

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:37 a.m. on January 20, 2010, in Room 548-S of the Capitol.

All members were present.

Committee staff present:

Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:

Bud Welch, Murder Victims Families' for Human Rights
Bishop Scott J. Jones, United Methodist Church, Kansas Area
Sam Millsap, Adjunct Professor of Law, St. Mary's Law School
Ernestine Krehbiel, President, League of Women Voters of Kansas
Kris Ailsieger, Assistant Attorney General
Barry Disney, Assistant Attorney General
Melissa Smith, Victim advocate
Amy Scott, Victim advocate

Others attending:

See attached list.

Bill Introductions

Senator Derek Schmidt introduced a bill regarding drugs. The bill was introduced without objection.

The Chairman reopened the hearing on **SB 208 - Abolishing the death penalty and SB 375 - Abolishing the death penalty; creating the crime of aggravated murder.**

Bud Welch appeared in support providing his personal experience regarding the death of his daughter in the bombing of the Murrah Federal Building in Oklahoma City. The phrase "the death penalty brings closure to victims" is a myth perpetuated by politicians and news media. Six months after the bombing a poll showed 85% of survivors and victims' families wanted the death penalty, six years later that figure had dropped to near half and today it is even lower. They did not feel any better following the execution of Tim McVeigh. (Attachment 1)

Bishop Scott Jones spoke in favor stating for moral, practical and economic reasons now is the right time to abolish capital punishment. Moral arguments include respect for the sanctity of life and the structural unfairness in our legal system. Practical arguments includes current evidence of many people wrongly convicted and a lifetime behind bars is both punishment and an opportunity for repentance. The economic argument is powerful in the current economic crisis facing our state and continued spending for capital punishment is to misplace our priorities. (Attachment 2)

Sam Millsap testified in support indicating he has successfully prosecuted several capital murder cases and each of those defendants have been executed by the State of Texas. Mr. Millsap stated he now opposes the death penalty due to his experiences he feels the criminal justice system is not competent to decide who may live or die and the cost can no longer be justified. The flood of exonerations that has occurred in recent years, coupled with a few highly publicized innocence cases is undermining public confidence in the criminal justice system. Life without parole is a good alternative to the death penalty in Kansas. (Attachment 3)

Ernestine Krehbiel appeared in favor stating it is important to consider the costs associated with the prosecution of a death penalty case. A death penalty that attempts to be fair is costly and given the current budget crisis, voters question why state money is being expended on a process that does not make the citizens any safer. Given the expense of death penalty cases the League of Women Voters urge the Committee to consider the ways our limited state budget funds could be used more effectively. (Attachment 4)



CONTINUATION SHEET

Minutes of the Senate Judiciary Committee at 9:37 a.m. on January 20, 2010, in Room 548-S of the Capitol.

Kris Ailsieger appeared in opposition stating the Attorney General believes the death penalty is the appropriate penalty for the small class of heinous murderers subject to it. It is a matter of justice, it is not a matter of cost. This debate should be about insuring that the appropriate punishment is administered for the crime committee, and insuring justice. There are some murderers whose crimes are so heinous, they are deserving of the death penalty. There will be future serial killers and mass murders, the appropriate and penalty to punish them will no longer be available if this bill is enacted. (Attachment 5)

Barry Disney spoke in opposition stating in the confines of a conference room, murders that qualify for the death penalty seem distant and the horrors behind the crimes are difficult to imagine. This is not the case for the police, prosecutors and survivors of the crimes. It is unwise to decide the fate of the death penalty based upon the bottom line of a ledger sheet. Kansas has one of the most conservative death penalty laws in the country and is used sparingly. The existing law reserves the death penalty for only those few crimes committed each year that are so horrible that a lesser penalty is inadequate. (Attachment 6)

Amy Scott spoke in opposition stating the issue is not just about cost. The opinions of Kansans are representative of the juries that have convicted the men on death row today. The crimes committed were so horrendous, it was an appropriate punishment. Law enforcement officials and prosecutors need as many tools as possible to protect the citizens of this state. Future victims of crimes need to have the option of the death penalty when it is warranted. (Attachment 7)

