Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on January 24, 2005, in Room 123-S of the Capitol.

All members were present.

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

Conferees appearing before the committee:
Phill Kline, Kansas Attorney General
Ron Wurtz, Assistant Federal Public Defender
Pat Scalia, Executive Director, Board of Indigent Services
Nola Foulston, Sedgwick County District Attorney

Others attending:
See attached list.

Chairman Vratil called the meeting to order and asked if there were any bill introductions.

Melissa Wangemann, Legal Counsel for the Secretary of State, stated that the Secretary requested the introduction of a bill that would amend the charitable organization and solicitations act. Currently, charitable organizations with solicitations of more than $100,000 in a year have to file an audited statement, and the bill would raise the threshold to $500,000. This would take the burden off of small charities. (Attachment 1) Senator Goodwin moved, Senator Bruce seconded and the motion carried.

Chairman Vratil opened the hearing on **SB 28**.

SB 28 Death penalty; if aggravating circumstances outweigh mitigating circumstances, the sentence is death; if circumstances are equal, the defendant is not sentenced to death

Neutral:
Phill Kline, Kansas Attorney General, stated that, the day before, he and thousands of others honored the life of Sheriff Samuels, 42, who was shot dead while trying to serve a warrant on a repeat felony defendant for the manufacture and use of methamphetamine. General Kline stated he brought this up to help explain the difficult decision that the Committee faces, because, today, Kansas does not have an operable death penalty.

General Kline said no one can predict what tragedies lie ahead for the people of Kansas because of those who would perpetrate such heinous actions against innocent citizens and law enforcement personnel. If the legislature fails to act, Kansas will probably not have a death penalty for such future actions. Yet if the body does act, the opportunity for the U.S. Supreme Court to grant *certiorari* and prevail on the pending appeal is lessened. On average, the U.S. Supreme Court dockets between 8,000 and 9,000 cases a year and hear 80 cases a year. In short, 1 percent of cases seeking review are granted. General Kline believes Kansas has a one in seven chance of receiving *certiorari.*

General Kline outlined the sequence of events that will occur if *certiorari* is granted and indicated a decision in the case could be handed down between when it is scheduled for argument and the third week of June, 2006. If *certiorari* is denied, the mandate in the *Marsh* case will then stand. (Attachment 2)

Ron Wurtz, Assistant Federal Public Defender, stated his purpose in testifying was to highlight problems which are not directly tied to the death penalty statutes, but ultimately impact the reliability of decisions of prosecutors, judges, and juries in death penalty cases.

Mr. Wurtz stated that video-taping the entire interrogation of persons accused of a crime would render

evidence more reliable and ease the court's job in making its admissibility determinations, and may shorten cases when a defendant is confronted with his or her own words and behavior on video.

Mr. Wurtz stated that the biggest area where innocent people are convicted is through mistaken identification. The Illinois and Connecticut reports, as well as a number of other studies, are recommending that eyewitness viewings, whether line-ups or photos, be presented sequentially rather than as a group. The purpose is to eliminate "relative judgement" through which the witness identifies the person who looks most like the perpetrator. (Attachment 3)

Pat Scalia, testified on behalf of the Board of Indigent Defense Services. Ms. Scalia briefly stated the status of the current death penalty cases. As a result of the current appeal filed with the United States Supreme Court, Ms. Scalia stated there was no advantage to creating a new death penalty statute until there is a final decision on the last one. (Attachment 4)

Opponents:
Nola Folston, Sedgwick County District Attorney, encouraged that 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. (Attachment 5)

Paul Morrison, Johnson County District Attorney, testified that he believes restraint from taking action is important and in everyone's best interest at this time. Mr. Morrison stated if the legislature takes action now, it will lessen the chances of the U.S. Supreme court hearing the case on appeal. If that happens, the seven inmates currently on death row will most likely have their sentences converted to life terms of confinement, which in his opinion, would be a travesty. (Attachment 6)

Written testimony in opposition to the bill was provided by Mr. Thomas Drees, President of Kansas County and District Attorney Association, and Kristi Smith, south Central Coordinator, Murder Victims' Families for Reconciliation. (Attachments 7-8).

