsequently rule against the State, the seven defendants previously sentenced to death will instead be re-sentenced, typically with consecutive hard 40's or 50's depending on when the murder was committed. Now, try to imagine the personal agony the affected families have experienced since the time their loved ones were murdered. Due to the extraordinary length of the proceedings, they endured 3 to 10 times the length of a typical non-capital homicide trial. Likewise they had to endure a much longer pre-trial process as both the prosecution and defense needed much greater time to prepare their case. Awaiting the defendant's execution is in itself tremendously stressful. Any doubt a family member might harbor regarding the incongruity of taking another's life has to be countered daily with a renewed attempt to believe that the execution is justifiable and that "Justice" must be served.

And then there is the issue of the media. The families are continuously placed in the spotlight, required to recite over and over their acceptance of the death verdict and their desire that the execution process proceeds. Often such statements can have an ostracizing effect upon others, despite the sympathy the community may feel towards the family. A former prison guard involved in executions at Lansing wryly observed "the criminal has become more like [the family] used to be (repentant/ God fearing) and the survivors have become more like he used to be". My challenge is to put aside any pre-conceived leanings you may hold and ask the following question. If the US Supreme Court upholds the unconstitutionality of the present death penalty, are you then willing to risk putting more families through the same torturous process that the present victims' families were subjected by rendering a "quick fix" solution?

I assert to you today that the task of "fixing" the death penalty is impossible. Defense attorneys have cited numerous challenges to the constitutionality of capital punishment. To believe that this distinguished body can foresee upcoming legal challenges and thereby take a proactive avoidance course is absolutely naïve. For example, the issue of attorney competence was discussed in Monday's testimony. Kansas State Board of Indigent Defense Services administrator, Pat Scalia, was quoted that each of the Board's Capital Defense Unit's attorneys met the American Bar Association's minimum standards. Kansas should be proud to have those qualified attorneys trying cases so that we are less likely to convict an innocent defendant.

But, I submit that within 10 years a case outside Kansas will be decided in the US Supreme Court that will rule against a conviction based on inadequate defense counsel. Consider the likely probability that a judgment will be rendered that all states must prescribe *by statute* that defense counsel must be certified by those ABA standards. Even though Kansas' defense attorneys meet those qualifications, *because it wasn't legislatively mandated,* Kansas' statute is ruled unconstitutional. Now you can say, "Bill, don't bother us with your hypothetical scenarios". I would argue any "new and improved" version of the death penalty is seriously at risk of any number of constitutional flaws that can't be foreseen today. The 1994 Legislature thought they were passing a fair and constitutional law that would provide victims' families a sense of closure and finality. In hindsight, we can look back and observe how very, very wrong they were.

Last year the Legislature took a major step in providing security and finality when it passed the life without parole provision. I was deeply disappointed that Greenwood Sheriff Samuels accused murderer was not tried under this provision. The use and success of that sentencing discretion is clearly evident when Missouri and Oklahoma- 2 states busily executing defendants- and Kansas- with its dual abolitionist and death seeking identity- are compared with Iowa, an abolitionist state which provides maximum sentences for murder of life without parole. Please note on the accompanying chart the disparity between Iowa and the others: Iowa has consistently had one of the lowest murder rates in the nation while Missouri and Oklahoma are in the opposite camp. We in Kansas fall in between. Now I'll be the first to admit that statistical evidence can be misleading- but nevertheless this table gives pause to wonder about the death penalty's deterrent value compared to a true life sentence. In conclusion, I ask each of you, lets not make the mistake of reinstituting the machinery of death. Instead of trying to mend the current statute, let's end it, once and for all.

RANK ORDER & MURDER RATES PER 100,000 INHABITANTS OF KANSAS, IOWA, OKLAHOMA AND MISSOURI ACCORDING TO THE UNIFORM CRIME REPORT 1984- 2003

