

REVISED  
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## SUPPLEMENTAL NOTE ON SENATE BILL NO. 28

Without Recommendation by Senate  
Committee on Judiciary

### **Brief\***

SB 28 would clarify the Kansas death penalty statute dealing with aggravating and mitigating circumstances. The bill would clarify that if a jury finds that the aggravating circumstances and mitigating circumstances are equal, the defendant shall not be sentenced to death but rather to life without the possibility of parole.

The bill addresses a recent ruling of the Kansas Supreme Court, *State v. Marsh*, \_\_ Kan. \_\_, 102 P3d 139 (2004), which held the death penalty law was unconstitutional on its face. The Court interpreted the statute to require a tie between aggravating and mitigating circumstances to go to the state and thus require the imposition of the death penalty. The Court said when a tie occurs in aggravating and mitigating circumstances, the benefit must go to the defendant and the death penalty may not be imposed.

### **Background**

No proponents appeared in favor of the bill.

The Kansas Attorney General, an assistant federal public defender, and the Executive Director of the Board of Indigents' Services appeared as neutral conferees.

The Attorney General expressed concern that if the Legislature amended the death penalty law in line with the *Marsh* case, that this

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

action may hurt the state's chances of being granted *certiorari* by the U.S. Supreme Court to have the *Marsh* case overturned.

If the *Marsh* decision stands, then no one who has been convicted of a capital crime and sentenced to death in Kansas since the reenactment of the death penalty in 1994 will be executed – all persons who were sentenced to death will need to be resentenced to either a Hard 40 or a Hard 50 sentence. In addition, five murder cases where the death penalty is being sought are now proceeding to trial and more of these defendants will be eligible for the death penalty.

The assistant federal public defender suggested certain amendments to the Kansas death penalty procedure to insure fairness, including: full and open discovery; discovery depositions; *ex parte* document subpoenas; video-taping of all interrogations; double-blind lineups; and written records of all statements made by the murder witnesses at the time they identify the defendants.

The bill was opposed by the Sedgwick and Johnson County District Attorneys, the Kansas County and District Attorneys Association, and a representative of Murder Victims' Families for Reconciliation. The prosecutors opposed the bill for fear legislative action would hurt the state's chances of being granted *certiorari* before the U.S. Supreme Court. The victim's group opposed the death penalty and wanted the impact of the *Marsh* case, *i.e.*, abolition of the death penalty, to stand.

### **Kansas Death Penalty Law and Procedure**

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

- Intentional and premeditated killing of any person in the commission of kidnaping or aggravated kidnaping;
- Intentional and premeditated killing of any person pursuant to a contract;
- Intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional facility;

- Intentional and premeditated killing of the victim of, the commission of, or attempt to commit rape, criminal sodomy, or aggravated criminal sodomy;
- Intentional and premeditated killing of a law enforcement officer;
- Intentional and premeditated killing of more than one person as a part of the same act or transaction or acts connected together; or
- Intentional and premeditated killing of a child under the age of 14 in the commission of kidnaping or aggravated kidnaping with intent to commit a sex offense.

A separate sentencing proceeding to determine whether the defendant shall be sentenced to death is required. In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in KSA 21-4625 and any mitigating circumstances.

The aggravating circumstances are limited by statute to the following:

- The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.
- The defendant knowingly or purposely killed or created a great risk of death to more than one person.
- The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.
- The defendant authorized or employed another person to commit the crime.
- The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

- The defendant committed the crime in an especially heinous, atrocious, or cruel manner.
- The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.
- The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

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

- The defendant has no significant history of prior criminal activity.
- The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
- The victim was a participant in or consented to the defendant's conduct.
- The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
- The defendant acted under extreme distress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.
- At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.
- A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances in KSA 21-4625 exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.

The death penalty is carried out by intravenous injection at the Lansing Correctional Facility.

A person under 18 or a mentally retarded person cannot be sentenced to death or to life without the possibility of parole under KSA 21-4622 and KSA 21-4623.

#### **Kansas Supreme Court Decisions: the Kansas Death Penalty Law Is Unconstitutional**

The Kansas Supreme Court has rendered two decisions involving the Kansas capital punishment law. Both cases found the law unconstitutional. A 2001 case found the law was unconstitutional only as applied in the specific case of the defendant, Gary Kleypas. The Court in 2004, however, found the law unconstitutional on its face and incapable of being construed by the Court in a constitutional manner.

