

SESSION OF 2005

**SUPPLEMENTAL NOTE ON
SENATE RESOLUTION NO. 1820**

As Recommended by Senate Committee on
Judiciary

Brief*

SR 1820 states that it is the opinion of the Kansas Senate that the Kansas death penalty law as written is constitutional and that if any single provision of that law is found to be unconstitutional that provision should be severed from the rest and other provisions of the statute upheld.

The Kansas Supreme Court and the United States Supreme Court should be informed that the Kansas Legislature relied on the Kansas Supreme Court's decision in *State v Kleypas* in deciding not to amend the Kansas death penalty law to alter the weighing equation provisions during hearings in 2002 and 2004.

Finally, the Kansas Senate respectfully requests the United States Supreme Court to grant *certiorari* to hear the *Marsh* case and find Kansas death penalty law constitutional as written or, in the alternative, as applied through the cure imposed by the Kansas Supreme Court in the *Kleypas* decision.

Background

The resolution was requested by Senator Derek Schmidt. The Senate Committee agreed to introduce the resolution and recommend it directly to the full Senate.

*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>

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 filed a motion for rehearing with the Kansas Supreme Court which was denied. 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.