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 25, 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:
Kathy Lobb, South Advocates Coalition of Kansas
Jane Rhys, Kansas Council on Developmental Disabilities
Rocky Nichols, Disability Rights Center of Kansas

Others attending:
See attached list.

Chairman Vratil introduced a bill, in conjunction with the Attorney General, to provide for a three-judge panel to deal with school finance litigation. The bill would apply only when there was a lawsuit filed with an alleged violation of Article Six of the Kansas Constitution. Senator Schmidt moved, seconded by Senator O'Connor, and the motion carried.

Senator Schmidt introduced four bills. The first bill was requested by the Allen County Attorney and amends a bill passed several years ago that allows a County to seek reimbursement for prisoners who have means to pay medical costs incurred while in jail. Some judges are requiring counties to file civil actions as opposed to making the reimbursement part of the restitution order. This bill will allow restitution orders to cover this issue. The second bill was requested by Chief Judge Fred Lorenz and is related to medical malpractice screening panels, giving judges discretion to exceed the $500 cap on attorney fees for those serving on the screening panels. The third bill, also requested by Chief Judge Lorenz, deals with community service organizations that use offenders sentenced to do community service. The bill sets limitations on liability for those organizations who agree to receive people doing community service. The fourth bill relates to tort reform liability and provides that where punitive damages are awarded, those punitive damages would not go the plaintiff or to pay attorney's fees, but would go to the state. Senator Goodwin moved to introduce all 4 bills, seconded by Senator O'Connor, and the motion carried.

Dan Hermes, representing Kansas Coordinators of Projects, requested the introduction of a bill that would allow the Department of Revenue to look back more than five years to discover DUIs. Senator Schmidt moved, Senator Goodwin seconded, and the motion carried.

Tom Whitaker, Kansas Motor Carriers Association, requested the introduction of a bill that would prohibit indemnification process in transportation contracts between shippers and motor carriers. Senator Donovan moved, Senator Umbarger seconded, and the motion carried.

Kyle Smith, on behalf of the Kansas Bureau of Investigation, requested the introduction of a bill to make needed updates to the statutes used to investigate criminal activity on and using the Internet. The changes would be in criminal procedure and deal with inquisition subpoenas and interstate search warrants. (Attachment 1) Senator Donovan moved, Senator O'Connor seconded, and the motion carried.

Kevin Graham, on behalf of the Attorney General, requested the introduction of a bill related to sex crimes against children, increasing penalties by one level for indecent liberties of a child and aggravated indecent liberties of a child. The bill also deals with the number of counts someone may be charged with regarding sexual exploitation of a child. Mr. Graham gave the example of a person that has child pornography pictures. If caught with ten pictures, ten counts may be brought against the person. However, if that person has one

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.

million pictures of children on his computer hard drive, only one count may be brought against the person. Mr. Graham also requested the introduction of a bill to change the general statute of limitations for all crimes from two years to five years. This simplifies the procedures for many white collar felony crimes. Senator Donovan moved to introduce both bills, seconded by Senator O'Connor, and the motion carried.

Chairman Vratil opened the hearings on **SB 14** and **SB 32** and announced the Committee would hear testimony on both bills, as many of the witnesses were speaking on behalf of both. The bills are similar, with the major difference being one deals with the definition of cognitive disability and the other with the definition of mental retardation.

SB 14 Definition of mentally retarded for the purposes of imposing the death penalty; pre-trial hearing and special verdict question to the jury

SB 32 Persons with a cognitive disability not eligible for death penalty

Proponents:
Kathy Lobb, South Advocates Coalition of Kansas, testified in support of the bills. Ms. Lobb stated it was very important to protect people with severe intellectual disabilities form the death penalty and asked the Committee to support one of the two bills. (Attachments 2 &3)

Randy Hearell, Kansas Judicial Council, testified regarding **SB 32**, stating that in 2003, the legislature requested the Judicial Council to study the United States Supreme Court case of *Atkins v. Virginia*, 122 S Ct. 2242 (2002), which held that the execution of a person with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment. Mr. Hearell stated that a copy of the study was attached to his testimony. (Attachment 4)

Mr. Hearell also testified that **SB 32** was similar to **SB 355** introduced in 2004. It was also similar to **SB 14** in that both bills remove the "age of onset" language found in K.S.A. 76-12b01; delete the "casual link" language found in 21-4634; provide a pretrial hearing on the question of disability; provide for a special question to the jury and require the state Board of Indigents' Defense Services provide counsel for a person under the sentence of death to determine if that person is mentally retarded (or cognitively disabled).

Mr. Hearell stated that **SB 32** defines the term "cognitive disability" and originally was drafted to exempt a broader class of persons with functional disabilities from the death penalty than those with mental retardation exempted. The reason the Judicial Council chose to define "cognitive disability" as opposed to "mentally retarded" is that the reasons the U.S. Supreme Court gave in the Adkins case for not executing persons who are mentally retarded seemed to apply equally to persons with other forms of cognitive disabilities.

SB 32 is different from **SB 14** in that in **SB 14**, the definition of "significantly sub-average general intellectual functioning" utilizes a standardized test chosen by the Secretary of Social and Rehabilitation Services to measure such functioning. In **SB 32**, the means of measuring such functioning is not mentioned in the definition and is presumed to be professionally accepted standards.

Jane Rhys, Kansas Council on Developmental Disabilities, testified that the Council supports **SB 14** but prefers **SB 32**. Ms. Rhys stated that they support the elimination of the "age of onset" language from the current definition of mental retardation and the definition found in **SB 14**, page 4, lines 40 through 43 and page 5, lines 1 through 3.

Ms. Rhys was concerned with the addition that the standardized intelligence test be specified by the Secretary of Social and Rehabilitation Services. The individual who holds that position is selected by the Governor and may or may not have knowledge of various standardized tests that are available. Ms. Rhys recommended that if **SB 14** was being considered, that an amendment be considered to the bill on page 5, line 2, to eliminate "specified by the secretary of social and rehabilitation services". (Attachments 5 & 6)

Rocky Nichols, Disability Rights Center of Kansas, testified in support of the goals and merits of both bills. Both bills use two or more deviations as the standard for defining who is excluded from the death penalty.

However, **SB 32** says "two or more standard deviations below the norm" whereas **SB 14** says "two or more standard deviations from the mean score on a standardized intelligence test specified by the Secretary of SRS", which literally means two or more deviations below or above the mean. Mr. Nichols stated the Disability Rights Center of Kansas recommends the language in **SB 32**, defining "significant limitations" in intellectual functioning. (Attachments 7 & 8)

Written testimonies were provided by: Kerrie Bacon, Legislative Liaison for the Kansas Commission on Disability Concerns, supporting **SB 14** and **SB 32** (Attachments 9 & 10); Tonya Dorf, Kansas Association of Centers for Independent Living, supporting **SB 14** (Attachment 11); Rud Turnbull, Beach Center on Disability, supporting **SB 14** and **SB 32** (Attachment 12).

Opponent:
Written testimony opposing **SB 14** and **SB 32** was provided by Kevin O'Connor, Kansas County and District Attorneys Association (Attachments 13 & 14).

Chairman Vratil asked the Committee to read the written testimony from Mr. O'Connor before the Committee works the bill, as it is the only testimony in opposition of the bills.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for January 26, 2005.

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.

Continue to route

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/25/05

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Bryan Behgam	Rep. Davis
P Biggs	KSC
B Harmon	KSC
J Butler	KSC
David Klepper	KC STAR
Aliah Harrison	KAAAC
Jennifer Schwartz	KACM
Shannon L. Jones	SILCK
Paul D'A[illegible]	SEN. Bruce
Heather Morgan	Division of Budget
Dan Meroves	KCASAP
Bill Sneed	KMVFR
JIM CLARK	KBA
Randy M. Hearrell	KS Judicial Council
Angie Reinking	SACK
Kathy Lobb	SACK
Joe Rhys	KCDD
Rocky Nichols	DRC

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues 1/25/05

NAME	REPRESENTING
Kevin Barone	KTLA
Tom Whitaker	KMCA
Michael White	KCDAA
KEVIN GRAHAM	A.G.
John Peterson	Ks Govt Consulting
Mike Hutfles	KGC
[illegible]	OJA
MATT FLETCHER	INTERHAB
Kerrie Bacon	Kansas Commission on Disability Concerns (KCDC)

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Senate Judiciary Committee
Bill Request
Kyle G. Smith
On behalf of the Kansas Bureau of Investigation
January 25, 2005

Chairman Vratil and Members of the Committee:

On behalf of the Director Larry Welch, I am here today to request this committee introduce needed updates of our statutes used to investigate criminal activity on and using the Internet.

As the use of chat rooms, spoofed e-mail and the anonymity of the internet has become exploited by criminals, from pedophiles to terrorists, it has become apparent that we need updated investigative tools to deal with this new technology. We would request updating our investigatory statutes to better reflect the computerized world and use of the Internet. These changes would be in criminal procedure and deal with inquisition subpoenas and interstate search warrants.

As shown in the attached draft amendment to K.S.A. 21-3101, we would request an amendment that would simplify our investigative inquisition statute. Striking the existing language as proposed would give us one standard method for investigating and would speed up obtaining the subpoenas, which is crucial when trying to obtain digital records which can be erased in seconds. When I testified on SB 25, I proposed adding to the already long shopping list of crimes the new proposed terrorism and illegal use of weapons of mass destruction offenses. Given the parallel need for application in child pornography cases, it seems we should just consider changing the rule instead of adding exceptions.

Also, the use of the Internet has shown a gap in the law when search warrants are issued to identify suspects using the anonymity of the Internet as a shield. Since so many Internet service providers operate in other states - which don't have to honor our search warrants or we, theirs, criminals are able to operate across state lines in relative safety. Attached is a copy of a California statute that has worked very well in clarifying how search warrants for digital information from in-state and out-of-state corporations should be handled. A similar statute in Kansas would help.