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for January 25, 2005.

*Please Route to All Guests

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-24-05

NAME	REPRESENTING
John Kiefhaber	Ks. Pharmacists Assoc.
Max Heidrick	Beloit Ks -
Pat Scalia	BIDS
Ron Wurtz	BIDS
Rudy M. Yearrell	Federal Council
Bill Lucas	MVFR
Heather Morgan	Division of Budget
Susan Ortiz	
Barbara Allander	
Amber Shawdi	PIMCA
Jeanne Goodwin	City of Wichita
Brad Smoot	Pfizer
Julene Maeker	Gov office
Kelly Peel	SRS/Addiction & Prevention Servs.
Richard Samaniego	KCDAA
Lucas Bell	KCDAA
Liz Heyka Sadler	
Megan Heyka Deeter	
Aliah Harrison	KAADAC
Lane Walsh	OJA

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-24-05

NAME	REPRESENTING
Patti Biggs	KSC
Julia Butler	KSC
Brendan Harmon	KSC
Pat Walker	
Dave Kleppe	KC STAR
Kevin Berone	KTLA
Rebecca Woodman	Capital Appellate Defender
Riyo Kusazumi	
Ashley McMillan	Senate President's Office
Carolyn Middendorf	Ks St Bd Educ
Deanna Hennessey	Amnesty International
KEVIN GRAHAM	A.G.
PHILL KLINE	A.G.
PAUL MORRISON	JOHNSON CO. D.A.
John Peterson	Ks Governmental Consulting
Deb Billingsley	Bd of Pharmacy
Melissa WANGEMANN	Legal Counsel for

RON THORNBURGH
Secretary of State

Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1594
(785) 296-4564

STATE OF KANSAS

MEMO

TO: SENATE JUDICIARY COMMITTEE

FROM: MELISSA A. WANGEMANN, LEGAL COUNSEL
OFFICE OF THE SECRETARY OF STATE

DATE: 24 JANUARY 2005

RE: BILL INTRODUCTION;
REGISTRATION OF CHARITABLE ORGANIZATIONS

The Kansas Secretary of State requests introduction of a bill that would update one statute contained within the Charitable Organizations and Solicitations Act.

BACKGROUND

Charitable organizations register with the Secretary of State. They must file a financial statement with their registration, detailing the activities of their last fiscal year. In lieu of filing the financial statement, a charitable organization may file a copy of its income tax returns. Any organization that collects more than $100,000 in annual contributions must also submit an *audited* financial statement from a CPA.

Charitable organizations receiving $100,000 in contributions are relatively small, and an audit generally costs $7,000-$10,000.

OBJECTIVE OF LEGISLATION

- Increase threshold amount requiring an audit from $100,000 to $500,000.
- Require filing of income tax returns to offset loss of audited statement.

Our bill would tie the requirement of an audit to charitable contributions exceeding $500,000 annually. We understand that this threshold amount is consistent with the threshold amount requiring an audit for receipt of federal funds. To offset the loss of the audited information, the new law would require copies of the income tax returns, which are a discretionary filing under current law.

Business Services: (785) 296-4564
FAX: (785) 296-4570
Web Site: *www.kssos.org*
E-mail: *kssos@kssos.org*

17-1763. Same; registration statement; audited financial statement; issuance of license and identification number; fee; rules and regulations. (a) Except for charitable organizations exempt under K.S.A. 17-1762 and amendments thereto, no charitable organization shall solicit funds in this state, nor employ a professional fund raiser to solicit funds in this state, for any charitable purpose, unless such organization has filed with the office of the secretary of state of the state of Kansas, a registered statement prior to solicitation.