Year	US Avg	Kansas		Iowa		Oklahoma			Missouri		
		Rate	Rank*	Rate	Rank	Rate	Rank	Executions	Rate	Rank	Executions
1984	7.9	3.7	35	2.0	45	7.8	18		7.1	22	
1985	8.0	4.9	30	1.9	48	7.7	21		8.1	16	
1986	8.6	4.4	36	1.8	49	8.1	19		9.2	14	
1987	8.3	4.4	35	2.1	47	7.5	22		8.3	17	
1988	8.5	3.4	39	1.7	50	7.4	21		8.0	18	
1989	8.7	5.5	29	1.9	48	6.5	24		7.9	19	1
1990	9.4	4.0	39	1.9	48	8.0	20	1	8.8	19	4
1991	9.8	6.1	28	2.0	46	7.2	23		10.5	17	1
1992	9.3	6.0	28	1.6	49	6.5	24	2	10.5	13	1
1993	9.5	6.4	27	2.3	48	8.4	20		11.3	11	4
1994	9.0	5.8	28	1.7	46	6.9	22		10.5	13	
1995	8.2	6.2	26	1.8	48	12.2	3	3	8.8	16	6
1996	7.4	6.6	24	1.9	48	6.8	23	2	8.1	15	6
1997	6.8	6.0	24	1.8	46	6.9	21	1	7.9	14	6
1998	6.3	5.9	23	1.9	47	6.1	22	4	7.3	16	3
1999	5.7	6.0	20	1.5	49	6.9	14	6	6.6	17	9
2000	5.5	6.3	13	1.6	45	5.3	22	11	6.2	15	5
2001	5.6	3.4	32	1.7	45	5.3	20	18	6.6	12	7
2002	5.6	2.9	34	1.5	46	4.7	24	7	5.8	17	6
2003	5.7	4.5	28	1.6	47	5.9	18	14	5.0	23	2

* Rate refers to the murder rate per 100,000 inhabitants. Rank refers to rank order- highest to lowest- of the 50 United States.
Data supplied by the U.S. Dept. of Justice & the NAACP Legal Defense Fund.

(4)

Kansas Catholic Conference

6301 ANTIOCH • MERRIAM, KANSAS 66202 • PHONE/FAX 913-722-6633 • WWW.KSCATHCONF.ORG

Testimony on HB 2061
Corrections and Juvenile Justice
February 9, 2005
Kansas Catholic Conference – Sister Therese Bangert

"The new evangelization calls for followers of Christ who are unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil." (Pope John Paul)
(All quotes in bolded italics are from the United States Conference of Catholic Bishops statement "A Good Friday appeal to end the Death Penalty"-1999)

The death penalty issue is what first brought me to the Capitol in 1987 –
the year that six Senators changed their vote from "yes" to "no"
when Gov. Carlin's veto was not on the other end of their vote.

I learned a lot about Senators and the death penalty issue that session.
There were a few Senators who were quite sure
that the death penalty was good public policy for Kansas.
There were a group of Senators who felt strongly
that the death penalty was wrong and that Kansas had no business
being in the killing business.
Then there was the group that struggled
in their heart and spirit with their vote.
They struggled because they knew the polls showed
that the majority of their constituents favored the death penalty.

One Senator at my first visit said,
"After my last vote for the death penalty,
I had nightmares that I was executing someone."
He changed his vote.

I came to respect the special struggle of the vote on the death penalty.
I came to respect Senators for their struggle.

House C & JJ
2-9-05
Attachment 4

A lot has happened to me since that session in 1987.
I've served and am serving
on the Board of the Kansas Coalition Against the Death Penalty.
For six years I served on the Board
of the National Coalition Against the Death Penalty.
My religious community, the Sisters of Charity of Leavenworth
have taken a corporate stance against the death penalty.
In some way I have almost daily contact with some death penalty issue.
I tell people I've experienced more about the death penalty
then you want to know!

Sadly, many Americans – including many Catholics – still support the death penalty out of understandable fear of crime and horror at so many innocent lives lost through criminal violence.

Eight years ago I moved from Topeka to Kansas City.
In Kansas City I became a Police Chaplain.
I've gone to the prisons as a Chaplain since 1973.
I became a Police Chaplain
to place myself on the other side of the crime equation
– to minister there soon after a murder happens . . .
– to be the bearer of the news that someone's loved one is dead . . .
And in my pride I did not want people to say
that "naïve nun" does not know
what she is talking about when she quotes
the Bible, the Pope, the words of the Church in opposing the death penalty.

At this point I've lost track of how many J-1's (Police lingo for homicide) . . .
of how many J-1 scenes are part of my experience.
These experiences have taught me much.
They've taught me much
and only further deepened my resolve
to raise my voice against any violence wherever that may be.