#### ***State v. Kleypas* (272 Kan. 894 (2001))**

Gary Kleypas was convicted in the Crawford County District Court of capital murder, attempted rape, and aggravated burglary, and sentenced to death. The defendant appealed, challenging *inter alia*, the weighing equation of aggravating and mitigating circumstances in KSA 21-4624. *Kleypas* was the first court challenge of Kansas' death penalty statute.

The Court looked at the issue of whether the Kansas death penalty statute (KSA 21-4624) is unconstitutional because of the weighing equation that mandates a sentence of death when aggravating and mitigating circumstances are equal.

The Court held that the weighing equation in death penalty statute, which it construed to mandate death if aggravating and mitigating

circumstances were equal, was unconstitutional as applied, violating the Eighth Amendment prohibition on cruel and unusual punishment.

The Court went on to say, however, that the weighing equation in KSA 21-4624 did not invalidate Kansas' death penalty statute.

The *Kleypas* Court reasoned that the Kansas Legislature had intended to enact a constitutional death penalty scheme and thus it concluded that KSA 21-4624(e) was not void on its face, but only in its application to the defendant. The majority, by a four to three vote, held that by requiring the "tie" to go to the defendant, the intent of the Legislature may be carried out in a constitutional manner. The Court then held that KSA 21-4624 did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

Three years later the Court reversed itself and repudiated the above interpretation in the decision of *State v. Marsh* (\_\_\_ Kan. \_\_ Decided Dec. 17, 2004).

Michael Marsh was convicted in the Sedgwick County District Court of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. The defendant appealed, challenging *inter alia*, the weighing equation of aggravating and mitigating circumstances in KSA 21-4624. The Court with three new justices since its 2001 decisions, looked once again at the weighing equation.

Nearly identical issues once again were reviewed by the Court. The Court again held that the weighing equation in the death penalty statute, which it said mandated death if aggravating and mitigating circumstances were equal, was unconstitutional as applied, violating the Eighth Amendment prohibition on cruel and unusual punishment.

The *Marsh* court then, held that KSA 21-4624(e) was unconstitutional on its face and overruled that portion of the *Kleypas* decision that earlier had saved the statute through judicial construction.

The *Marsh* majority declined to use the avoidance doctrine, or the rule of constitutional doubt, under which a court will not strike down a statute as unconstitutional if it can be construed in a manner consistent with legislative intent. Instead, the *Marsh* majority found KSA 21-4624 unconstitutional on its face, stating that the statutory interpretation

maxims of avoidance and constitutional doubt cannot apply where the statute itself is clear and unambiguous.

### **Impact of the *Marsh* Case on Death Row Inmates**

The following are the names of the seven persons who have been convicted of capital murder in Kansas and the date of their offenses.

Gary Kleypas – March 30, 1996  
Michael Marsh – June 17, 1996  
Gavin Scott – September 13, 1996  
John Robinson Sr. – June 3, 2000  
Jonathan Carr – December 11 and 15, 2000  
Reginald Carr – December 11 and 15, 2000  
Douglas Belt – June 25, 2002

None of the above defendants will receive the death penalty if the *Marsh* decision stands. The maximum sentence that can be given is the Hard 40 for those defendants whose crimes were committed prior to July 1, 1999. The rest of the above list are eligible for the Hard 50. The sentence of life without parole was effective July 1, 2004 and therefore would not apply to any of the above defendants.

### **Kansas Attorney General Files Appeal to U.S. Supreme Court**

The Kansas Attorney General has filed a motion for rehearing with the Kansas Supreme Court but does not believe the Court will reverse itself. The Attorney General intends to file a *writ of certiorari* with the United States Supreme Court to seek to have that court reverse the *Marsh* ruling and uphold the constitutionality of the Kansas capital punishment law. Whether the US Supreme Court grants the writ will not be known until late spring or early summer.

If the U.S. Supreme Court fails to grant *certiorari* or, having granted the review but renders a decision against the State of Kansas, then all death penalty sentences rendered since the enactment of the law in 1994 are invalid and all defendants receiving the death sentence will have to be resentenced. None will be eligible for the death penalty even if the Legislature "fixes" the statute. Such a fix must be prospective

only - otherwise it would violate the *ex port facto* clause of the *U.S. Constitution*.

The maximum sentence that can be imposed is either the Hard 40 or the Hard 50. Note the same result on any of these defendants will apply to the five death penalty cases now proceeding to trial. None of these defendants, if convicted, will be eligible for the death penalty if the *Marsh* ruling stands.

The fiscal note stated the fiscal impact, if any, of the bill cannot be estimated.