Written testimony in support of **SB 375** was submitted by:

Paige Nichols, Kansas Association of Criminal Defense Lawyers (Attachment 8)

The next meeting is scheduled for January 21, 2010.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-20-2010

NAME	REPRESENTING
<i>Bill Lucas</i>	MVFRKS
CAROLYN Zimmerman	MVFRKS
Bud Welch	MVFHR - OK
Scott Jones	United Methodist Church
Donna Schneeweis	Amnesty International
CHRISTINA PARTAIN COOK	KEADP
PATRICIA A. SCALIA	BIDS
Christy Molzen	Judicial Council
Roger Newfeld Smith	Western District, Mennonite Church USA Southern Hills Mennonite Ch. Topeka, KS
Larry Dixon	
<i>Margaret E. Maulsonis</i>	SCLA
<i>Ernestine Krebbel</i>	League of Women Voters
<i>Richard Smalley</i>	Kennedy Assoc.
<i>Lan Wols</i>	Office of Jud. Branch
Terry Harmon	Amnesty International
Sister Jeanne McKenna	Sisters of St. Joseph of Convent
Otto Vaughn	Topeka NAACP
Glenda Overstreet	NAACP, Topeka

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-20-2010

NAME	REPRESENTING
Mary Wilkerson	KEC UMC - UMW
John's Green	KANSAS EAST CONFERENCE UNITED Methodist Church LAITY + UMW
Nancy Clark	KANSAS EAST CONF UMW
Jeanette Grenz	Kansas East Conf United Methodist Church
Tania Sudduth	Kansas East Conference United Methodist Church
Sue Luttrell	Kansas East Conference United Methodist Church + UMW
SEAN MILLER	CAPITOL STRATEGIES
Carolyn McGinn	State Senate
Rev. Lynn Jambeck	Highland Park United Methodist Church Topeka, KS
Sister Therese Bangert	KS. Cath. Conf.
Paul Johnson	" " "
Catie Roch	KANSAS
Kelsey Neft	KANSAS
DAVID HUTCHINGS	KANSAS BUREAU OF INVESTIGATION
Ross M. Allen	Jackson Heights High-School
Caitlin Messer	"
D. Gibb	KSAG
KRIS AILSLIEGER	KSAG

Testimony in Support of Senate Bill _____
Senate Judiciary Committee
January 20, 2010

Bud Welch
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Murdered Victims Families for Human Rights
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I want to tell you a little about my daughter, Julie-Marie Welch. Born seven weeks premature, she was given a 10-percent chance of survival. Her early difficulties, though, did not cause any permanent physical defects. In eighth grade Julie met a non-English-speaking Mexican girl who quickly became bilingual, which made Julie long to speak a foreign language. She mastered Italian, German, Spanish and French in Catholic high school and spent 11 months of her junior year studying in Spain. She returned to Spain during her Marquette University undergraduate days.

Julie lived her faith. Each day she attended Mass at Our Lady of Mount Carmel/St. Thérèse Little Flower Church. At the Oklahoma City parish where Mexican-Americans worshiped, she ran a children's program. Often, she telephoned me and asked me to meet her there for Mass. When she came for Mass kids would come running across the street yelling her name. I wish I had the faith Julie had.

Once she and I listened to a news report about an execution. "All they're doing is teaching children to hate," Julie said to me. In August 1994 she began work as an interpreter for the Social Security Administration in Oklahoma City. On the morning of April 19th Julie walked to the waiting room to meet a client when a bomb detonated at the Murrah Federal Building, killing her and 167 others.

That morning I was still home thinking about lunch with her. Every Wednesday we met at a Greek restaurant across from Julie's workplace. Shortly after 9 a.m., my brother telephoned and said, "Turn on the television, Bud."

I spent two days near the telephone, waiting after the bombing. Julie always telephoned me. I didn't go to the bomb site. I wouldn't have been allowed to get close, so I stayed near the telephone. I hoped to receive her familiar telephone call. Instead, I was told her body had been found the Saturday after the bombing.

Within the first 72 hours after the bombing, President Clinton and Attorney General Reno promised to seek out, find the people responsible and apply the death penalty. That was "the big fix"- my government was going to fix this horrible crime by causing more death.