I've also spent some time at each of the 5 death penalty trials
held in Wyandotte County.
I've seen grieving, angry victim families.
I've seen grieving defendant families.
I've seen pictures and heard scenarios
that have left bruises on my spirit.
But I've never felt killing another human being is a solution.

Respect for all human life and opposition to the violence in our society are at the root of our long-standing position against the death penalty. We see the death penalty as perpetuating a cycle of violence and promoting a sense of vengeance in our culture. As we said in *Confronting a Culture of Violence:* ***"We cannot teach that killing is wrong by killing."***

All my experiences have taught me that there are many parts of this process that I suspect you and your constituents have not thought about:

- Most of us think in terms of our loved one being murdered not our loved one being the murderer.
- Most don't consider the Corrections' officers who we ask to strap a person down and put them to death. Wardens and corrections officers have told me. "I can't say this publicly, Sister, but I'm against the death penalty. It is against everything we hope for in the Department Of Corrections."
- Most don't consider jurors who come back 10 to 15 years later in an appeals process and say, "If I had known such and such, I would not have voted for death." I believe we lay a life-long burden on people who we ask to be part of the process of killing someone.
- Most don't think of the incredible number of resources that go into executing someone. To this point, Kansas has provided good defense. But I watch huge amounts of resources go into both prosecution and defense.

We seek to educate and persuade our fellow citizens that this penalty is often applied unfairly and in racially biased ways.

- Since my move to Kansas City I experience what I have heard others talk about – watching the murders that make the front page and return to that space and the murders that merit two inches on an inside page.

Modern society has the means of protecting itself, without definitively denying criminals the chance to reform. I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary.

(Pope John Paul, January '99)

Last year this legislature passed a bill that provides for a sentence of life without the possibility of parole. Some call this bill death by incarceration.

In the name of the Catholic Bishops of Kansas, I urge you to "end not mend" the death penalty in Kansas.

Testimony
House Corrections and Juvenile Justice
February 9, 2005
Mary Ann Slattery
Former Assistant District Attorney
Wyandotte County
In support of Repeal of the Death Penalty

Good afternoon, Mr. Chairman and Members of the Committee,

For the past twenty-five years I have been a prosecutor in Wyandotte County. As you well know, Wyandotte County always is either number 1 or 2 in the violent crime category. Until two weeks ago, when I retired, I was the Chief Deputy District Attorney. I have always been very concerned about public safety and victims' rights. However, I have grave concerns about Kansas having any type of death penalty and would urge you to repeal our current law.

If you were to talk with defense attorneys in our jurisdiction, I believe they would tell you I am considered tough on plea bargains and definitely not "soft on crime."

I am wholeheartedly against the death penalty for the following five reasons:

1. I think it is morally wrong to take any person's life. Capital punishment will not bring back the life lost. It is not a proven deterrent. Many states with the death penalty have very high homicide rates in spite of capital punishment laws.

2. The death penalty is not cost effective. Money could better be spent on victim compensation, prisons, rehabilitation programs, crime prevention or to ease the crisis in funding to all levels of education.

3. I believe that society can be protected by locking up extremely dangerous people for life. The State should have available sentencing options which would virtually guarantee that dangerous criminals would not be released.

4. It is inconsistent for a society to teach the value of human life and then to take a human life by means of a death penalty. Some people have been sentenced to death—and even executed—and later have been found to be innocent.

5. The death penalty, whether broad or narrow in scope, would ultimately be applied to very few persons. Our resources and energies should be focused on making life better for all Kansans rather than on taking life from a few.

The five reasons I have just given I sent to all members of the Kansas Senate and House in February of 1994. Unfortunately in 1994, Kansas implemented the Death Penalty. Thankfully no one has yet been executed.

Since the death penalty law was passed Wyandotte County has filed and tried several death penalty cases. My convictions against the death penalty have only grown stronger. To see the time and energy expended on capital murder cases is appalling. The expense to the taxpayers in Kansas is much greater than was ever projected when the death penalty was passed. Because of the heightened scrutiny in these cases, the time devoted by the Court, the State and the Capital Defenders is unbelievable. Victim families wait two, three or four years for resolution of a case when a typical first degree murder case should be resolved by a jury within a year from arrest. The appeal process is also very costly. Before Kansas enacted the death penalty there was only speculation as to its cost. Now the figures are coming in. It is unconscionable the amount being spent so that the State may execute an offender. The needs of the poor, the elderly and our youth could be much better met with the funds now being wasted on death penalty cases.