Thank you for your time and consideration. I would be happy to answer any questions.

Senate Judiciary
1-25-05
Attachment 1

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

KBI Draft amendments to assist Internet investigations

22-3101. Inquisitions; witnesses. (1) If the attorney general, an assistant attorney general, the county attorney or the district attorney of any county is informed or has knowledge of any alleged violation of the laws of Kansas, such ~~person may apply to a district judge to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law. Upon the filing of the application, the judge with whom it is filed, on the written praecipe of such attorney, shall issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation. Such subpoenas shall be served and returned as subpoenas for witnesses in criminal cases in the district court. (2) If the attorney general, assistant attorney general, county attorney or district attorney, or in the absence of the county or district attorney a designated assistant county or district attorney, is informed or has knowledge of any alleged violation in this state pertaining to gambling, intoxicating liquors, criminal syndicalism, racketeering, bribery, tampering with a sports contest, narcotic or dangerous drugs or any violation of any law where the accused is a fugitive from justice, such~~ attorney shall be authorized to issue subpoenas for such persons as such attorney has any reason to believe or has any information relating thereto or knowledge thereof, to appear before such attorney at a time and place to be designated in the subpoena and testify concerning any such violation. For such purposes, any prosecuting attorney shall be authorized to administer oaths. If an assistant county or district attorney is designated by the county or district attorney for the purposes of this subsection, such designation shall be filed with the chief judge of such judicial district.
(3) Each witness shall be sworn to make true answers to all questions propounded to such witness touching the matters under investigation. The testimony of each witness shall be reduced to writing and signed by the witness. Any person who disobeys a subpoena issued for such appearance or refuses to be sworn as a witness or answer any proper question propounded during the inquisition, may be adjudged in contempt of court and punished by fine and imprisonment.

II.

(a) As used in this section, the following terms have the following meanings:

(1) The terms "electronic communication services" and "remote computing services" shall be construed in accordance with the Electronic Communications Privacy Act in Chapter 121 (commencing with Section 2701) of Part I of Title 18 of the United State Code Annotated. This section shall not apply to corporations that do not provide those services to the general public.

(2) An "adverse result" occurs when notification of the existence of a search warrant results in:

(A) Danger to the life or physical safety of an individual.

(B) A flight from prosecution.

(C) The destruction of or tampering with evidence.

(D) The intimidation of potential witnesses.

(E) Serious jeopardy to an investigation or undue delay of a trial.

(3) "Applicant" refers to the peace officer to whom a search warrant is issued pursuant to subdivision (a) of Section 1528.

(4) "California corporation" refers to any corporation or other entity that is subject to Section 102 of the Corporations Code, excluding foreign corporations.

(5) "Foreign corporation" refers to any corporation that is qualified to do business in this state pursuant to Section 2105 of the Corporations Code.

(6) "Properly served" means that a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed in Section 2110 of the Corporations Code.

(b) The following provisions shall apply to any search warrant issued pursuant to this chapter allowing a search for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where those records would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications.

(1) When properly served with a search warrant issued by the California court, a foreign corporation subject to this section shall provide to the applicant, all records sought pursuant to that warrant within five business days of receipt, including those records maintained or located outside this state.

(2) Where the applicant makes a showing and the magistrate finds that failure to produce records within less than five business days would cause an adverse result, the warrant may require production of records within less than five business days. A court may reasonably extend the time required for production of the records upon finding that the foreign corporation has shown good cause for that extension and that an extension of time would not cause an adverse result.

(3) A foreign corporation seeking to quash the warrant must seek relief from the court that issued the warrant within the time required for production of records pursuant to this section. The issuing court shall hear and decide that motion no later than five court days after the motion is filed.

(4) The foreign corporation shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in Section 1561 of the Evidence Code. Those records shall be admissible in evidence as set forth in Section 1562 of the Evidence Code.

(c) A California corporation that provides electronic communication services or remote computing services to the general public, when served with a warrant issued by another state to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant had been issued by a California court.

(d) No cause of action shall lie against any foreign or California corporation subject to this section, its officers, employees, agents, or other specified persons for providing records, information, facilities, or assistance in accordance with the terms of a warrant issued pursuant to this chapter.

DATE: January 25, 2005

TO: Senate Judiciary Committee

FROM: Kathy Lobb, Legislative Liaison
Self-Advocate Coalition of Kansas

RE: Senate Bill 14

Thank you for the opportunity to comment on Senate Bill 14.

My name is Kathy Lobb. I am representing the Self-Advocate Coalition of Kansas better known as SACK. SACK is the state wide advocacy group for adults with developmental disabilities. SACK is made up of approximately 20 local advocacy groups across the state. SACK is also a member of the Big Tent Coalition.

I am here to ask you to support this bill. We feel it is very important to protect people with severe intellectual disabilities from the death penalty. People can get disabilities after the age of 21 that can prevent them from understanding their actions. If someone with a disability breaks the law they should be punished but they should not be threatened with the death penalty.

We feel it does not matter what age you are when you acquire a severe intellectual disability. People who do not understand their actions should be protected from the death penalty. We do not want to see the death penalty applied to people who do not understand their rights and have limited capacity for reason and logic.

An important aspect of this bill is that people would have to meet a high standard to prove they have a cognitive disability. It also provides for a preliminary pre-trial determination of cognitive disability. This would protect the state from spending money on a death penalty trial for someone who meets the strict definition required in order be exempt from the death penalty. Again, individuals will still be tried and held accountable for their crimes; they just won't be threatened with death over actions they may not understand.

Thank you for your time.

Kathy Lobb

DATE: January 25, 2005

TO: Senate Judiciary Committee

FROM: Kathy Lobb, Legislative Liaison
Self-Advocate Coalition of Kansas

RE: Senate Bill 32

Thank you for the opportunity to comment on Senate Bill 32.

My name is Kathy Lobb. I am representing the Self-Advocate Coalition of Kansas better known as SACK. SACK is the state wide advocacy group for adults with developmental disabilities. SACK is made up of approximately 20 local advocacy groups across the state. SACK is also a member of the Big Tent Coalition.

I am here to ask you to support this bill. We feel it is very important to protect people with severe intellectual disabilities from the death penalty. People can get disabilities after the age of 21 that can prevent them from understanding their actions. If someone with a disability breaks the law they should be punished but they should not be threatened with the death penalty.

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An important aspect of this bill is that people would have to meet a high standard to prove they have a cognitive disability. It also provides for a preliminary pre-trial determination of cognitive disability. This would protect the state from spending money on a death penalty trial for someone who meets the strict definition required in order be exempt from the death penalty. Again, individuals will still be tried and held accountable for their crimes; they just won't be threatened with death over actions they may not understand.

Thank you for your time.

Kathy Lobb

KANSAS JUDICIAL COUNCIL

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ADMINISTRATIVE ASSISTANT

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council - Randy M. Hearrell**

DATE: **January 25, 2004**

RE: **2005 SB 32**

In 2003, the Legislature requested the Judicial Council to study the United States Supreme Court case of Atkins v. Virginia, 122 S Ct. 2242 (2002), which held that execution of a person with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment.

The requested study was assigned to the Judicial Council Criminal Law Advisory Committee. A copy of the Committee report is attached to this testimony. In addition, the Committee proposed, and the Judicial Council approved, introduction of 2004 SB 355. I have not attached a copy of SB 355 because it is nearly identical to 2005 SB 32.

SB 32 is similar to 2005 SB 14 in that both bills: remove the "age of onset" language found in K.S.A. 76-12b01; delete the "causal link" language found in 21-4634; provide a pretrial hearing on the question of disability; provide for a special question to the jury and require the state Board of Indigents' Defense Services provide counsel for a person under the sentence of death to determine if that person is mentally retarded (or cognitively disabled).

SB 32 defines the term "cognitive disability" and originally was drafted to exempt a broader class of persons with functional disabilities from the death penalty than those with mental retardation exempted. The definition of "cognitive disability" in SB 32 was intended to include persons with traumatic brain injury; organically caused brain injury, such as by stroke, encephalitis, meningitis or Alzheimer's disease; or extensive exposure to lead or other toxic material and who have a functional disability similar to mental retardation.

The reason the Judicial Council chose to define "cognitive disability" as opposed to "mentally retarded" is that the reasons the U.S. Supreme Court gave in the Adkins case for not executing persons who are mentally retarded seemed to apply equally to persons with other forms of cognitive disabilities. Those reasons are:

> "...by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions."

> "Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes."

In SB 14, because the "age of onset" language is not included in the definition of "mentally retarded" or "mental retardation" the group of persons covered by SB 14 and SB 32 are nearly identical.

SB 32 is different from SB 14 in that in SB 14 the definition of "significantly subaverage general intellectual functioning" utilizes a standardized test chosen by the Secretary of SRS to measure such functioning. In SB 32, the means of measuring such functioning is not mentioned in the definition and is presumed to be professionally accepted standards.

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

Background

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

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

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

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

History of HB 2349

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

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

Committee Review of HB 2349

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

1. Definition of "Mentally Retarded"

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

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

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

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

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

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

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

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

2. Committee Review of the Definition Issue

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

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

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

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

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

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

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

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

<u>3. Time of Hearing</u>

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

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

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

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

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

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

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

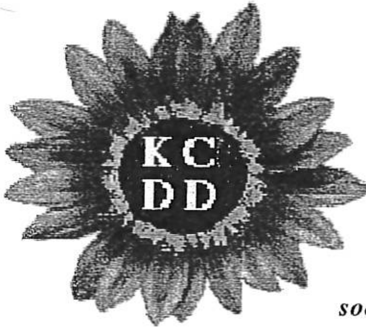
The Committee engaged in lengthy discussion on this issue, ultimately agreeing with Prof. Ellis that, even though it not yet completely clear whether *Ring* will apply to this situation, it is wiser to write the statute as if it does to insulate Kansas from potential litigation and appeals.