And I bought into that. The first five weeks after the bombing are a blur to me. I wanted McVeigh and Nichols hanged, no trials necessary. I suffered from a temporary insanity. I would have killed them with my bare hands if I could have reached them. Three days after the bombing, as I watched Tim McVeigh being led out of the courthouse, I hoped someone in a high building with a rifle would shoot him dead. I wanted him to fry.

I was a physical and mental wreck because I was stuck on April 19, 1995. I smoked one and a half packs a day before the bombing. Afterward, I started smoking three packs a day. Unable to deal with the pain of Julie's death, I started self-medicating with alcohol. I was drinking three or four rum-and-Cokes a night until eventually the hangovers were lasting all day. Then, on a cold day in January 1996, I came to the bombsight – as I did every day – and I looked across the wasteland where the Murrah Building once stood. My head was splitting from drinking the night before and I thought, "I have to do something different, because what I'm doing isn't working."

Then, the realization hit me that trials were necessary. We didn't know beyond a doubt that McVeigh and Nichols were truly guilty. For the next few weeks I started to reconcile things in my mind, and finally concluded that it was revenge and hate that had killed Julie and the 167 others. Tim McVeigh and Terry Nichols had been against the US government for what happened in Waco, Texas, in 1993 and seeing what they'd done with their vengeance, I knew I had to send mine in a different direction. Shortly afterwards I started speaking out against the death penalty.

Shortly after the bombing I'd seen a news report on Tim McVeigh's father, Bill. He was shown stooping over a flowerbed, and when he stood up I could see that he'd been physically bent over in pain. I recognized it because I was feeling that pain, too.

In September 1998, after Tim McVeigh had been sentenced to death, I had a chance to meet Bill McVeigh at his home near Buffalo. I wanted to show him that I did not blame him. His youngest daughter also wanted to meet me, and after Bill had showed me his garden, the three of us sat around the kitchen table. Up on the wall were family snapshots, including Tim's graduation picture. They noticed that I kept looking up at it, so I felt compelled to say something. "God, what a good looking kid," I said.

Earlier, when we'd been in the garden, Bill had asked me, "Bud, are you able to cry?" I'd told him, "I don't usually have a problem crying." His reply was, "I can't cry, even though I've got a lot to cry about." But now, sitting at the kitchen table looking at Tim's photo, a big tear rolled down his face. It was the love of a father for a son.

When I got ready to leave I shook Bill's hand, then extended it to Jennifer, but she just grabbed me and threw her arms around me. She was the same sort of age as Julie but felt so much taller. I don't know which one of us started crying first. Then I held her face in my hands and said, "Look, honey, the three of us are in this for the rest of our lives. I don't want your brother to die and I'll do everything I can to prevent it." As I walked away from the house I realized that until that moment I had walked alone, but now a tremendous weight had lifted from my shoulders. I had found someone who was a bigger

victim of the Oklahoma bombing than I was, because while I can speak in front of thousands of people and say wonderful things about Julie, if Bill McVeigh meets a stranger he probably doesn't even say he had a son.

Since I met Bill McVeigh, I feel closer to God. I'm not a real religious person, but that was an unforgettable experience. About a year before the execution I found it in my heart to forgive Tim McVeigh. It was a release for me rather than for him.

I was surprised by the people who celebrated when McVeigh's sentence of death was announced. Vengeance solves no problems. The criminal commits a violent act. Then we, as a society, ratchet it up; we do him violence. Next, we ask ourselves, 'Why are we such a violent society?'

You Legislators hear a lot about the phrase, "Victims needing closure". I'm here to tell you, that is nothing but a myth perpetuated by politicians and news media. Six months after the bombing a poll taken in Oklahoma City of victims' families and survivors showed that 85% wanted the death penalty for Tim McVeigh. Six years later that figure had dropped to nearly half, and now most of those who supported his execution came to believe it was a mistake. In other words, they didn't feel any better after Tim McVeigh was taken from his cell and killed.