I would ask you to vote to repeal the death penalty and to put our limited financial resources where they will benefit all Kansans. I ask that you not fund death penalty cases and executions in the name of our citizens. "End it, don't mend it!"

Sincerely,

Mary Ann Slattery
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House Committee on Corrections and Juvenile Justice
February 9, 2005
House Bill 2061

Testimony of:

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Kansas' recent 10-year experiment with the death penalty has been one of arbitrariness, racial disparity, appellate reversals and incredible expense. This should be no surprise, however, since this has been the history of capital punishment in America.

As an attorney who has litigated death penalty cases for the past 25 years, in Illinois, Kansas and in federal courts throughout the country, I can attest that the Kansas experience with the death penalty has been and will continue to be the same as other states throughout the nation.

The legal debacle created by the Marsh and Kleypas decisions does not make Kansas an aberration. State after state has seen the majority of its death sentences reversed, even with unflawed statutes. A Columbia University study found that of 4,578 death sentences adjudicated completely, i.e., through federal habeas review, during a 23-year period, 68% -- more than two out of three -- were found to be "seriously flawed." According to the study, 1,885 death sentences (41%) were reversed because of serious error when reviewed on direct appeal. Of the death sentences that survived state direct and post-conviction review, 599 were federal review. Of those 599 death sentences, 237 (40%) were reversed due to serious error. Based on the foregoing, the study concludes that nationally, the overall error-rate in our capital punishment

system was 68%. Error rates in the two most experienced death penalty states tracked this basic average, with 52% of Texas cases reversed and 73% of those from Florida.

Non-death belt states fared no better. The reversal rate of New Jersey capital cases reviewed on state direct appeal alone is 70%. Of 51 death sentences reviewed on direct appeal, the New Jersey Supreme Court found reversible error in 36. A high affirmance rate by a state's highest court does not change the overall reversal rate. The California Supreme Court, one of the most conservative in the nation, reverses only 10 percent of death sentences, one of the lowest rates in the country. However, federal courts have reversed 62 percent of the sentences affirmed by the California court, the highest rate nationally, resulting in an overall reversal of two out of every three capital cases.

Neither does the amount of funding for death penalty defense alter the two-thirds reversal rate. California typically spends much more money on capital cases than most states, but the dozens of death sentences reversed since 1987 involved trials marred by the same types of problems found in states known for spending less on capital cases, such as Texas and Alabama: lawyers who put on perfunctory defenses; prosecutors who concealed evidence; and mistake-prone trial judges.

If the death penalty continues in Kansas, with a repaired statute, we can look forward to two cases reversed for every case upheld. This Legislature must decide if this is a course worth pursuing.

Besides being prone to reversal, the death penalty is both racially and geographically biased. The recent report issued by the Kansas Judicial Council Death Penalty Advisory Committee examined the State's application of capital punishment and the hefty price tag of seeking the death penalty. The Committee found that since Kansas reinstated the

death penalty in 1994 there were 44 potential capital cases involving minority victims. However, none of these cases resulted in a death sentence. Of the eight defendants in Kansas who did receive death sentences, all of their victims were white. This racial disparity in Kansas is mirrored in the practice in the rest of the nation. As has been the case for many years, the great majority of those executed in 2004 were guilty of murdering white victims. Only 12% of those executed were convicted of murdering a black person, despite the fact that blacks are victims in about 50% of murders in the U.S. Texas, which has carried out 336 executions since the death penalty was reinstated, has executed only one white person for the murder of a black person, and in that case there was also a white victim.

Geographic disparity is also an issue in Kansas. Sedgwick County had 17 potential capital cases. Wyandotte County had 25. Sedgwick County went to trial in eight of its 17 capital cases, Wyandotte only two. Of the eight death sentences imposed in Kansas in the past 10 years, six originated in Sedgwick County and only two cases were from the entire rest of the state. No death verdicts have come in Wyandotte County cases, although that county has the most potential capital cases of any county in the state. The Legislature must ask itself if a law this arbitrarily enforced represents justice at all.