(b) The secretary of state shall prescribe registration forms which shall be signed and sworn to by two authorized officers of the organization, including the chief fiscal officer, and which shall include the following information about such organization's activities in this state:

(1) The name of the organization and the name or names under which it intends to solicit;

(2) the purpose for which such organization was organized;

(3) the principal mailing address and street address of the organization and the mailing addresses and street addresses of any offices in this state;

(4) the names and mailing addresses and street addresses of any subsidiary or subordinate chapters, branches or affiliates in this state;

(5) the place where and the date when the organization was legally established, the form in which such organization is organized and a reference to any determination of such organization's tax-exempt status, if any, under the federal internal revenue code of 1986;

(6) the names and mailing addresses and street addresses of the officers, directors, trustees and principal salaried employees of the organization;

(7) the name and mailing address and street address of the person having custody of such organization's financial records;

(8) the names of the individuals or officers of the organization who will have responsibility for the custody of the contributions;

(9) the names of the individuals or officers of the organization who will have responsibility for the distribution of the contributions;

(10) the names of the individuals or officers of the organization who will have responsibility for the conduct of solicitation activities;

(11) the general purposes for which the organization intends to solicit contributions;

(12) a statement indicating whether the organization intends to solicit contributions directly or have such solicitation done on such organization's behalf by others and naming any professional fund raiser the organization intends to use;

(13) a statement indicating whether the organization is authorized by any other governmental authority to solicit contributions and whether such organization is or has ever been enjoined by any court from soliciting contributions;

(14) the cost of fund raising incurred or anticipated to be incurred by the organization, including a statement of such costs as a percentage of contributions received; and

(15) a copy of the charitable organization's federal income tax returns, if the charitable organization is required to file such; otherwise a financial statement covering complete disclosure of the fiscal activities of the organization during the preceding year. ~~Each organization may submit a statement~~ The financial statement shall be submitted on forms approved by the secretary of state, signed and sworn by at least two authorized officers of the organization, including the chief fiscal officer. Such financial statement shall include a balance sheet and statement of income and expense, clearly setting forth the following: Gross receipts and gross income from all sources, broken down into total receipts and income from each separate solicitation project or source; cost of administration; cost of solicitation; cost of programs designed to inform or educate the public; funds or properties transferred out of this state, with explanation as to recipient and purpose; and total net amount disbursed or dedicated for each major purpose, charitable or otherwise. ~~The secretary of state in the secretary's discretion may accept executed copies of federal internal revenue service returns and reports in lieu of a financial statement~~.

(c) A charitable organization that received contributions in excess of ~~$100,000~~ $500,000 during the organization's most recently completed fiscal year shall file, in addition to the federal income tax returns or statement required by subsection (b), an audited financial statement for the charitable organization's most recently completed fiscal year, prepared in accordance with generally accepted accounting principles, and the opinion of an independent certified public accountant on the financial statement.

(d) Upon receipt of any such registration, the secretary of state shall issue a charitable solicitation license and identification number. All certificates of registration and identification numbers issued to charitable organizations shall expire on the last day of the sixth month following the month in which the fiscal year of the charitable organization ends.

(e) Every charitable organization required to register with the secretary of state shall pay a fee of $20 with each registration.

(f) The secretary of state may adopt rules and regulations necessary for the administration of this act.

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
ATTORNEY GENERAL

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January 24, 2005

TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE

PHILL KLINE, KANSAS ATTORNEY GENERAL

CONCERNING SB 28

Chairman Vratil 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 17th 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 29th 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. To date, the Court has not acted on that motion. Should the motion be denied, our office will seek review 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 1st of March should a decision on the rehearing motion be handed down

Senate Judiciary
1-24-05
Attachment 2

by that time. 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 dockets 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

Testimony before the Senate Judiciary Committee
"Fixing the Death Penalty"
by

Ronald E. Wurtz[1]
Assistant Federal Public Defender
424 S. Kansas Avenue, Room 205
Topeka, Kansas 66603
785-232-9828

My purpose here is to highlight the problems which are not directly tied to the death penalty statutes themselves, but which nevertheless will ultimately impact the reliability of decisions of prosecutors, judges and juries in death penalty cases. It should be clear that I personally do not believe the use of capital punishment is good public policy for many reasons, but my purpose here is to suggest measures which, if this body chooses to retain the death penalty, would clearly make the process more fair and reliable.