Testimony of Bishop Scott J. Jones before the Judiciary Committee of the Kansas Senate
Regarding Capital Punishment and Senate Bills 208 and 375

Leadership in any community or organization frequently involves deciding how we can make progress by taking important steps at the right time. For moral, practical and economic reasons, I believe that now is the right time to abolish capital punishment in the state of Kansas. Why is it the right time? DNA technological advances have changed the practical evidence in favor of abolishing the death penalty, and our state's economic crisis means we simply cannot afford to pay for revenge any more. Decisions we make with our money have a moral dimension and we ought to craft our budget to help our state be the best it can be. No longer funding capital punishment is an excellent step forward.

One moral argument is based on how our government teaches respect for the sanctity of human life. The Social Principles of The United Methodist Church represent our best effort to apply biblical principles to contemporary reality. We support justice and we know that punishment is often deserved. But our teaching on this issue begins, "We believe the death penalty denies the power of Christ to redeem, restore and transform all human beings. . . . We believe all human life is sacred and created by God and therefore, we must see all human life as significant and valuable." We believe a pro-life position requires an end to judicial executions.

A second moral argument is about structural unfairness in our legal system. Wealthy persons get the best legal representation and the fairest trials. Poor persons relying on court-appointed attorneys are often poorly represented. The poor are much more likely to be convicted of capital crimes even when all other factors are weighed. I believe our American legal system is the best in the world. But I have heard from prosecutors, judges, defense lawyers and law-school professors that all too often there are factors other than justice that strongly influence the outcome of important cases.

Turning to practical arguments, recent developments in DNA technology have shown that many persons on death row were wrongly convicted. John Grisham's *The Innocent Man: Murder and Injustice in a Small Town* is a powerful true story about how police misconduct and jury bias made a mistake that only a federal judge could correct. Ron Williamson was innocent, but sentenced to death anyway. Killing a convicted person forever removes the possibility of fixing such a mistake. The uncertainty of even our best evidence ought to stop us from delivering an irreversible judgment.

Another practical argument says that life in prison without parole is an adequate and possibly harsher punishment for the most serious crimes. A lifetime behind bars is both punishment and an opportunity for repentance. It is a punishment because the person lives every day with the wasted realities of his past and the drastic limitations of his present. It is an opportunity because they have time to make their peace with God. From my point of view, conversion to Christ and an opportunity to live a faithful life behind bars is the best possible outcome for many convicts.

The people I know who engage in prison ministry have shared with me eloquent stories of how people in prison do occasionally turn their lives around. A friend of mine recently shared with me a story about how one man serving a life sentence without parole spends his days working in the prison hospital ministering to other inmates as they are dying. He will never leave prison, but after conversion he chooses to allow God to use him to ease the suffering of others. He is guilty of murder and could have been executed. Instead, he is spending his days caring for

others. While such conversions may be rare, I hope our state gives the maximum opportunity for such life-changes to happen.

The economic argument at this time in our state's history is powerful. Death penalty cases and their associated appeals are incredibly expensive. They consume state money and court time when our state budget is already suffering from an economic downturn. Our state budget is reducing the amount of money for senior citizen care, for K-12 schools, for highways and for economic development. To continue spending money for capital punishment is to misplace our priorities.

I know that the decisions faced by senators and representatives are complex. Each of you wants to do the morally right thing. Each of you wants to represent your constituents and their views. Each of you must balance economic realities. Political realities come into play as well. I suggest that this year is in fact a time when all of those factors make it the right time to take this step forward and help make Kansas a better state.

Contact Information

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**Testimony in Support of Senate Bill 375
Senate Judiciary Committee
State of Kansas
January 20, 2010**

I'm Sam Millsap and I come to you from Texas, the execution capital of the free world. Let me begin my testimony with a word of thanks to the members of this Committee for reporting similar legislation favorably last year to the full Senate and for confronting this very important issue again this year. I am deeply appreciative for the opportunity to share my personal experience and to answer your questions.

You should know that I am a graduate of the University of Texas and I'm very humble today. As you may know, we were No. 1 until Monday night when we got our clock cleaned by Kansas State in Manhattan. We thought we only had to worry about one Kansas basketball team. I'm sure we all look forward to February 8 when the Longhorns and Jayhawks, that other Kansas basketball team, strap it on in Austin. Although Kansans would prefer to play in Allen Fieldhouse, that game will be played in our SuperDrum—the other place in Texas where executions occur with painful regularity.