<u>4. Retrospective Application of *Atkins*</u>

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

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

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



Kansas Council on Developmental Disabilities

Submitted by Jane Rhys

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

SENATE JUDICIARY COMMITTEE

January 25, 2005

Mr. Chairman, Members of the Committee, my name is Jane Rhys and I am providing this information on behalf of the Kansas Council on Developmental Disabilities. We support Senate Bill 14, but prefer SB 32. Specifically, we support the elimination of the age of onset from the current definition of mental retardation as found " and the definition found in SB 14, page 4, lines 40 through 43 and page 5, lines 1 through 3:

> (26) ''Mental retardation'' or ''mentally retarded'' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.
> (27) ''Significantly subaverage general intellectual functioning'' means performance which is two or more standard deviations from the mean score on a standardized intelligence test, specified by the secretary of social and rehabilitation services.

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

Eliminating the age of onset expands the protection provided in our law to anyone who meets the definition of having a cognitive disability. This could include persons who have mental retardation, a traumatic brain injury, or Alzheimer's disease. At issue is <u>not</u> the type or cause of the intellectual impairment; at issue is whether we put to death individuals who do not have the intellectual capacity to understand that what they did was wrong. This was the issue the Supreme Court decided in *Atkins vs. Virginia*.

Attachment 1, from a paper by the American Association on Mental Retardation, defines mental retardation. This is the same definition used in SB 32 with the omission of age of onset. The AAMR has been defining and redefining mental retardation since 1921. They are the world's oldest and largest interdisciplinary organization of professionals concerned about mental retardation with active members in 55 countries including the U.S. Attachment 2 is from Article 18.- the Kansas Developmental Disabilities Reform Act. Note that the state approved definition, which is very close to the AAMR definition, requires "significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior". This is not a mild disability nor is it be easy to "fake".

Traumatic Brain Injury (TBI) consists of a serious injury to the brain, usually through an accident. Attachment 3 provides additional information from the National Institute of Neurological Disorders and Stroke. Very few individuals who have a TBI would qualify under this definition. Of the Kansas individuals who experienced TBI in 2003, 732 became permanently disabled, and 139 had disabilities so severe that they qualified for service on the SRS head Injury Waiver, however, few of them had a severe cognitive disability.

Alzheimer's disease is growing with the increasing numbers of elderly. It is a progressive brain disorder that gradually destroys a person's memory and ability to learn, reason, make judgments, communicate and carry out daily activities. As Alzheimer's progresses, individuals may also experience changes in personality and behavior, such as anxiety, suspiciousness or agitation, as well as delusions or hallucinations. The national Alzheimer's Association estimates that Kansas has 50,000 persons with Alzheimer's disease. However, their fact sheet (Attachment 4) shows that Alzheimer's disease is progressive and goes through seven stages. A person in Stages 1 though 5 does not experience "significant limitations both in intellectual functioning and deficits in adaptive behavior". Those in Stage Six could qualify and those in Stage Seven might be too physically and mentally impaired to commit murder, at least a murder that would qualify them for the death penalty.

This is not a great opening up of a loophole through which undeserving Kansans will escape just punishment for their crimes. Instead, this is looking not only at the wording of 2002 U.S. Supreme Court case, *Atkins vs. Virginia,* but it's intent which held that executing a person with mental retardation was cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. If it is cruel and unusual punishment to execute a person with mental retardation whose disability occurred before age

22, then it is cruel and unusual punishment to execute a similar person with mental retardation whose disability occurred after age 22.

I am concerned with the addition that the standardized intelligence test be specified by the secretary of Social and Rehabilitation Services. The individual who holds that position is selected by the Governor and may or may not have knowledge of various standardized tests that are available. As a former State Department of Education compliance monitor, part of my responsibilities were to review educational files to see if appropriate testing me3asures had been used to correctly identify children. Many times I found tests that were standardized but were very inappropriate for the purpose for which they were used. Therefore, I would re4commend that page 5, line2 beginning with "specified by the secretary of social and rehabilitation services" be eliminated.

As always, I appreciate your time and patience and would be happy to respond to any questions you may have.

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Attachment 1

DEFINITION OF MENTAL RETARDATION

Mental retardation is not something you have, like blue eyes, or a bad heart. Nor is it something you are, like short, or thin.

It is not a medical disorder, nor a mental disorder.

Mental retardation is a particular state of functioning that begins in childhood and is characterized by limitation in both intelligence and adaptive skills.

Mental retardation reflects the "fit" between the capabilities of individuals and the structure and expectations of their environment.

The AAMR Definition of Mental Retardation

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

This disability originates before age 18.

Five Assumptions Essential to the Application of the Definition

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

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Founded in 1876, AAMR is an international multidisciplinary association of professionals. The Association has had responsibility for defining mental retardation since 1921.

American Association on Mental Retardation

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Attachment 2

Article 18.--- DEVELOPMENTAL DISABILITIES REFORM

39-1801. Citation of act. The provisions of K.S.A. 1995 Supp. 38-1801 through 39-1810 shall be known and may be cited as the developmental disabilities reform act.
History: L. 1995, ch. 234, § 1; Jan. 1, 1996.

39-1803. Definitions. As used in the developmental disabilities reform act:
(a) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community.
(f) "Developmental disability" means:
(1) Mental retardation; or
(2) a severe, chronic disability, which:
(A) Is attributable to a mental or physical impairment, or multiple sensory impairments, a combination of mental and physical impairments, physical and sensory impairments, mental and sensory impairments or a condition which has received a dual diagnosis of mental retardation and mental illness;
(B) is manifest before 22 years of age;
(C) is likely to continue indefinitely;
(D) results, in the case of a person five years of age or older, in a substantial limitation in three or more of the following areas of major life functioning: Self-care, receptive and expressive language development and use, learning and adapting, mobility, self-direction, capacity for independent living and economic self-sufficiency;
(E) reflects a need for a combination and sequence of special interdisciplinary or generic care, treatment, specialized communications techniques or other services which are lifelong, or extended in duration and are individually planned and coordinated; and
(F) does not include individuals who are solely and severely emotionally disturbed or seriously or persistently mentally ill or have disabilities solely as a result of the infirmities of aging.

(h) "Mental retardation" means substantial limitations in present functioning that is manifested during the period from birth to age 18 years and is characterized by *significantly subaverage intellectual functioning* existing concurrently with *deficits in adaptive behavior* including related limitations in two or more of the following applicable adaptive skill areas: Communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. (Italics added).

fact sheet

alzheimer's association

Experts have documented common patterns of symptom progression that occur in many individuals with Alzheimer's disease and developed several methods of "staging" based on these patterns. Progression of symptoms corresponds in a general way to the underlying nerve cell degeneration that takes place in Alzheimer's disease. Nerve cell damage typically begins with cells involved in learning and memory and gradually spreads to cells that control every aspect of thinking, judgment, and behavior. The damage eventually affects cells that control and coordinate movement.

Staging systems provide useful frames of reference for understanding how the disease may unfold and for making future plans. But it is important to note that all stages are artificial benchmarks in a continuous process that can vary greatly from one person to another. Not everyone will experience every symptom and symptoms may occur at different times in different individuals. People with Alzheimer's live an average of 8 years after diagnosis, but may survive anywhere from 3 to 20 years.

The framework for this section is a system that outlines key symptoms characterizing seven stages ranging from unimpaired function to very severe cognitive decline. This framework is based on a system developed by Barry Reisberg, M.D., Clinical Director of the New York University School of Medicine's Silberstein Aging and Dementia Research Center.

Within this framework, we have noted which stages correspond to the widely used concepts of mild, moderate, moderately severe, and severe Alzheimer's disease. We have also noted which stages fall within the more general divisions of early-stage, mid-stage, and late-stage categories.

Stage 1: No cognitive impairment
Unimpaired individuals experience no memory problems and none are evident to a health care professional during a medical interview.

Stage 2: Very mild cognitive decline
Individuals at this stage feel as if they have memory lapses, especially in forgetting familiar words or names or the location of keys, eyeglasses, or other everyday objects.

But these problems are not evident during a medical examination or apparent to friends, family, or co-workers.