I draw on two well-thought-of studies on this subject which are summarized in the Kansas Judicial Council Report of November 12, 2004. Those studies are the State of Connecticut Commission on the Death Penalty, Study Pursuant to Public Act no. 01-151 of the Imposition of the Death Penalty in Connecticut (Jan. 8, 2003) and Report of the Governor's Commission on Capital Punishment for the State of Illinois (April 15, 2002).

While this legislature may address the constitutional issues raised in the first two cases to be reviewed by the Kansas Supreme Court, and it may choose to narrow or broaden the reach of capital punishment, the fairness of that system cannot be accomplished if the information which is given to the prosecutors by investigators is not thorough and accurate. This testimony emphasizes the need to regulate that area of the law.

Full and Open Discovery

Probably the most frequent reason for reversal of capital cases relates to the failure of the prosecutors to disclose to the defendant exculpatory evidence. Of course the law is clear in its requirement that anything which is helpful to the defense relating to either guilt or punishment must be disclosed by prosecutors even in the absence of a request for that information by the defendant's lawyers. It is not the law that causes the problem, but the procedure for discovery in general that makes this such a frequent and serious problem. While there are cases where prosecutors unethically withhold such evidence in their zeal to win a conviction, these are likely very rare.

More common is a prosecutor's failure to recognize the exculpatory nature of evidence in the investigator's file. There is an easy fix for this problem: full and open discovery.

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[1]Formerly Shawnee County Public Defender, 1979-1994; Chief Attorney, Kansas Death Penalty Defense Unit, 1994-1998.

To achieve this goal, two areas must be addressed: (1) the prosecutor must receive all of the information the police acquire in their investigation, and (2) everything must be disclosed to the defense.

The Illinois Commission report recommended that police document all items of evidence, and turn this schedule over to the prosecutor, and further recommended that prosecutors be given access to all police investigatory materials. This Illinois Legislature adopted this recommendation in modified form, stating that police are required to give the prosecutor exculpatory information. 725 ILCS 5/103-2.1.[2]

Second, an "open file" discovery policy should be mandated. Many Kansas prosecutors voluntarily follow this policy, but they are by no means required to do so. If prosecutors are required to turn over their entire files to the defense (not including work product, of course), the chance of their inadvertent omission of exculpatory information would be substantially reduced.

Discovery Depositions

Although not addressed by the Connecticut and Illinois reports, the institution of discovery depositions to permit a thorough preparation of the case would also go a long way toward increasing the fairness and reliability of death penalty prosecutions. The State of Florida has used depositions in criminal cases for many years with good results. *See* Fla. R. Crim. P. Rule 3.220.

In Kansas, the prosecutor has the inquisition process to compel reluctant witnesses to give information relevant to criminal cases. The defense has no equivalent method of discovering valuable information. In a capital case, the defendant's lawyers are expected to leave no stone unturned in their investigation of both the guilt of the defendant and the defendant's background as it may bear on the issue of penalty during the penalty trial of the case. If someone has information which may be valuable to this inquiry, the only way a defendant can get it is to secure the voluntary cooperation of the witness, or subpoena the witness to trial without knowing the substance of the information the witness may give. While most often the former method is satisfactory, but in those occasions where the witness is reluctant, the defendant is left with no effective remedy. For example, if the someone has information that casts doubt on a prosecution witness's testimony, but that person is a friend of the victim or is otherwise biased against the defendant, without the ability to interview that witness, important information can be lost to the defendant.

Discovery depositions could be regulated by the Court to prevent abuse

Ex Parte Document Subpoenas

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[2]The Judicial Council Report cites 725 I.L.C.S. 5/114-13, which provides the same protections to juvenile offenders.

As noted above, the defense attorneys are expected to do a thorough investigation of the defendant's background in order to present a case for a life sentence. Failure to adequately conduct this investigation amounts to the ineffective assistance of counsel.