All of these systemic failures come when, by every measure, the death penalty in the U.S. is at its lowest ebb in popular support

One of the best measures of public support for the use of the death penalty is the number of death sentences meted out annually. In the late 1990's, the number of death sentences in the country averaged about 300 per year. That rate has dropped by 50%. The Bureau of Justice Statistics reported 144 death sentences in 2003, the lowest number in 30 years, until 2004 when there were 130 death sentences.

The size of death row had increased steadily from 1976 until 2001. Since 2001,however, it has been in decline. One year ago, the NAACP Legal Defense Fund reported 3,504 people on death row; at the same time this year, the total was down to 3,471. The decline this year occurred even without a large number of commutations as occurred in Illinois in 2003.

Actual executions in 2004 were down 10% from 2003 (from 65 to 59), and they have dropped 40% since 1999. Again, in 2004, the great majority (85%) of the executions took place in the South. Only 2 states outside of the South (Ohio and Nevada) carried out executions last year. Seventeen percent of those executed this year waived their appeals.

Public support for the death penalty has also declined. This is shown most clearly in opinion polls that offer a choice between the death penalty and life without parole as the appropriate sentence for first-degree murder. When those options are considered, support for the death penalty has dropped and support for life without parole has steadily increased, so that they are now within a few percentage points. The Gallup Poll of May 2004 reported that 50% of respondents favored the death penalty while 46% favored life without parole, a difference close to the 3-point margin of error in the poll. In 1997, the difference between these two choices was 32 percentage points.

The continuation of the death penalty in Kansas will be a futility which will result only in more reversals, more disparity and more expense. I urge you to vote no on House Bill 2061 and reject any attempt to "fix" the Kansas death penalty statute and continue this 10-year folly.

(7)

Testimony before the House Corrections and Juvenile Justice Committee
On House Bill 2061
by
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My purpose in coming before the Committee today is to highlight some of the more recent proposals other states have considered to enhance the reliability of the decisions in death penalty cases and to help ensure that no innocent person is sentenced to death. Although obviously this is not the main thrust of the bill, I believe that as long as changes are being made to the death penalty statutes, these proposals should at least be examined. I would also like to talk about what I see as the next challenge to the language regarding K.S.A. 2004 Supp. 21-4624(e). I want to make it clear at the outset that I come before the committee as a neutral party, and my testimony is presented for informational purposes only. The wisdom of adopting any or all of the proposals that I discuss is left up to the Committee.

Proposals Other States Have Adopted to Enhance Reliability

This part of my testimony, while not related specifically to the weighing equation, highlights some of the measures adopted by other states to reduce the risk of an innocent person being sentenced to death, and to enhance the reliability of death sentences. This testimony is based on research that I conducted into other states as a member of the Kansas Judicial Council's Death Penalty Advisory Committee, and draws heavily on studies conducted by Connecticut and Illinois: The State of Connecticut Commission on the Death Penalty in Connecticut (Jan. 8, 2003) and the Report of the Governor's Commission on Capital Punishment for the State of Illinois (April 15, 2002). Once again, while it is not my purpose to advocate that these same or similar proposals be adopted by the Committee, I believe that they are items of which the Committee should be made aware.

1. Open File Discovery

Both the Illinois and Connecticut reports found problems with the failure of the prosecution to turn over exculpatory evidence and investigative materials in death penalty cases, often because the materials were never in fact turned over to the prosecutor to begin with. 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 Illinois Commission further recommended that prosecutors be given access to all police investigatory procedures. 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. 5/103-2.1 (criminal prosecutions); 725 I.L.C.S. 5/114-13 (juvenile offenders).

The Connecticut Commission report recommended that an open-file discover 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. To date, no action has been taken on that proposal.

Kansas statutory and case law clearly acknowledges a duty of prosecutors to disclose exculpatory evidence. There is, however, no law which mandates that police keep track of evidence and turn over such evidence to the prosecution. Similarly, while many prosecutors in Kansas voluntarily follow an "open-file" discovery policy, there is no law which mandates such a policy.