Stage 3: Mild cognitive decline
Early-stage Alzheimer's can be diagnosed in some, but not all, individuals with these symptoms
Friends, family, or co-workers begin to notice deficiencies. Problems with memory or concentration may be measurable in clinical testing or discernible during a detailed medical interview. Common difficulties include:

* Word- or name-finding problems noticeable to family or close associates
* Decreased ability to remember names when introduced to new people
* Performance issues in social or work settings noticeable to family, friends, or co-workers
* Reading a passage and retaining little material
* Losing or misplacing a valuable object
* Decline in ability to plan or organize

Stage 4: Moderate cognitive decline
(Mild or early-stage Alzheimer's disease)
At this stage, a careful medical interview detects clear-cut deficiencies in the following areas:

* Decreased knowledge of recent occasions or current events
* Impaired ability to perform challenging mental arithmetic-for example, to count backward from 100 by 7s
* Decreased capacity to perform complex tasks, such as marketing, planning dinner for guests, or paying bills and managing finances
* Reduced memory of personal history
* The affected individual may seem subdued and withdrawn, especially in socially or mentally challenging situations

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Stage 5: Moderately severe cognitive decline (Moderate or mid-stage Alzheimer's disease)

Major gaps in memory and deficits in cognitive function emerge. Some assistance with day-to-day activities becomes essential. At this stage, individuals may:

* Be unable during a medical interview to recall such important details as their current address, their telephone number, or the name of the college or high school from which they graduated
* Become confused about where they are or about the date, day of the week, or season
* Have trouble with less challenging mental arithmetic; for example, counting backward from 40 by 4s or from 20 by 2s
* Need help choosing proper clothing for the season or the occasion
* Usually retain substantial knowledge about themselves and know their own name and the names of their spouse or children
* Usually require no assistance with eating or using the toilet

Stage 6: Severe cognitive decline (Moderately severe or mid-stage Alzheimer's disease)

Memory difficulties continue to worsen, significant personality changes may emerge, and affected individuals need extensive help with customary daily activities. At this stage, individuals may:

* Lose most awareness of recent experiences and events as well as of their surroundings
* Recollect their personal history imperfectly, although they generally recall their own name
* Occasionally forget the name of their spouse or primary caregiver but generally can distinguish familiar from unfamiliar faces
* Need help getting dressed properly; without supervision, may make such errors as putting pajamas over daytime clothes or shoes on wrong feet
* Experience disruption of their normal sleep/waking cycle
* Need help with handling details of toileting (flushing toilet, wiping, and disposing of tissue properly)
* Have increasing episodes of urinary or fecal incontinence
* Experience significant personality changes and behavioral symptoms, including suspiciousness and delusions (for example, believing that their caregiver is an impostor); hallucinations (seeing or hearing things that are not really there); or compulsive, repetitive behaviors such as hand-wringing or tissue shredding
* Tend to wander and become lost

Stage 7: Very severe cognitive decline (Severe or late-stage Alzheimer's disease)

This is the final stage of the disease when individuals lose the ability to respond to their environment, the ability to speak, and, ultimately, the ability to control movement.

* Frequently individuals lose their capacity for recognizable speech, although words or phrases may occasionally be uttered
* Individuals need help with eating and toileting and there is general incontinence of urine
* Individuals lose the ability to walk without assistance, then the ability to sit without support, the ability to smile, and the ability to hold their head up. Reflexes become abnormal and muscles grow rigid. Swallowing is impaired.

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Fact sheet prepared October 13, 2003

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Attachment 3

NINDS Traumatic Brain Injury Information Page

Synonym(s): Head Injury, Brain Injury
Condensed from Traumatic Brain Injury: Hope Through Research

What is Traumatic Brain Injury?

Traumatic brain injury (TBI) occurs when a sudden physical assault on the head causes damage to the brain. The damage can be focal, confined to one area of the brain, or diffuse, involving more than one area of the brain. TBI can result from a closed head injury or a penetrating head injury. A closed head injury occurs when the head suddenly and violently hits an object, but the object does not break through the skull. A penetrating head injury occurs when an object pierces the skull and enters the brain tissue. Several types of traumatic injuries can affect the head and brain. A skull fracture occurs when the bone of the skull cracks or breaks. A depressed skull fracture occurs when pieces of the broken skull press into the tissue of the brain. This can cause bruising of the brain tissue, called a contusion. A contusion can also occur in response to shaking of the brain within the confines of the skull, an injury called "countrecoup." Shaken baby syndrome is a severe form of head injury that occurs when a baby is shaken forcibly enough to cause extreme countrecoup injury. Damage to a major blood vessel within the head can cause a hematoma, or heavy bleeding into or around the brain. The severity of a TBI can range from a mild concussion to the extremes of coma or even death. A coma is a profound or deep state of unconsciousness. Symptoms of a TBI may include headache, nausea, confusion or other cognitive problems, a change in personality, depression, irritability, and other emotional and behavioral problems. Some people may have seizures as a result of a TBI.

Is there any treatment?

Immediate treatment for TBI involves surgery to control bleeding in and around the brain, monitoring and controlling intracranial pressure, insuring adequate blood flow to the brain, and treating the body for other injuries and infection.

What is the prognosis?

The outcome of TBI depends on the cause of the injury and on the location, severity, and extent of neurological damage: outcomes range from good recovery to death. Doctors often use the Glasgow Coma Scale to rate the extent of injury and chances of recovery. The scale (3-15) involves testing for three patient responses: eye opening, best verbal response, and best motor response. A high score indicates a good prognosis and a low score indicates a poor prognosis.

What research is being done?

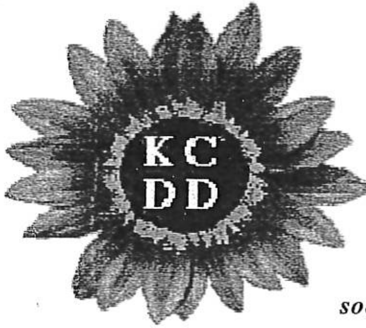
The NINDS conducts and supports research on trauma-related disorders, including traumatic brain injuries. Much of this research focuses on increasing scientific understanding of these disorders and finding ways to prevent and treat them.

Prepared by:
Office of Communications and Public Liaison
National Institute of Neurological Disorders and Stroke
National Institutes of Health

Bethesda, MD 20892

NINDS health-related material is provided for information purposes only and does not necessarily represent endorsement by or an official position of the National Institute of Neurological Disorders and Stroke or any other Federal agency. Advice on the treatment or care of an individual patient should be obtained through consultation with a physician who has examined that patient or is familiar with that patient's medical history.

All NINDS-prepared information is in the public domain and may be freely copied. Credit to the NINDS or the NIH is appreciated.



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SENATE JUDICIARY COMMITTEE

January 25, 2005

Mr. Chairman, Members of the Committee, my name is Jane Rhys and I am providing this information on behalf of the Kansas Council on Developmental Disabilities. We support Senate Bill 32, having previously supported SB 355 during the 2004 Session and having worked with the Kansas Judicial Council on its development. Specifically, we support the use of the term "cognitive disability" and the definition found in SB 32, page 1, lines 15 through 20:

> (a) ''Cognitive disability'' means a disability characterized by significant limitations both in intellectual functioning and deficits in adaptive behavior as expressed in conceptual, social and practical adaptive skills; and
> (b) ''significant limitations'' in intellectual functioning means two or more standard deviations below the norm.

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

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Attachment 1

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Attachment 2

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History: L. 1995, ch. 234, § 1; Jan. 1, 1996.

39-1803. Definitions. As used in the developmental disabilities reform act:
(a) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community.
(f) "Developmental disability" means:
(1) Mental retardation; or
(2) a severe, chronic disability, which:
(A) Is attributable to a mental or physical impairment, or multiple sensory impairments, a combination of mental and physical impairments, physical and sensory impairments, mental and sensory impairments or a condition which has received a dual diagnosis of mental retardation and mental illness;
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(C) is likely to continue indefinitely;
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(E) reflects a need for a combination and sequence of special interdisciplinary or generic care, treatment, specialized communications techniques or other services which are lifelong, or extended in duration and are individually planned and coordinated; and
(F) does not include individuals who are solely and severely emotionally disturbed or seriously or persistently mentally ill or have disabilities solely as a result of the infirmities of aging.

(h) "Mental retardation" means substantial limitations in present functioning that is manifested during the period from birth to age 18 years and is characterized by *significantly subaverage intellectual functioning* existing concurrently with *deficits in adaptive behavior* including related limitations in two or more of the following applicable adaptive skill areas: Communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. (Italics added).

fact sheet

alzheimer's association

Experts have documented common patterns of symptom progression that occur in many individuals with Alzheimer's disease and developed several methods of "staging" based on these patterns. Progression of symptoms corresponds in a general way to the underlying nerve cell degeneration that takes place in Alzheimer's disease. Nerve cell damage typically begins with cells involved in learning and memory and gradually spreads to cells that control every aspect of thinking, judgment, and behavior. The damage eventually affects cells that control and coordinate movement.

Staging systems provide useful frames of reference for understanding how the disease may unfold and for making future plans. But it is important to note that all stages are artificial benchmarks in a continuous process that can vary greatly from one person to another. Not everyone will experience every symptom and symptoms may occur at different times in different individuals. People with Alzheimer's live an average of 8 years after diagnosis, but may survive anywhere from 3 to 20 years.

The framework for this section is a system that outlines key symptoms characterizing seven stages ranging from unimpaired function to very severe cognitive decline. This framework is based on a system developed by Barry Reisberg, M.D., Clinical Director of the New York University School of Medicine's Silberstein Aging and Dementia Research Center.

Within this framework, we have noted which stages correspond to the widely used concepts of mild, moderate, moderately severe, and severe Alzheimer's disease. We have also noted which stages fall within the more general divisions of early-stage, mid-stage, and late-stage categories.

Stage 1: No cognitive impairment
Unimpaired individuals experience no memory problems and none are evident to a health care professional during a medical interview.

Stage 2: Very mild cognitive decline
Individuals at this stage feel as if they have memory lapses, especially in forgetting familiar words or names or the location of keys, eyeglasses, or other everyday objects.

But these problems are not evident during a medical examination or apparent to friends, family, or co-workers.