Much of this investigation involves the collection of documents from private and public organizations, much of which is normally confidential. While some will release the information upon a defendant's execution of a release, many organizations will not release relevant documents without court process. The defendant is entitled to have is case preparation remain confidential (subject to reciprocal discovery requirements), so he should be permitted to submit requests for document subpoenas ex parte to a judge to facilitate the adequate preparation of the cases. See e.g., Federal Rule of Criminal Procedure 17(c).

Interrogation Procedures

The extraction of confessions and admissions from persons accused of crime is an important part of any investigation, and the Courts are charged with the determination of the fairness of the procedures used to obtain that evidence. The video-taping of the entire interrogation would render this evidence more reliable, would ease the Court's job in making its admissibility determinations, and often shortens cases where the defendant is confronted with his/her own words and behavior in living color.

Both the Illinois and Connecticut Commissions have recommended procedures be put in place to help insure that suspects are not coerced or tricked into making an involuntary or false confession. In Kansas, video or audio-taping of an interrogation is not a prerequisite to allowing the statement into evidence at trial, but in my experience many police agencies utilize this procedure at least for part of the confession. It would not be hard to do. As the co-chair of the Illinois Commission reported, "Various police throughout the country who already follow this practice report no impairment of their ability to obtain admissions and confessions, a decrease in motinos to suppress based on claims of police coercion and trickery, and an increase in pleas of guilty, and jury acceptance of recordings as what was said and done at the station." Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done*, 51 Fed. Law. 37 (July 2004).

I have personally observed the proper use of video-taping, and it is usually devastating evidence against the accused. I have also observed cases in which the whole trial centered on the accuracy of a policeman's report of an interrogation where there was nothing but the officer's notes of that interview.

The Connecticut Commission recommended that questioning of suspects in capital cases that is conducted at the police station be recorded. Videotape is the preferred option, with audiotape allowed where videotape would be impracticable. The Illinois Commission made a similar recommendation that the entire interrogation at a police facility be conducted. Where a statement is made in a situation where recording is impracticable, the Commission recommended

that the statement later be read to the suspect on videotape and asked if it is accurate and true. Illinois adopted this recommendation in modified form, providing that, beginning in 2005, all statements must be taped and non-taped statements are presumed inadmissible unless one of nine exceptions apply. *See* 705 I.L.C.S. 405/5-401.5.

Mistaken Eyewitnesses

The Connecticut Report cited testimony from Barry Scheck[3] that mistaken eyewitness testimony was the main reason for 84% of wrongful convictions in a recent study of 74 U.S. cases. Both the Illinois and Connecticut reports made several recommendations to combat this problem

Both recommended that lineups be done sequentially with the potential witness viewing people or photos one at a time rather than viewing the whole lineup at once. The purpose is to eliminate "relative judgement" through which the witness identifies the person who looks most like the perpetrator. There are several studies cited in the Illinois Report which show that this procedure produces a lower rate of mistaken identifications in perpetrator-absent lineups with little loss in the rate of accurate identifications in perpetrator present lineups.

The reports also recommend "double-blind" lineups in which the official conducting the lineup is not aware of the identity of the suspect. Such a procedure would avoid the potential of cuing by the official.

Each report also recommended that the witness to the lineup be specifically told that the suspect might not be in the lineup or photo spread, thus reducing the pressure on the witness to identify someone. The Illinois Commission also recommended the witness be told not to assume the person administering the viewing knows which person is suspect, thus reducing the possibility the witness will believe that the law enforcement officer is "signaling" the witness to pick someone. Illinois has adopted these recommendations. 725 I.L.C.S. 5/107A-5(a).

The Illinois Commission recommended that a clear written record be made of any statements made by the witness at the time of the identification as to the witness' confidence that the identified person is or is not the perpetrator, and that this record be made prior to any feedback from police. This would reduce the possibility that the witness who makes a tentative identification at the lineup would make a stronger identification in court after receiving positive feedback from law enforcement officers after the lineup.

Finally the Illinois Commission recommends that identification procedures be videotaped when practicable. This recommendation was also codified. (Id.).

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[3]Director of the Innocence Project, Cardozo Law School.