Let me assure you at the outset that, although I may be horse's ass when it comes to the Longhorns, I am no wild-eyed, pointy-headed, liberal social scientist type when it comes to the death penalty. I am a former elected District Attorney in San Antonio, Texas, the 7th largest city in America, and a former member of the Board of Directors of the National District Attorneys Association.

I was, until a few years ago, a strong supporter of the death penalty. I am not here today to with a preachy message about morality. I do not oppose the death penalty on moral grounds. I have great respect for the many thoughtful people who believe some crimes are so horrible that the only appropriate response from civilized people is the imposition of the death penalty. Although I agree with them in principle, I oppose the death penalty because my experience as a prosecutor tells me two things:

–The greatest criminal justice system in the world is simply not competent to decide who may live and who must die; and

–The cost of the death penalty can no longer be justified.

As Bexar County District Attorney, I prosecuted capital murder cases and compiled a perfect record. In every case I prosecuted, the defendant was convicted; each of those defendants has been executed by the State of Texas.

I'm not bragging; I say these things to make a point. I have done more than just "talk the talk" on this issue. I don't come to you with mushy, philosophical

blather. I have "walked the walk." I have lived in the belly of the beast and no one ever accused me of being soft on crime.

In December of 2005, a major Texas newspaper argued persuasively that one of my prosecutions—the Ruben Cantu case—may have resulted in the execution of an innocent man. I fervently hope that there are only a few prosecutors and former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man.

I believe prosecutors whose very best efforts may have produced unfortunate results in capital murder cases have a moral and ethical duty to accept responsibility for their mistakes. It is for this reason that I welcome the opportunity to share with you my death penalty experience and, at the risk of being accused of carpetbagging, to urge you to send this bill to the Senate floor with a favorable recommendation.

The beginning point for this discussion is the acknowledgment that Texas and Kansas are obviously very different in some respects when it comes to the death penalty. Your last execution occurred when I was still in high school; Texas has executed 449 people since the death penalty was reinstated. Even though 2010 is only 3 weeks old, we've already executed 2 people this year.

Although we are different in some respects, we are identical in those that matter most. The people and courts of Kansas—like their counterparts in Texas, are not infallible. Your courts function as ours do; our juries determine guilt or innocence based on testimony from fact and expert witnesses who may or may not be telling the truth and who, even when they tell the truth as they know it, are sometimes simply wrong.

As is the case in Texas, the criminal justice system in Kansas, on its best day, is driven by decisions that are made by imperfect human beings. Try as we do to always get it right, we sometimes get it wrong.

It is against this backdrop—what our states have in common, that I share my experience—the perspective of a former elected major metropolitan District Attorney who has prosecuted death penalty cases successfully, who has accepted personal responsibility for the execution of a man who may well have been innocent, and who knows first hand how fundamentally important it is that we keep the promise that our courts will guarantee the protection of the innocent. In the Ruben Cantu case, I was dealing with an incredibly savage crime against two victims; the only eyewitness managed to survive nine gunshot wounds. We had a brutal crime and no physical evidence connecting anyone to the crime; we had no gun, no fingerprints, and no confession; Cantu denied involvement in the crime until the day he died. We had one compelling eyewitness and nothing more.

I assumed personal responsibility for the execution of Ruben Cantu because, whether he was innocent or not, I am now certain that my decision to seek Cantu's execution on the basis of the testimony of a single eyewitness was wrong because, although I didn't fully appreciate it at the time, eyewitness testimony is simply not as reliable as we like to believe. A recent study concluded that, in the 100's of cases in which convicted defendants have been cleared through DNA testing, more than 75% were convicted based largely on mistaken eyewitness testimony.