Stage 3: Mild cognitive decline
Early-stage Alzheimer's can be diagnosed in some, but not all, individuals with these symptoms
Friends, family, or co-workers begin to notice deficiencies. Problems with memory or concentration may be measurable in clinical testing or discernible during a detailed medical interview. Common difficulties include:

* Word- or name-finding problems noticeable to family or close associates
* Decreased ability to remember names when introduced to new people
* Performance issues in social or work settings noticeable to family, friends, or co-workers
* Reading a passage and retaining little material
* Losing or misplacing a valuable object
* Decline in ability to plan or organize

Stage 4: Moderate cognitive decline
(Mild or early-stage Alzheimer's disease)
At this stage, a careful medical interview detects clear-cut deficiencies in the following areas:

* Decreased knowledge of recent occasions or current events
* Impaired ability to perform challenging mental arithmetic-for example, to count backward from 100 by 7s
* Decreased capacity to perform complex tasks, such as marketing, planning dinner for guests, or paying bills and managing finances
* Reduced memory of personal history
* The affected individual may seem subdued and withdrawn, especially in socially or mentally challenging situations

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Stage 5: Moderately severe cognitive decline (Moderate or mid-stage Alzheimer's disease)
Major gaps in memory and deficits in cognitive function emerge. Some assistance with day-to-day activities becomes essential. At this stage, individuals may:
* Be unable during a medical interview to recall such important details as their current address, their telephone number, or the name of the college or high school from which they graduated
* Become confused about where they are or about the date, day of the week, or season
* Have trouble with less challenging mental arithmetic; for example, counting backward from 40 by 4s or from 20 by 2s
* Need help choosing proper clothing for the season or the occasion
* Usually retain substantial knowledge about themselves and know their own name and the names of their spouse or children
* Usually require no assistance with eating or using the toilet

Stage 6: Severe cognitive decline (Moderately severe or mid-stage Alzheimer's disease)
Memory difficulties continue to worsen, significant personality changes may emerge, and affected individuals need extensive help with customary daily activities. At this stage, individuals may:
* Lose most awareness of recent experiences and events as well as of their surroundings
* Recollect their personal history imperfectly, although they generally recall their own name
* Occasionally forget the name of their spouse or primary caregiver but generally can distinguish familiar from unfamiliar faces
* Need help getting dressed properly; without supervision, may make such errors as putting pajamas over daytime clothes or shoes on wrong feet
* Experience disruption of their normal sleep/waking cycle
* Need help with handling details of toileting (flushing toilet, wiping, and disposing of tissue properly)
* Have increasing episodes of urinary or fecal incontinence
* Experience significant personality changes and behavioral symptoms, including suspiciousness and delusions (for example, believing that their caregiver is an impostor); hallucinations (seeing or hearing things that are not really there); or compulsive, repetitive behaviors such as hand-wringing or tissue shredding
* Tend to wander and become lost

Stage 7: Very severe cognitive decline (Severe or late-stage Alzheimer's disease)
This is the final stage of the disease when individuals lose the ability to respond to their environment, the ability to speak, and, ultimately, the ability to control movement.
* Frequently individuals lose their capacity for recognizable speech, although words or phrases may occasionally be uttered
* Individuals need help with eating and toileting and there is general incontinence of urine
* Individuals lose the ability to walk without assistance, then the ability to sit without support, the ability to smile, and the ability to hold their head up. Reflexes become abnormal and muscles grow rigid. Swallowing is impaired.

Contact Center 1.800.272.3900
TDD Access 1.312.335.8882
Web site www.alz.org
Fact sheet prepared October 13, 2003

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Attachment 3

NINDS Traumatic Brain Injury Information Page

Synonym(s): Head Injury, Brain Injury
Condensed from Traumatic Brain Injury: Hope Through Research

What is Traumatic Brain Injury?

Traumatic brain injury (TBI) occurs when a sudden physical assault on the head causes damage to the brain. The damage can be focal, confined to one area of the brain, or diffuse, involving more than one area of the brain. TBI can result from a closed head injury or a penetrating head injury. A closed head injury occurs when the head suddenly and violently hits an object, but the object does not break through the skull. A penetrating head injury occurs when an object pierces the skull and enters the brain tissue. Several types of traumatic injuries can affect the head and brain. A skull fracture occurs when the bone of the skull cracks or breaks. A depressed skull fracture occurs when pieces of the broken skull press into the tissue of the brain. This can cause bruising of the brain tissue, called a contusion. A contusion can also occur in response to shaking of the brain within the confines of the skull, an injury called "countrecoup." Shaken baby syndrome is a severe form of head injury that occurs when a baby is shaken forcibly enough to cause extreme countrecoup injury. Damage to a major blood vessel within the head can cause a hematoma, or heavy bleeding into or around the brain. The severity of a TBI can range from a mild concussion to the extremes of coma or even death. A coma is a profound or deep state of unconsciousness. Symptoms of a TBI may include headache, nausea, confusion or other cognitive problems, a change in personality, depression, irritability, and other emotional and behavioral problems. Some people may have seizures as a result of a TBI.

Is there any treatment?

Immediate treatment for TBI involves surgery to control bleeding in and around the brain, monitoring and controlling intracranial pressure, insuring adequate blood flow to the brain, and treating the body for other injuries and infection.

What is the prognosis?

The outcome of TBI depends on the cause of the injury and on the location, severity, and extent of neurological damage: outcomes range from good recovery to death. Doctors often use the Glasgow Coma Scale to rate the extent of injury and chances of recovery. The scale (3-15) involves testing for three patient responses: eye opening, best verbal response, and best motor response. A high score indicates a good prognosis and a low score indicates a poor prognosis.

What research is being done?

The NINDS conducts and supports research on trauma-related disorders, including traumatic brain injuries. Much of this research focuses on increasing scientific understanding of these disorders and finding ways to prevent and treat them.

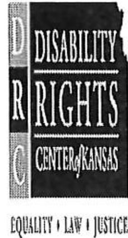
Prepared by:
Office of Communications and Public Liaison
National Institute of Neurological Disorders and Stroke
National Institutes of Health

Bethesda, MD 20892

NINDS health-related material is provided for information purposes only and does not necessarily represent endorsement by or an official position of the National Institute of Neurological Disorders and Stroke or any other Federal agency. Advice on the treatment or care of an individual patient should be obtained through consultation with a physician who has examined that patient or is familiar with that patient's medical history.

All NINDS-prepared information is in the public domain and may be freely copied. Credit to the NINDS or the NIH is appreciated.

Testimony to the Senate Judiciary Committee
Senate Bill 14
January 25, 2005



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Submitted by Rocky Nichols

Chairman Vratil and Members of the Committee:

My name is Rocky Nichols. I am the Executive Director of the Disability Rights Center of Kansas (DRC), formerly known as Kansas Advocacy and Protective Services. DRC is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, DRC is designated to be the agency that protects and advocates for Kansans with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, organizationally independent of both state government and disability service providers.

The Disability Rights Center of Kansas supports the goals of both SB 14 and SB 32. SB 14 was the bill endorsed by the Interim Judiciary Committee and SB 32 is basically the version drafted and endorsed by the Judicial Council. As you know The Judicial Council is a non-partisan organization made up of judges, prosecutors, attorneys and policymakers. The Judicial Council's bill came after careful deliberation. Both bills – SB 14 & 32- ensure complete compliance with the *Atkins vs. Virginia* decision by the U.S. Supreme Court, 536 U.S. 304 (2002), by removing the language that requires a nexus between the intellectual functioning disability and the ability to appreciate the criminality of the conduct. Both bills protect persons with significant intellectual functioning disabilities (of which mental retardation is the most well known) from being executed regardless of the age of onset of the disability. Both bills use two or more deviations as the standard for defining who is excluded from the death penalty. However, SB 32 (the Judicial Council bill) says "two of more standard deviations below the *norm*" while SB 14 says "two or more standard deviations *from the mean*

score on a standardized intelligence test specified by the secretary of SRS." We recommend the language in the Judicial Council bill – SB 32 – defining "significant limitations" in intellectual functioning. Current law does not specify that the Secretary chooses the test.

Senate Judiciary
1-25-05
Attachment 7

dditionally, SB 14 says "two or more standard deviations from the mean," whi ter means 2 or more deviations below or above the mean.

Other Core Concepts of SB 14 & SB 32:

- Protects from the death penalty individuals who have significantly impaired intellectual functioning, defined as two or more standard deviations below the norm/mean, and deficits in adaptive behavior. SB 32 bill labels this significantly subaverage intellectual functioning as a "cognitive disability," while SB 14 uses the label "mental retardation."

- Both bills do not protect every Kansan with a significant intellectual functioning disability from the death penalty. Only those with intellectual functioning two of more standard deviations below the norm/mean and limitations in adaptive behavior. Does not protect every person with a brain injury or every person with subaverage intellectual functioning disabilities. Only those with the most *significantly* impaired intellectual functioning who meet this strict definition are protected (two standard deviations).
- Both bills provide for pre-trial determination of the cognitive disability / mental retardation. This is important, because the state should not be burdened with the millions of dollars of costs for death penalty cases when the defendant is ineligible.
- Does not involve determinations of mental illness, not guilty by reason of insanity, capacity to stand trial, or guilt or innocence. Those are separate issues.
- Still allows justice to be served by allowing any other punishment for those who fit this rigid definition of cognitive disability, including life without parole, etc.
- Does not tie protection from the death penalty to any particular age of onset of the significant intellectual functioning disability. It should not matter when the disability onset or occurred. Whether they were born with it or acquired it later in life.

At its core, this issue is about intellectual functioning – not what "label" is placed on a person. It should not matter the name of the label placed on a person with significant intellectual functioning disability, whether it is the label of "cognitive disability," "mental retardation," etc. What matters is that a person with two or more standard deviations below the norm in intellectual functioning and limitations in adaptive behavior cannot, in the words of the US

upreme Court, “abstract from mistakes and learn from experience … engage log reasoning … understand the reactions of others” and do not have the capacity to “actively participate in their defense.” Therefore, it does not matter when their disability began or manifested itself. Whether they were born with this type of significant impaired intellectual functioning disability or whether it was acquired by disease or catastrophic traumatic brain injury is not the core question. The core question is do they have the intellectual functioning equivalent to the label “mental retardation?” If yes, then they should not be subject to the death penalty. It should not matter when the disability manifest itself (at birth or catastrophic brain injury).