Conclusion

By providing judges and defense counsel with the tools to present juries with facts that bear on the punishment as well and the guilt of those charged with capital crimes, this Legislature can reduce the chances of wrongful convictions and disproportionate punishments. The foregoing suggestions, if implemented will move toward a goal of fair and reliable litigation.

I have attached copies of the Illinois statutes which address these issues as well as some model legislation to explore the advisability of passing these measures. I remain at your service to consult and advise as you may see it helpful.

ILLINOIS STATUTES REFERENCED IN TESTIMONY

725 ILCS 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 [FN1] 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, [FN2] and the information shall not be transmitted to anyone except as needed to comply with this Section.

725 ILCS 5 § 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.

725 ILCS 5 § 114-13. Discovery in criminal cases.

(a) Discovery procedures in criminal cases shall be in accordance with Supreme Court Rules.

(b) Any public investigative, law enforcement, or other public agency responsible for investigating any homicide offense or participating in an investigation of any homicide offense, other than defense investigators, shall provide to the authority prosecuting the offense all investigative material, including but not limited to reports, memoranda, and field notes, that have been generated by or have come into the possession of the investigating agency concerning the homicide offense being investigated. In addition, the investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports, memoranda, and field notes, within its possession or control that would tend to negate the guilt of the accused of the offense charged or reduce his or her punishment for the homicide offense. Every investigative and law enforcement agency in this State shall adopt policies to ensure compliance with these standards. Any investigative, law enforcement, or other public agency responsible for investigating any "non-homicide felony" offense or participating in an investigation of any "non-homicide felony" offense, other than defense investigators, shall provide to the authority prosecuting the offense all investigative material, including but not limited to reports and memoranda that have been generated by or have come into the possession of the investigating agency concerning the "non-homicide felony" offense being investigated. In addition, the investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports and memoranda, within its possession or control that would tend to negate the guilt of the accused of the "non-homicide felony" offense charged or reduce his or her punishment for the "non-homicide felony" offense. This obligation to furnish exculpatory evidence exists whether the information was recorded or documented in any form. Every investigative and law enforcement agency in this State shall adopt policies to ensure compliance with these standards.

MODEL LEGISLATION, 2005 STATE LEGISLATIVE SESSIONS

AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS

SECTION 1: DEFINITIONS

For the purposes of this section:

A. "Eyewitness" means a person who observes another person at or near the scene of an offense;

B. "Photo lineup" means a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator;

C. "Live lineup" means a procedure in which a group of persons, including the person suspected as the perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator;

D. "Investigator" means the person conducting the live or photo lineup;

E. "Identification procedure" means either a photo lineup or a live lineup; and

F. "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

SECTION 2. EYEWITNESS IDENTIFICATION PROCEDURES

Not later than January 1, 2006, each municipal police department and the state police

shall adopt procedures for the conducting of photo lineups and live lineups that comply with the following requirements:

A. When practicable, the investigator shall be a person who is not aware of which person in the photo lineup or live lineup is suspected as the perpetrator of the offense;

1. When it is not practicable for the investigator to be a person who is not aware of which person in the photo or live lineup is suspected as the perpetrator of the offense:

a. the lineup will be presented simultaneously, not sequentially; and

b. the investigator will state in writing the reason that presentation of the lineup was not made by a person who was not aware of which person in the photo lineup or live lineup was suspected as the perpetrator of the offense;

B. The eyewitness shall be instructed prior to the identification procedure:

1. That the perpetrator may not be among the persons in the photo lineup or the live lineup;

2. That the eyewitness should not feel compelled to make an identification;

3. That when administering a live lineup or photo lineup in sequence rather than simultaneously:

(a) Each photograph or person will be viewed one at a time;

(b) The photographs or persons will be displayed in random order;

(c) The eyewitness should take as much time as needed in making a decision about each photograph or person before moving to the next one; and

(d) All photographs or persons will be shown to the eyewitness, even if an identification is made before all have been viewed.