Cantu was not one of those horrible prosecution misconduct cases that you hear about. We voluntarily disclosed the problems with the case to the defense long before he was tried. Cantu was convicted and executed and everyone forgot about him until our star witness recanted his trial testimony in 2004. Although our current District Attorney has investigated the matter exhaustively and concluded that the recantation is not credible, very legitimate questions concerning Cantu's guilt remain because the man who was present when the murder occurred has confirmed that Cantu was not the shooter. Although he is not particularly credible, he had nothing to gain by lying 20 years later from his prison cell. Even miserable human beings tell the truth most of the time.

What makes the Cantu case so troubling is that it could happen anywhere—even Kansas. Ruben Cantu received more than the fair trial our system guarantees—he arguably received a perfect trial. He had a fine defense attorney and a fair judge; every bit of exculpatory evidence was voluntarily disclosed to the defense and fully litigated. And yet, almost 25 years later, very serious questions remain.

What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. We have seen junk science debunked, and the exposure of terrible mistakes by forensic laboratories. And finally, we have seen misconduct and errors by key players within the system.

The growing opposition to the death penalty has been powered by innocence concerns. Some of you have probably heard the argument from death penalty supporters that there is no proof that an innocent person has ever been executed in the United States. Justice Scalia made that very statement in his concurring opinion in *Kansas v. Marsh*, a case that is well known to all of you. The fact is that 139 death row inmates have been exonerated in America since 1976. I would challenge Justice Scalia and the other folks who argue that there is no proof that an innocent person has ever been executed in the United States to make that argument after they have examined two other Texas cases.

Cameron Willingham, who became a tragic poster child for innocence in the September 7, 2009, issue of *The New Yorker*, was convicted and executed for torching his house in a fire that killed his three children. His conviction was based on expert testimony that was considered at the time to be reliable. What

we now know with certainty—too late for Willingham—is that what we accepted as expert testimony only a few years ago was really nothing more than junk science; it is now clear that the expert testimony upon which his conviction was largely based was simply wrong and that, in fact, the State of Texas convicted and executed a man for something that, according to current scientific knowledge, was not even a crime.

Carlos DeLuna—also from Texas—was almost certainly innocent. Like the Cantu case, questionable eyewitness testimony was relied on by the prosecution to convict DeLuna for the brutal stabbing murder of a female gas station attendant. In addition, however, there was no investigation by the police of tips that pointed within days of the murder to a man who subsequently bragged repeatedly to friends that he had murdered Wanda Lopez. Although the prosecutor knew him well, he nevertheless argued in his closing that the probable murderer was a “phantom” who existed only in the mind of Carlos DeLuna. Moreover, the prosecutor was personally familiar with the *modus operandi* of the probable murderer—a preference for gas station robberies, knives, and attacking women—and nevertheless failed to disclose this exculpatory evidence to the defense as required by law.

Although these cases are different from each other in material respects, they all have one thing in common. Whether the Cantu, Willingham, and DeLuna were innocent or not, each of their juries—if they had known what we know today—would almost certainly have returned verdicts of “not guilty” based on the existence of “reasonable doubt.”

These and other cases, coupled with the growing number of DNA exonerations, are undermining public confidence in the criminal justice system. As you learned yesterday, the American Law Institute, which developed in the early 60's the approach to death penalty prosecutions that most states use today, has recently abandoned its support for the death penalty.

Because our criminal justice system, on its best day, is driven by decisions that are made by imperfect human beings who make mistakes, there is compelling evidence that our criminal justice system is simply not competent to decide who may live and who must die.

In spite of this obvious fact, many good and decent people are willing to accept a system that makes mistakes in death penalty cases; they believe it's OK if we get it right most of the time

--that the price for the only penalty that fits the most heinous crimes, the occasional wrongful execution, is not too high;

--that good intentions, strong procedural safeguards, and a fair trial provide enough protection.

Although I do not oppose the death penalty on moral grounds, I don't think it's good enough to get it right most of the time. Accepting a system that tries hard and almost always gets it right breaks the promise that our courts will guarantee the protection of the innocent. Anything less is demeaning to the people of Kansas.

Just as demeaning is the suggestion that the threat of a capital murder trial helps prosecutors coax defendants to plead guilty through plea bargaining. Apart from the fact that it would be unethical to hold a death sentence over a defendant's head to encourage a guilty plea, such a claim misses the most crucial point.