If you want to prevent the death penalty for persons with significant intellectual functioning disabilities and those that have “mental retardation,” then you should protect them regardless of the age of onset. Further, you should establish the protections in the law to make absolutely certain that the State does not execute a person with significant intellectual functioning disability. That is why having the post trial determination by a jury on the issue of mental retardation is so important. 82% of Americans oppose the death penalty for persons with mental retardation, the most well known type of significant intellectual functioning/cognitive disability (Gallup Poll). Even supporters of the death penalty oppose its use for persons with these significant intellectual functioning disability (Source: Gallup polling found that though 70% of Americans may support the limited use of the death penalty, 82% oppose it for mental retardation). The Judicial Council took painstaking efforts to craft a proposal that brings Kansas into *full* compliance with the U.S. Supreme Courts’ *Atkins v. Virginia* decision and establish the protections to prevent persons with significant intellectual functioning disabilities from being executed.

Current Kansas law protects persons with “mental retardation” from the death penalty, but it ties a nexus between the intellectual functioning and the ability to appreciate the criminality of their actions. Kansas is the only state with this nexus requirement, and it is constitutionally questionable. The recent Kansas Supreme Court case overturning our current death penalty statute should be a distinct and vivid reminder of the importance of taking a conservative

pproach when enacting death penalty provisions. Both bills strike this nexus langua

Background:

By way of background we offer the following synopsis of the history of this important discussion. The Judicial Council's proposal to change the death penalty statutes was triggered by a 2002 U.S. Supreme Court case, *Atkins vs. Virginia*, which held that executing a person with mental retardation, perhaps the most well known type of cognitive disability, is cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Reasons why the high court stated that the death penalty was cruel and unusual is because these individuals have "diminished capacities to undertake and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," and because of their disability, they do not have the intellectual functioning to actively participate in their own defense. The high court held that the two reasons to execute criminals, retribution and deterrence, are absent when persons with significant cognitive disabilities are being sentenced. *Atkins*, 536 U.S. at 318-319.

The Judicial Council's recommendations became SB 355 (2004 Legislature) and now SB 32 (2005 Legislature). SB 32 - The Judicial Council's bill does the following:

1. The Judicial Council's decision to base the definition of "cognitive disability" on the nationally accepted definition for mental retardation developed by AAMR (American Association on Mental Retardation) fits well with the Court's guiding principle regarding the national consensus with regard to execution of persons with cognitive disabilities. This proposal is also effective because the definition of cognitive disability is not limited by age of onset and thus ensures that persons with cognitive disabilities will not be subjected to the death penalty. The issue is whether the person's cognitive disability creates significant intellectual functioning and adaptive behavior deficits. If so, then the death penalty would be cruel and unusual punishment for that Kansan with a cognitive disability. The label mental retardation is the most well known type of cognitive disability. Kansas public policy should focus on the capacity of the person to function, regardless of any particular

term, label or diagnosis. The Judicial Council version of the bill fulfilled that req .ne

2. If passed, the Judicial Council's bill could save Kansas' taxpayers millions of dollars in death penalty defense expenditures. The bill ensures the opportunity to raise the question of cognitive disability before trial, instead of only after the guilt phase. Current law is unclear, but implies that the hearing is post-trial. Since this procedure has not been used with a person with significant impaired intellectual functioning, we do not have the benefit of a district court ruling let alone an appellate ruling. Simply put, considerable time, energy and resources can be saved by clearly making a pretrial determination of ineligibility for the death penalty because of cognitive disability.
3. The use of cognitive impairment to prevent the imposition of the death penalty should be extremely rare. I am attaching testimony from Dr. William Stiers, Chief of Rehabilitation Psychology and Neuropsychology with the University of Kansas Medical Center. It provides information on what types of significant disabilities may meet the definition of "cognitive disability" in the Judicial Council's bill. It further quotes US Census data to show that fewer than 1.5% of Kansans have a cognitive disability with the type of significant intellectual functioning impairment as defined in the Judicial Council's bill. How many of that 1.5% with significant cognitive disabilities will ever commit a crime? How many of them will ever commit a crime of capital murder subject to the death penalty? Given Kansas' current death penalty law, which requires premeditated capital murder of more than one person, etc., you can see how that the number impacted by this change drops dramatically.

The 2004 Interim Special Committee on Judiciary also addressed this very important issue. The Interim Committee recommended that the 2005 Legislature consider a bill (SB 14) that accomplishes the same result as the 2004 Bill by removing the disability age of onset (currently age 18) and ensuring that a pre-trial determination of mental retardation is available. Senate Bill 14 retains the high standards in the current Kansas law that determines whether or not a person has mental retardation. SB 14 makes a person who has been convicted of capital murder ineligible for the death penalty if they have mental retardation, defined as: *Significantly sub-average general intellectual functioning existing concurrently with deficits in*

daptive behavior. ''Significantly sub-average general intellectual functioning me performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary of social and rehabilitation services. Again, we would recommend the language from SB 32, and not have the Secretary choose the test.

In our opinion, the definition of cognitive disability (SB 32) and Mental Retardation (SB 14) would not include anyone currently on death row in Kansas. To the best of our knowledge, and upon reasonable investigation, none of the current person's convicted and sentenced to death made a claim of mental retardation under current law, and none of them have both cognitive deficit two standard deviations below the norm and significant limitation in adaptive functioning.

We hope that this committee will trust the deliberative efforts and experience of the good judges, prosecutors, and attorneys of the Judicial Council, as well as, the members of the 2004 Special Committee on Judiciary. Persons with cognitive disabilities, by having significant impaired intellectual functioning, are simply incapable of forming sufficient intent, premeditation, and lack the full extent of appreciation of the consequences of their conduct. Kansas should not put people with significant cognitive disabilities to death. Life in prison without parole is enough.

DRC believes that the Judicial Council and Interim Committee did an incredible job of gathering information and conducting exhaustive legal research in preparing their proposals for your consideration. The Judicial Council worked on their measure with national experts in this field, like Professor James Ellis from the University of New Mexico and Professor Rudd Turnbull from the University of Kansas' Beach Center on Disability. Professor Ellis has advised the U.S. Supreme Court several times about mental retardation and death penalty issues, and actually successfully argued the *Atkins* case before the high court. DRC supports the Judicial Council's thoroughly researched and considered work product. The Special Committee on Judiciary conducted a thorough review as well. Professor Ellis testified before the Committee as did many others.

.s stated above, DRC supports the goals of both SB 14 and SB 32 as presented. .h t bring Kansas law into compliance with the Atkins decision by the U.S. Supreme Court and protect persons with significant cognitive disabilities from being put to death regardless of the age of onset of the disability. Both bills provide for pre-trial determination of cognitive disability / mental retardation. Both bills have the pretrial determination and post trial by a jury. Both bills protect persons with significant intellectual functioning disabilities from the death penalty, regardless of when the disability onset, or occurred. And, both bills continue to ensure that justice can be served.

The University of Kansas Medical Center

School of Medicine
Department of Rehabilitation Medicine

November 19, 2004

Members of the Joint Judiciary Interim Committee
State of Kansas

I am writing to provide some information regarding persons with severe cognitive limitations.

Severe cognitive impairment is a condition in which an individual has significantly impaired intellectual functioning, and impaired cognitive abilities such as paying attention, understanding and communicating with others, making sense of visual information, remembering things and events, using reason to arrive at logical conclusions, solving simple daily problems, and organizing and directing their own activities. "Severe" is defined as 2 standard deviations below the mean on tests of cognitive functioning.[1]

There are a number of conditions which may result in severe cognitive impairment. These include:

(1) genetic abnormalities and birth defects
(2) illnesses, such as infections (for example, meningitis or encephalitis), Alzheimer's disease, and others
(3) injuries, such as traumatic brain injury (concussion), asphyxiation (for example, near drowning), stroke, brain tumor, electrical injuries, and others.

Severe cognitive disability involves both severe cognitive impairment, as shown by psychological testing, **and** severely impaired adaptive functioning, as shown by ability to manage usual daily activities (such as self-care, understanding and communicating, safety awareness, interacting appropriately with others, and self-control). Not all individuals with severe cognitive impairment have severe cognitive disability.

When an individual has a severe cognitive disability prior to age 18, this is referred to as mental retardation/developmental disability (MR/DD). However, if such a condition occurs after age 18, the person would not be classified as MR/DD, although they may have identical severe cognitive disability. *(continued on back)*

Important Questions

One question may be about the number of individuals in Kansas who might meet this definition. Although this is difficult to determine, the following may give some helpful information:

---

[1] A *mean* is the average. A *standard deviation* is a measure of variability around the mean. One standard deviation is a clear and noticeable step away from average. Two standard deviations below the mean would be expected to be found in approximately 2% of the population.

Persons in the U. S. With Cognitive Disability Who Are Unable to Manage Everyday Activities = 1.5 %
(U. S. Census Bureau, Survey of Income and Program Participation, 2001).

This is consistent with the statistical definition (above) that less than 2% of the population can be expected to have severe cognitive *disability* (severe cognitive *impairment* plus severely impaired adaptive *functioning*). Most of these individuals can be expected to be in a nursing home or other care facility, although some may be cared for at home by family. Rarely may such individuals live independently in the community.

Another question may be about the accuracy of determining who does and does not have a severe cognitive disability, especially in circumstances where individuals may have a motivation to mis-represent themselves. First, the last 5-10 years have seen a significant improvement in the science of evaluating cognitive impairment. New tests and procedures are available to evaluate both *ability* (for example, IQ or intelligence) and *validity/reliability* (for example, honesty of effort in taking the tests). Second, since severe cognitive disability involves problems with both cognitive and adaptive functioning, an individual would only meet this criterion if they were shown to be impaired on valid and reliable psychological testing, **and** were shown to be impaired in usual daily functioning over a significant span of time.