C. The photo lineup or live lineup shall be composed so that the fillers generally fit the

description of the person suspected as the perpetrator and, in the case of a photo lineup, so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out;

D. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the person suspected as the perpetrator participates shall be different from the fillers used in any prior lineups;

E. At least five fillers shall be included in the photo lineup and at least four fillers shall be included in the live lineup, in addition to the person suspected as the perpetrator;

F. In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness;

G. In a live lineup, any identification actions, such as speaking or making gestures or other movements, shall be performed by all lineup participants;

H. In a live lineup, all lineup participants shall be out of the view of the eyewitness at the beginning of the identification procedure;

I. The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure;

J. Nothing shall be said to the eyewitness regarding the position in the photo lineup or the live lineup of the person suspected as the perpetrator, except as otherwise provided in subparagraph (D) of subdivision (3) of this subsection;

K. Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator;

L. The investigator shall seek, in the eyewitness's own words, his or her confidence

level that the person or persons identified in the lineup is the suspect;

M. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior to obtaining the eyewitness's statement that he or she is certain of the selection;

N. A written record of the identification procedure shall be made that includes the following information:

1. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's own words regarding how certain he or she is of the selection;

2. The names of all persons present at the identification procedure;

3. The date and time of the identification procedure;

4. In a live or photo lineup where the subjects were presented sequentially as opposed to simultaneously, the order in which the photographs or persons were displayed to the eyewitness;

5. In a photo lineup, the photographs themselves;

6. In a photo lineup, identification information and the sources of all photographs used; and

7. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

SECTION 3. REMEDIES FOR NONCOMPLIANCE

A. Evidence of a failure to comply with any of the provisions of this statute shall be considered

by the trial courts in adjudicating motions to suppress eyewitness identification.

B. Evidence of a failure to comply with any of the provisions of this statute shall be admissible in support of claims of eyewitness misidentification as long as such evidence is otherwise admissible.

C. When evidence of a failure to comply with any of the provisions of this statute has been presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of eyewitness identifications.

SECTION 4. TRAINING OF LAW ENFORCEMENT OFFICERS

From appropriations made for that purpose, the Secretary of Public Safety shall create, administer, and conduct training programs for law enforcement officers and recruits on the methods and technical aspects of the eyewitness identification practices and procedures referenced in this Act.

SECTION 5. EFFECTIVE DATE

Section 3 of this act shall take effect on January 1, 2006. Section 2 of this Act shall take place on July 1, 2007.

Submitted by Pat Scalia

Testimony on senate Bill 28
1/24/05
Senate Judiciary

Thank you for the opportunity to appear before you and offer testimony regarding the impact of SB 28 on the State Board of Indigents' Defense Services. I am Pat Scalia and I serve as State Director for BIDS.

The proposed legislation would change the burden of proof necessary for the imposition of the death penalty. The proposed legislation is an effort to correct statutory language found to be a constitutional violation by the Kansas Supreme Court in the Marsh case. However, prosecutors have requested that the Kansas Supreme Court reconsider its decision. In the event that the Kansas Supreme Court declines to reconsider its opinion, the prosecution advises that they will seek a review of the matter by the United States Supreme Court.

At this writing, eight persons have been sentenced to death but of these eight, one is to be retried, one death sentence was vacated by agreement, and one, the Marsh case resulted in the statute being found unconstitutional by the Kansas Supreme Court. Five death penalty cases are currently proceeding to trial. Three of these were filed in FY05. Each district court judge is handling the proceedings differently. A trial began last week in Montgomery County. The judge in that case is proceeding with a trial on what would be the guilt phase but is waiting for the outcome of both that trial and a final decision on the constitutionality of the statute before convening a separate jury to decide on a possible sentence of death. Other counties are proceeding toward trial pending the constitutionality decision and yet another has wisely stayed all proceedings. Certainly the idea of two separate juries hearing a case will be challenged on appeal. Other proceedings while the state of the law is in flux will be challenged as well.

There is no advantage in creating a new death penalty statute until we have a final decision on the last one. Further, if a new statute is passed, it is unlikely that the United States Supreme Court will examine the statute we currently have. We would be left with a statute intended to "fix" something without ever knowing what was broken.