2. Safeguards for Eyewitness Testimony

The Illinois and Connecticut Reports also contained several proposals designed to reduce perceived problems with the reliability of eyewitness testimony. Both reports recommended that lineups be done sequentially, with the persons or photographs 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. The basis for this recommendation was an attempt to eliminate the witness's tendency to identify the person who looks most like the perpetrator.

Both reports 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. The Illinois Commission recommended that this procedure be used "[w]hen practicable".

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. The Illinois Commission further recommended that the witness be told that he or she should not assume that the person administering the lineup or photo spread knows which person is the suspect. The purpose of this proposal was to reduce the possibility that the witness will believe that law enforcement is signaling him or her as to which person to pick.

The Illinois Commission recommended that a clear written record be made of any statements made by the witness at the time of the identification regarding his or her confidence in the identification, as well as any feedback from law enforcement personnel. The purpose of this recommendation was 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 intentional feedback from law enforcement personnel.

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

3. Investigation Procedures.

Both The Illinois and Connecticut Commission recommended that procedure be put in place to help ensure the reliability of confessions. The Connecticut Commission recommended a requirement that questioning of suspects conducted in police facilities be recorded, preferably on videotape, but with audiotape allowed were videotape is not practicable. The Illinois Commission similarly recommended that videotape of the *entire* interrogation at a policy facility be conducted. The Illinois Commission recommended that, where videotape of the entire interrogation is not practicable, the statement taken prior to the videotape be reread to the suspect on videotape, with the suspect given the opportunity to either confirm or deny its accuracy. Illinois has adopted this recommendation in modified form. Beginning in 2005, all statements in Illinois must be video- or audio-taped, and non-taped statements are presumed to be inadmissible unless one of nine exceptions applies.

4. Informant Testimony

Both Kansas and Illinois law provide safeguards to compensate for the unreliability of testimony from jailhouse informants. Kansas has adopted a pattern jury instruction which 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." P.I.K. Crim. 3d 52.18A(2003). Illinois law goes even further, and now prohibits the death penalty if the only evidence of the defendant's guilt is the uncorroborated testimony of a jailhouse informant or accomplice. 720 I.L.C.S. 5/9-1(h-5).

Proposed Changes to the Weighing Equation

As currently proposed, House Bill No. 2061 corrects the problem with the "weighing equation" in K.S.A. 2004 Supp. 21-4624(e) identified by the Kansas Supreme Court. K.S.A. 2004 Supp. 21-4624(e) currently provides that, where the jury unanimously finds that the aggravating circumstances are not outweighed by the mitigating circumstances, death is the result. The proposed amendment instead provides that death will be the result only where the aggravating circumstances outweigh the mitigating circumstances, and further makes it clear that death will not be imposed where the aggravating and mitigating circumstances are equal. This language is certainly sufficient to correct the problem identified by the Kansas Supreme Court.

What I would like to highlight, however, is what I perceive to be the next challenge to the weighing equation: that its mandate that death be imposed if the jury finds that the aggravating factors outweigh the mitigating factors may not allow the jury

to give full weight to the mitigating evidence. While the no statute has been overturned on this basis, it seems clear that this will be a battleground for the future.

Certainly, Kansas is not alone in using a mandate of death when aggravating circumstances outweigh mitigating circumstances. Other states such as California, Connecticut, and Maryland have basically the same system. It is also important to note that there is no real indication that such a mandate is a problem.

However, concern that there might be an issue has led some states to adopt a slightly different form, where a finding that aggravating circumstances outweigh mitigating circumstances is required for the jury to impose death, but does not mandate death. An example of such a statute is the Florida system, on which the Kansas death penalty system is loosely based. Under that system, the jury is asked whether aggravating circumstances exist, whether they are outweighed by mitigators, and, if not, whether, based on this consideration the defendant should be sentenced to death. Fla. Stat. Ann. § 921.141. North Carolina, another state Kansas has relied upon in drafting its death penalty statutes, has also adopted the same system. N.C. Gen Stat. Ann. § 15A-2000.

It appears that, by adding language similar to that in the Florida and North Carolina statutes, Kansas could solve this issue before it actually becomes a problem.

Conclusion

As I have noted above, the purpose of this testimony is to make the Committee aware of some of the measures that have been recommended or adopted in other states to enhance the reliability of death sentences, as well as a potential issue with regard to the proposed language of the weighing equation. I have attached copies of the statutes referenced. I remain at your service to provide more information should it be deemed helpful.