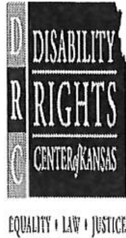
I hope this information is helpful. Please contact me at 913/588-6798 if I can be of further assistance.

Sincerely,

William Stiers, Ph.D., ABPP
Associate Professor
Chief, Rehabilitation Psychology and Neuropsychology
Department of Rehabilitation Medicine / Department of Psychiatry
University of Kansas Medical Center
Kansas City, Kansas

Mail Stop 1046 • 3901 Rainbow Blvd., Kansas City, Kansas 66160 • 913/588-6798

Testimony to the Senate Judiciary Committee
Senate Bill 32
January 25, 2005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Submitted by Rocky Nichols

Chairman Vratil and Members of the Committee:

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Senate Judiciary
1-25-05
Attachment 8

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1. The Judicial Council's decision to base the definition of "cognitive disability" on the nationally accepted definition for mental retardation developed by AAMR (American Association on Mental Retardation) fits well with the Court's guiding principle regarding the national consensus with regard to execution of persons with cognitive disabilities. This proposal is also effective because the definition of cognitive disability is not limited by age of onset and thus ensures that persons with cognitive disabilities will not be subjected to the death penalty. The issue is whether the person's cognitive disability creates significant intellectual functioning and adaptive behavior deficits. If so, then the death penalty would be cruel and unusual punishment for that Kansan with a cognitive disability. The label mental retardation is the most well known type of cognitive disability. Kansas public policy should focus on the capacity of the person to function, regardless of any particular

term, label or diagnosis. The Judicial Council version of the bill fulfilled that req[illegible]ne[illegible]

2. If passed, the Judicial Council's bill could save Kansas' taxpayers millions of dollars in death penalty defense expenditures. The bill ensures the opportunity to raise the question of cognitive disability before trial, instead of only after the guilt phase. Current law is unclear, but implies that the hearing is post-trial. Since this procedure has not been used with a person with significant impaired intellectual functioning, we do not have the benefit of a district court ruling let alone an appellate ruling. Simply put, considerable time, energy and resources can be saved by clearly making a pretrial determination of ineligibility for the death penalty because of cognitive disability.
3. The use of cognitive impairment to prevent the imposition of the death penalty should be extremely rare. I am attaching testimony from Dr. William Stiers, Chief of Rehabilitation Psychology and Neuropsychology with the University of Kansas Medical Center. It provides information on what types of significant disabilities may meet the definition of "cognitive disability" in the Judicial Council's bill. It further quotes US Census data to show that fewer than 1.5% of Kansans have a cognitive disability with the type of significant intellectual functioning impairment as defined in the Judicial Council's bill. How many of that 1.5% with significant cognitive disabilities will ever commit a crime? How many of them will ever commit a crime of capital murder subject to the death penalty? Given Kansas' current death penalty law, which requires premeditated capital murder of more than one person, etc., you can see how that the number impacted by this change drops dramatically.

The 2004 Interim Special Committee on Judiciary also addressed this very important issue. The Interim Committee recommended that the 2005 Legislature consider a bill (SB 14) that accomplishes the same result as the 2004 Bill by removing the disability age of onset (currently age 18) and ensuring that a pre-trial determination of mental retardation is available. Senate Bill 14 retains the high standards in the current Kansas law that determines whether or not a person has mental retardation. SB 14 makes a person who has been convicted of capital murder ineligible for the death penalty if they have mental retardation, defined as: *Significantly sub-average general intellectual functioning existing concurrently with deficits in*

.daptive behavior. "Significantly sub-average general intellectual functioni... me performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary of social and rehabilitation services. Again, we would recommend the language from SB 32, and not have the Secretary choose the test.

In our opinion, the definition of cognitive disability (SB 32) and Mental Retardation (SB 14) would not include anyone currently on death row in Kansas. To the best of our knowledge, and upon reasonable investigation, none of the current person's convicted and sentenced to death made a claim of mental retardation under current law, and none of them have both cognitive deficit two standard deviations below the norm and significant limitation in adaptive functioning.

We hope that this committee will trust the deliberative efforts and experience of the good judges, prosecutors, and attorneys of the Judicial Council, as well as, the members of the 2004 Special Committee on Judiciary. Persons with cognitive disabilities, by having significant impaired intellectual functioning, are simply incapable of forming sufficient intent, premeditation, and lack the full extent of appreciation of the consequences of their conduct. Kansas should not put people with significant cognitive disabilities to death. Life in prison without parole is enough.

DRC believes that the Judicial Council and Interim Committee did an incredible job of gathering information and conducting exhaustive legal research in preparing their proposals for your consideration. The Judicial Council worked on their measure with national experts in this field, like Professor James Ellis from the University of New Mexico and Professor Rudd Turnbull from the University of Kansas' Beach Center on Disability. Professor Ellis has advised the U.S. Supreme Court several times about mental retardation and death penalty issues, and actually successfully argued the *Atkins* case before the high court. DRC supports the Judicial Council's thoroughly researched and considered work product. The Special Committee on Judiciary conducted a thorough review as well. Professor Ellis testified before the Committee as did many others.

.s stated above, DRC supports the goals of both SB 14 and SB 32 as presented. .n b. bring Kansas law into compliance with the Atkins decision by the U.S. Supreme Court and protect persons with significant cognitive disabilities from being put to death regardless of the age of onset of the disability. Both bills provide for pre-trial determination of cognitive disability / mental retardation. Both bills have the pretrial determination and post trial by a jury. Both bills protect persons with significant intellectual functioning disabilities from the death penalty, regardless of when the disability onset, or occurred. And, both bills continue to ensure that justice can be served.

The University of Kansas Medical Center

School of Medicine
Department of Rehabilitation Medicine

November 19, 2004

Members of the Joint Judiciary Interim Committee
State of Kansas

I am writing to provide some information regarding persons with severe cognitive limitations.

Severe cognitive impairment is a condition in which an individual has significantly impaired intellectual functioning, and impaired cognitive abilities such as paying attention, understanding and communicating with others, making sense of visual information, remembering things and events, using reason to arrive at logical conclusions, solving simple daily problems, and organizing and directing their own activities. "Severe" is defined as 2 standard deviations below the mean on tests of cognitive functioning.[1]

There are a number of conditions which may result in severe cognitive impairment. These include:

(1) genetic abnormalities and birth defects
(2) illnesses, such as infections (for example, meningitis or encephalitis), Alzheimer's disease, and others
(3) injuries, such as traumatic brain injury (concussion), asphyxiation (for example, near drowning), stroke, brain tumor, electrical injuries, and others.

Severe cognitive disability involves both severe cognitive impairment, as shown by psychological testing, **and** severely impaired adaptive functioning, as shown by ability to manage usual daily activities (such as self-care, understanding and communicating, safety awareness, interacting appropriately with others, and self-control). Not all individuals with severe cognitive impairment have severe cognitive disability.

When an individual has a severe cognitive disability prior to age 18, this is referred to as mental retardation/developmental disability (MR/DD). However, if such a condition occurs after age 18, the person would not be classified as MR/DD, although they may have identical severe cognitive disability. *(continued on back)*

Important Questions

One question may be about the number of individuals in Kansas who might meet this definition. Although this is difficult to determine, the following may give some helpful information:

[1] A *mean* is the average. A *standard deviation* is a measure of variability around the mean. One standard deviation is a clear and noticeable step away from average. Two standard deviations below the mean would be expected to be found in approximately 2% of the population.

Persons in the U. S. With Cognitive Disability Who Are Unable to Manage Everyday Activities = 1.5 %
(U. S. Census Bureau, Survey of Income and Program Participation, 2001).

This is consistent with the statistical definition (above) that less than 2% of the population can be expected to have severe cognitive *disability* (severe cognitive *impairment* plus severely impaired adaptive *functioning*). Most of these individuals can be expected to be in a nursing home or other care facility, although some may be cared for at home by family. Rarely may such individuals live independently in the community.

Another question may be about the accuracy of determining who does and does not have a severe cognitive disability, especially in circumstances where individuals may have a motivation to mis-represent themselves. First, the last 5-10 years have seen a significant improvement in the science of evaluating cognitive impairment. New tests and procedures are available to evaluate both *ability* (for example, IQ or intelligence) and *validity/reliability* (for example, honesty of effort in taking the tests). Second, since severe cognitive disability involves problems with both cognitive and adaptive functioning, an individual would only meet this criterion if they were shown to be impaired on valid and reliable psychological testing, **and** were shown to be impaired in usual daily functioning over a significant span of time.

I hope this information is helpful. Please contact me at 913/588-6798 if I can be of further assistance.

Sincerely,

William Stiers, Ph.D., ABPP
Associate Professor
Chief, Rehabilitation Psychology and Neuropsychology
Department of Rehabilitation Medicine / Department of Psychiatry
University of Kansas Medical Center
Kansas City, Kansas

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DEPARTMENT OF COMMERCE
HOWARD R. FRICKE, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony to the Senate Judiciary Committee
Senate Bill 14
January 25, 2005

I am Kerrie Bacon, Legislative Liaison for the Kansas Commission on Disability Concerns (KCDC). KCDC is charged with providing information to the Governor, the Legislature, and to State agencies about issues of concern to Kansans with disabilities (K.S.A. 74-6706).

The Kansas Commission on Disability Concerns supports SB 14. The bill has been reviewed and is supported by the Disability Rights Center of Kansas and endorsed by the Interim Judiciary Committee. SB 14 protects individuals who have significantly impaired intellectual functioning from the death penalty, but still allows other punishment for the crime.

We encourage your support of Senate Bill 14.