Senate Judiciary
1-24-05
Attachment 4

Testimony by
District Attorney Nola Tedesco Foulston

January 24, 2005

To: Senator John Vratil and members of the Senate Judiciary 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*

Senate Judiciary
1-24-05
Attachment 5

[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. 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, *certiorari is* a discretionary writ of the US Supreme Court. 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

Testimony Regarding Senate Bill 28

Senate Judiciary Committee

Paul J. Morrison, District Attorney - Tenth Judicial District
January 24, 2005

As you are all aware, the Kansas Supreme Court in State v. Marsh recently struck down our death penalty statute, finding the system of weighing aggravating versus mitigating factors to be unconstitutional. As you are also aware, the Attorney General's Office is appealing this decision to the United States Supreme Court. While I certainly appreciate your interest in "fixing" this statutory problem, I strongly believe that restraint at this time is in everyone's best interest.

If the legislature corrects the problem, I believe it will lessen the chances of the United States Supreme Court hearing this case. If that happens, the seven inmates currently on death row will most likely have their sentences converted to life terms of confinement. I believe that would be a travesty as those seven compose some of the worst murderers in the history of this State.

If need be, there will be time later in this session to hopefully correct this problem. I would urge your restraint at this time.

Kansas County & District Attorneys Association

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January 22, 2005

Written testimony for SB 28
Chairman Vratil and Committee Members:

The Kansas County and District Attorneys Association (KCDAA) 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.

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 KCDAA 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 KCDAA 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,

Thomas J. Drees
Ellis County Attorney
KCDAA Board President

Testimony in opposition to Senate Bill 28
Senate Judiciary Committee
24 January 2005

Mr. Chairman and Members of the Committee:

I am Kristi Smith, speaking to you on behalf of Murder Victims' Families for Reconciliation. We are a group of survivors of family members that have had loved ones taken from us at the hand of another human being. I am here today to speak in opposition of Senate Bill 28.

My father, James K. Edwards was shot three times in the chest with hollow point bullets fired from a 357 magnum gun. Dad was murdered by Glendale Rider on December 15, 1978 in Wichita. Very briefly sanity escaped as I contemplated how putting a man to death for his murder would bring some satisfaction. At eighteen I had little knowledge of how the criminal justice system worked and assumed that Kansas had capital punishment and applied it as Indiana did. When the DA told me that Kansas did not have capital punishment I was relieved. Sanity for me shouted loudly that the death penalty was simply not the answer to justice, certainly not the answer for healing.

Conviction came after a long trial (a heart wrenching process for me) and I thought I had dealt with all that mattered. Truly, I had not moved very far at all in the healing process realizing that only after Glendale Rider came up for parole fifteen years later. The emotions were overwhelming and I was in the middle of the beginning again. Anger and fear took hold of me just as if someone had wrapped chains around my heart. What in the world …why do I have to…Lord, please make this go away. Being in such turmoil again was awful and I do not wish that for anyone that has survived such pain as in death by murder.

The capital punishment laws as written throughout history clearly exhibit flaws upon flaws exist. Historically the US and State Supreme Court(s) have made gigantic efforts to word the laws correctly in order to bring death (justice), but try as they might it just can't be done in a manner that is not complicated and drawn out. Those attempts at rewriting the laws bring intense pain, frustration and tears to family members across the nation. For us, living every day not being able to hold the person we love so dearly is pain enough. Sometimes we move from minute to minute hoping for a touch of peace. Is there a better way to bring justice without taking chances of remanded sentences? I believe that Kansas has some very suitable alternatives available in the hard forty, hard fifty and life without parole. Certainly these can keep Kansans safe without risking the execution of an innocent person. The alternative sentences would also protect survivors' privacy and enable a more rapid healing process by eliminating the lengthy appeals.
I urge you today to consider how much longer and how many more times we will visit this issue costing victims family members their peace and taxpayers millions without fixing this huge problem. Instead of mending the death penalty, please just end it.

Kristi Smith
South central Kansas Coordinator
Murder Victims' Families for Reconciliation
Kechi, Kansas