Illinois Statutes Referenced:

725 I.L.C.S. 5/103-2.1

When statements by accused may be used.

(a) In this Section, "custodial interrogation" means any interrogation during which (i) a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response.

In this Section, "place of detention" means a building or a police station that is a place of operation for a municipal police department or county sheriff department or other law enforcement agency, not a courthouse, that is owned or operated by a law enforcement agency at which persons are or may be held in detention in connection with criminal charges against those persons.

In this Section, "electronic recording" includes motion picture, audiotape, or videotape, or digital recording.

(b) An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding brought under Section 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.2, or 9-3.3 of the Criminal Code of 1961 unless:

(1) an electronic recording is made of the custodial interrogation; and
(2) the recording is substantially accurate and not intentionally altered.

(c) Every electronic recording required under this Section must be preserved until such time as the defendant's conviction for any offense relating to the statement is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is barred by law.

(d) If the court finds, by a preponderance of the evidence, that the defendant was subjected to a custodial interrogation in violation of this Section, then any statements made by the defendant during or following that non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed to be inadmissible in any criminal proceeding against the defendant except for the purposes of impeachment.

(e) Nothing in this Section precludes the admission (i) of a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing, (ii) of a statement made during a custodial interrogation that was not recorded as required by this Section, because electronic recording was not feasible, (iii) of a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness, (iv) of a spontaneous statement that is not made in response to a question, (v) of a statement made after questioning that is routinely asked during the processing of the arrest of the suspect, (vi) of a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement, (vii) of a statement made during a custodial interrogation that is conducted out-of-state, (viii) of a statement given at a time when the interrogators are unaware that a death has in fact occurred, or (ix) of any other statement that may be admissible under law. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions described in this subsection (e) is applicable. Nothing in this Section precludes the admission of a statement, otherwise inadmissible under this Section, that is used only for impeachment and not as

substantive evidence.

(f) The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

(g) Any electronic recording of any statement made by an accused during a custodial interrogation that is compiled by any law enforcement agency as required by this Section for the purposes of fulfilling the requirements of this Section shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, and the information shall not be transmitted to anyone except as needed to comply with this Section.

725 I.L.C.S. § 107A-5

Lineup and photo spread procedure.

(a) All lineups shall be photographed or otherwise recorded. These photographs shall be disclosed to the accused and his or her defense counsel during discovery proceedings as provided in Illinois Supreme Court Rules. All photographs of suspects shown to an eyewitness during the photo spread shall be disclosed to the accused and his or her defense counsel during discovery proceedings as provided in Illinois Supreme Court Rules.

(b) Each eyewitness who views a lineup or photo spread shall sign a form containing the following information:

(1) The suspect might not be in the lineup or photo spread and the eyewitness is not obligated to make an identification.

(2) The eyewitness should not assume that the person administering the lineup or photo spread knows which person is the suspect in the case.

(c) Suspects in a lineup or photo spread should not appear to be substantially different from "fillers" or "distracters" in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

720 I.L.C.S. 5/9-1(h-5)

Decertification as a capital case.

In a case in which the defendant has been found guilty of first degree murder by a judge or jury, or a case on remand for resentencing, and the State seeks the death penalty as an appropriate sentence, on the court's own motion or the written motion of the defendant, the court may decertify the case as a death penalty case if the court finds that the only evidence supporting the defendant's conviction is the uncorroborated testimony of an informant witness, as defined in Section 115-21 of the Code of Criminal Procedure of 1963, concerning the confession or admission of the defendant or that the sole evidence against the defendant is a single eyewitness or single accomplice without any other corroborating evidence. If the court decertifies the case as a capital case under either of the grounds set forth above, the court shall issue a written finding. The State may pursue its right to appeal the decertification pursuant to Supreme Court Rule 604(a)(1). If the court does not decertify the case as a capital case, the matter shall proceed to the eligibility phase of the sentencing hearing.

Execerpt From Florida Statute Referenced:

West's F.S.A. § 921.141

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death. . .

Excerpt from North Carolina Statute Referenced:

N.C.G.S.A. § 15A-2000

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(a) Separate Proceedings on Issue of Penalty. --

(1) Except as provided in G.S. 15A-2004, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. - Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

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