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1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1819
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Kansas Association of Centers for Independent Living
PO Box 311
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Submitted by
TANYA DORF

Senate Judiciary Committee
January 25, 2005

SB 14: The Death Penalty relating to Mental Retardation

Chairman Vratil and members of the Committee, thank you for the opportunity to provide testimony to you regarding Senate Bill 14. My name is Tanya Dorf, and I am the chair of the governmental affairs committee for the Kansas Association of Centers for Independent Living (KACIL). I am also the Executive Director of one of the KACIL members, Independence, Inc., in Lawrence.

Background
KACIL's mission is to coordinate efforts within Kansas, the United States, and internationally to the extent that these efforts will further independent living for all. KACIL advocates for the civil and human rights of Kansans with disabilities, regardless of age. Centers for Independent Living (CILs) are at the core of the disability rights movement. CILs provide a unique type of service for Kansans with disabilities by ensuring they have the independent living and advocacy skills they need to live and work independently in the community.

Atkins v. Virginia
In 2002 the U.S. Supreme Court ruled in *Atkins v. Virginia* that executing a person with mental retardation constitutes a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. The Court did not define mental retardation, leaving that decision up to the states, but it did make it clear that it is unconstitutional to put someone with mental retardation to death. The Court also made it clear that there is a national consensus that applying the death penalty to persons with mental retardation offends national standards of decency.

Justice Stevens wrote for the majority in the *Atkins* decision,

> "Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."

Kansas Law

State law in Kansas does not allow the death penalty to be applied to persons with mental retardation. But, Kansas state law does not adequately address the definition of mental retardation when used in capital murder cases. The seventeen other states which bar execution of persons with mental retardation use a clinical definition of mental retardation. SB 14 would apply a clinical definition of mental retardation to capital murder cases, which is very similar to the new language adopted by the Virginia General Assembly in response to the *Atkins* decision. It also closely mirrors the definition of mental retardation used by the American Association on Mental Retardation (AAMR).

AAMR is the oldest and largest interdisciplinary organization of professionals concerned about mental retardation and related disabilities. The AAMR traditionally has been responsible for setting the national standard definition of mental retardation. Their definition, revised in 2002, states:

> "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."

The proposed definition in SB 14 is very similar:

> "'Mental retardation' or 'mentally retarded' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."
>
> "'Significantly subaverage general intellectual functioning' means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary of social and rehabilitation services."

Because mental retardation is not something that can be definitively diagnosed like cancer or heart disease, it is important for professionals to have a standard to use and guidelines with which to apply that standard. The language in SB 14 gives Kansas the proper standard and provides for the guidelines to be adopted by the state agency responsible for services for Kansans with mental retardation.

KACIL strongly supports SB 14. This bill will ensure Kansans with mental retardation will continue to be exempt from the death penalty and that any challenge to the existing law in the courts will not succeed. The definition of mental retardation used in SB 14 gives the state the tools it needs to properly determine whether a defendant has mental retardation and should be subject to the death penalty.

Above all, KACIL stands for the civil and human rights of all Kansans with disabilities. By ensuring Kansans with mental retardation will not now nor in the future be subject to the death penalty, the Legislature can also uphold the civil and human rights that we all hold dear. On behalf of the members of KACIL, I urge you to pass SB 14.

Conclusion

Thank you for the opportunity to provide testimony to you regarding the death penalty and its application to Kansans with mental retardation. I am happy to provide any additional information at the Committee's request.

Tanya Dorf, KACIL Governmental Affairs Committee Chair
785-841-0333 *tanyad@independenceinc.org*

Testimony
SB 14 and SB 32

Either bill is satisfactory, though I prefer S. 32 because (a) it defines more fully the term "cognitive disability", (b) it includes a definition of "adaptive behavior", and (c) it does not allow the Secretary of SRS to specify which IQ test will govern the determination -- a power that may be used to weight the determination against the defendant or for the defendant depending on the inclination of the Secretary. I prefer the matter of "which test" to be a matter for the lawyers and trier of fact. By defining the terms consistent with the standard professional definition, S. 32 offers a great deal more guidance to lawyers, judges, and juries. And guidance is what they need to carry out the *Adkins* ruling that the 8th Am. forbids the execution of people who have mental retardation. I also believe that S. 32 is preferable because it results from a long study by professionals who had the benefit of expert testimony and who relied on that testimony.

Undoubtedly, the opposition to both bills will be that people can "fake" mental retardation/cognitive disability. In fact, however, a qualified professional who applies the professionally accepted instruments/tests/measures to determine whether a person meets the definitions will detect any genuine, and any pretended, cognitive disability.

The "faking" argument simply does not carry water.

In addition, the opposition will claim that people who have "fried their brains on drugs or alcohol" qualify as having a cognitive disability, as that term is defined. That claim misses the point of the *Adkins* decision, which is to keep people who have such a disability from being executed. Under *Adkins*, the cause of the disability is immaterial and the argument that it is material simply is not legally correct.

The opposition may also claim that the term "cognitive disability" as defined protects people who do not have mental retardation but other disabilities that render them unable to understand the meaning of capital punishment. That claim has merit, because the age-of-onset criterion that is used to define "mental retardation" is absent in S. 32, and thus S. 32 can apply to people who do not meet the test for "mental retardation" but who nevertheless have all of the characteristics of a person with mental retardation. S. 32 makes a deliberate choice to protect people who function as though they had retardation. That is a wise policy choice: the underlying rationale in *Adkins* was that the 8th Amendment prohibits a punishment that the punished person cannot possibly understand.

I write as former president of the American Association on Mental Retardation; chairman, Board of Trustees, Judge David L. Bazelon Center for Mental Health Law; former national secretary, The ARC of the USA; and former treasurer, The Association for Persons with Severe Handicaps.

Rud Turnbull, Ll.B. (J.D), Maryland Law School; Ll.M., Harvard Law School; and professor of special education and retired courtesy professor of law, The University of Kansas, Lawrence.

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Submitted by
Kevin O'Connor

Thank you for the opportunity to address the Committee.

The Kansas County and District Attorneys Association (KCDAA) strongly opposes SB14. The KCDAA opposes any change to the capital murder statute. Remember, the legislature passed a good, conservative death penalty law that has been recognized many times by the United States Supreme Court as a model death penalty law.

1) SB 14 is completely UNNECESSARY. Despite arguments to the contrary, the United States Supreme Court decision in Atkins v. Virginia, does NOT require any action by the Kansas Legislature. NO ACTION IS REQUIRED because the laws of the State of Kansas forbid the execution of the mentally retarded. Our law has always protected the mentally retarded from the death penalty. In fact, the United States Supreme Court noted our statute in the Atkins decision. The Supreme Court in Atkins did not define mental retardation and expressly left to the states the determination of who is mentally retarded. The Court noted the existing clinical definitions of retardation as used by mental health professionals. The American Association on Mental Retardation 2002 definition of mental retardation reads as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. *This disability originates before age 18.*

Every medically accepted definition of mental retardation includes an age of onset provision to weed out malingerers (fakers). Without an age of onset provision, an important check on manufactured claims of mental retardation is eliminated. Why eliminate the provision? Why reject the definition accepted by the experts? Most states have adopted all or part of the clinical definitions of mental retardation in crafting a LEGAL definition.

I have done a great deal of research into states' responses to the Atkins decision. In addition to legal research, I have spoken with prosecutors and representatives of District and County Attorney Associations from across the country. I have discussed the matter with the lawyers directly involved with the Atkins case. The Atkins case is currently being litigated in the Commonwealth of Virginia after the Virginia General Assembly, in response to Atkins, enacted legislation defining mental retardation and setting up procedures to have the issue determined in Virginia capital murder cases and state habeas matters. The Commonwealth of Virginia followed the clinical definition of mental retardation including an age of onset requirement. An age of onset provision (as discussed above) is important to the experts because the age of onset provision protects against malingerers (fakers). The State of Texas has not yet made changes to Texas state law even though the Atkins decision *does* require a change in Texas. Texas, a state that requires a change in its law, is being deliberative and is not rushing into a decision. Proponents in Kansas, a state where no change is required, are pushing the legislature to change a statute that was cited as a model by the Supreme Court.

2) A study of the impact on past and pending cases has not been done. The "studies" that have been done have been conducted by biased individuals and or groups that have their own agenda. The committees that have "studied" the issue did not fairly represent all views and opinions. Prosecutors with experience in capital murder litigation were not consulted or their opinions were ignored. Virginia conducted extensive studies and experts debated the issue before any REQUIRED changes were enacted. (Kansas requires no change in the law) In Kansas, a small group of advocates are behind the push for a change to fix a problem that does not exist. No studies have been conducted. No unbiased experts have debated the issue. The legislature is left with nothing but last year's bill offered by last year's proponents. Nothing has changed in a year. Kansas law on this issue does not require or need a change. A change will not help individuals that truly suffer from mental illness. The law protects those individuals in many ways and prosecutors are mindful of those that truly suffer from a mental illness. Mental retardation was not an issue with the men currently on death row. A change will create a new cottage industry of so-called experts that will do or say anything to classify murderers under the umbrella of an expanded and nearly unprecedented definition of mental retardation, an expanded definition that differs from nearly every state. The last time I testified I gave the example of the doctor that manipulated the PET scans of the Carr brothers.

3) The bill adds unnecessary layers to the litigation process. The inclusion of the unnecessary layers is a clear sign that those with experience in capital murder litigation were not consulted. For example, a jury question (New Sec. 2(d)) regarding mental retardation is not required by law and may inhibit a defendant's ability to present mental retardation evidence in mitigation. Proponents suggest that the provision is required by Ring v. Arizona. Courts throughout the country have consistently held that the mental retardation eligibility question is NOT a Ring issue.

Thank you for your careful consideration of this important subject.

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