When I became DA, plea bargaining was rampant in my county; everything was negotiable; the argument was that without plea bargaining the system would grind to a halt. We proved that was not true by refusing to negotiate charge reductions; we charged only what we could prove and defendants continued to plead guilty. They did so because, as every experienced prosecutor knows, 95%+ of all criminal defendants plead guilty for one simple reason: they are guilty!

My experience is supported by the record in several states. In New Jersey, for example, prosecutors have reported that abandoning the death penalty has had no effect on their ability to secure guilty pleas in murder cases. In Alaska, where plea bargaining was abolished in 1975, a study by the National Institute of Justice found that since the end of plea bargaining, "guilty pleas continued to flow in at nearly undiminished rates."

Concerns about innocence have been joined by cost considerations in this debate. Our weak economy pushed the cost of the death penalty to ground zero in the 10 state legislatures, including Kansas, that seriously considered abolition bills in 2009. New Mexico abolished the death penalty last year after learning that capital murder cases cost 6X more than ordinary murder cases. Maryland narrowed its death penalty statute dramatically for the same reasons; the Connecticut legislature passed an abolition bill that was subsequently vetoed by the Governor; one house in Montana, Colorado, and New Hampshire passed abolition bills. In all of these states, the driving issue was Cost, Cost, Cost!

As you know, the cost of the death penalty was a major issue in Kansas last year. Because Kansas is so conservative, many were surprised that an abolition bill got through this committee before being tabled by the full Senate last year. I was not surprised. This bill is not part of some fuzzy-headed, liberal conspiracy. Conservative, mainstream America is taking a second look at the death penalty.

Opposition to the death penalty is growing in states that elect conservative Republicans year after year. In Montana, which voted for John McCain and re-elected its Republican Senator in 2008, the Senate passed an abolition bill last year. Neighboring Nebraska, where Senator McCain buried Barack Obama, has

come within an eyelash of passing abolition legislation more than once in recent years.

The momentum we are seeing in statehouses across the country has also found its way into the jury box. The general acceptance of life without parole has caused the number of capital murder convictions to plummet throughout the country in recent years.

Some of your elected prosecutors will tell you that the cost of prosecuting a death penalty case is no greater than any other case. My experience is to the contrary and is supported by your own 2003 Performance Audit Report which found, based entirely on data from Kansas cases, that:

–Cases in which the death penalty was imposed cost 70% more than cases in which the death penalty was not sought;

–The median cost to prosecute a non-death penalty case in Kansas is \$740,000; a death penalty case costs about \$1.2 million;

–A death penalty trial in Kansas costs 15X more than a non-death penalty trial; the cost of a death penalty appeal is 20X more.

The recently released report of the Kansas Judicial Council Death Penalty Advisory Committee of legislators, judges, prosecutors, defense attorneys, and law professors explained in detail why death penalty cases are so much more expensive to prosecute than ordinary murder cases. Its conclusion is entirely consistent with my experience in Texas.

In death penalty cases, both sides must prepare for two trials—the first to determine guilt and the second to determine punishment. Jury selection is more complicated and takes longer in death penalty cases; more lawyers are required on both sides; death penalty cases require more investigation by both sides and an exhaustive social history of the defendant that is not required in non-death penalty cases; mitigation specialists, psychological evaluators, and other expert witnesses are required. A 1993 Duke University study concluded that a death penalty trial takes 3X as long as an ordinary murder trial.

In spite of federal efforts to streamline it, the post-conviction appeal process is always longer and more complicated in death penalty cases. An extensive study concluded in 2000 that 2/3 of all capital convictions are reversed because of serious errors and that, in more than 80% of the cases, the retrial resulted in something other than a death sentence.

Although some elected prosecutors will argue that, because the number of lawyers on staff, as well as their salaries, are set on an annual basis and do not increase when a death penalty case is being prosecuted, such suggestions are

disingenuous. Death penalty cases created havoc in my office by creating a loud sucking sound; they siphoned off my best lawyers and investigators—personnel that would otherwise have been available for other cases. Because they present unusual issues, the preparation that is required inevitably led to the postponement of other trials. Your Judicial Council recognized this crucial fact when it noted that the cost of the death penalty weighs heavily on the criminal justice system—so much so that “...other court business suffers potential neglect due to lack of time and personnel.”

Some blame defense lawyers and opponents of the death penalty for these additional costs. Your Judicial Council disagrees, concluding that “...these higher legal standards are necessary to insure that an innocent person is not put to death. If they are ignored, the result is likely to be a reversal on appeal and a costly retrial.”

Although there is no national data on the average cost of a death penalty case today, a very recent Death Penalty Information Center study found that in the last 30 years the American taxpayer has spent at least \$2.5 billion, and probably much more, on a death penalty machine that rarely executes anyone and virtually nothing on the victim families who wait patiently for closure that never seems to come.

In spite of the fact that Kansas has been very prudent on this issue, the undeniable fact is that Kansas pays dearly, year in and year out, for a death penalty system that hasn't executed anyone since 1965. Like most states that have the death penalty but rarely use it, what Kansas really has is nothing more than an *incredibly expensive form of life without parole*.

Your elected prosecutors may also argue that the availability of plea bargaining saves money in death penalty cases. With all due respect, the persuasive evidence is to the contrary. It is clear that whatever savings may be produced by this questionable practice are drowned out by the enormous cost of preparing a death penalty case that never goes to trial. Thoughtful studies in North Carolina, Indiana, and California, as well as your own 2003 Performance Audit Report, have established that this is undeniably true. In addition, the Judicial Conference of United States concluded that the average cost of representation in federal death penalty cases *that resulted in plea bargains* was \$192,333. The average cost of representation in cases that were eligible for the death penalty but in which the death penalty was not sought was only \$55,772.57. This study establishes that seeking the death penalty raises costs—even when the case results in a plea bargain.

Although one should never argue that money trumps justice or that the prosecution and punishment of criminal cases should be cost effective, it makes little sense to continue to fund a fiscal black hole in a troubled economy which, at least near term, is likely to produce fewer and fewer public dollars.

How much sense does it make to continue to fund a death penalty scheme that produces huge bills and no executions when those scarce tax dollars could be spent on public education, alternative sources of energy, health care, critical infrastructure needs, and programs for victim families?

Against this backdrop, it is understandable that support for the death penalty is declining. Only eleven states are responsible for more than 90% of our executions. Almost half of the states don't permit the death penalty (15) or, if they still have it on their books like Kansas, haven't used it in decades. Since 2000, the annual number of death sentences has declined 60%.

A parade of exonerations has awakened us to the fact that the fundamental promise we made to ourselves and each other when we agreed to give our government this awesome power—that the protection of the innocent will be guaranteed by our Courts—simply cannot be kept by a criminal justice system that is driven by decisions that are made by imperfect human beings.

The erosion of our confidence in the system that we have trusted implicitly to decide who may live and who must die, coupled with the availability of life without parole, has caused the number of death sentences and executions to drop sharply in recent years in America.

Finally, it is now clear that the cost of the death penalty can no longer be sustained.

The net effect of this confluence of facts is that mainstream America is taking a second look at the death penalty.

Kansans are fair-minded; you want the guilty to be caught and punished, but you also want a criminal justice system that protects the innocent. The flood of exonerations that has occurred in recent years, coupled with a few highly publicized innocence cases like Cantu and Willingham in Texas, Troy Davis in Georgia, and the Joe Amrine case in Kansas City, is undermining public confidence in the criminal justice system generally.

Life without parole is now available as an alternative to the death penalty in Kansas. In growing numbers, juries in America are sentencing defendants to life without parole and rejecting the death penalty. Even Sedgwick County jurors seem to be falling out of love with the death penalty. Why not? Who can argue that *a real life sentence is less punitive than death*?

What is at issue today is not what happens to the 10 men who are waiting to die in Kansas; it is for the almost 3 million law abiding Kansans who expect their criminal justice system to punish the guilty and also guarantee the protection of the innocent.

How we respond to this test will say a great deal more about us than it does about the miserable creatures who commit terrible crimes in our communities.

Let us never forget that we will be judged forever not by how we treated the rich, the powerful, and the well connected, but by how we cared for the weakest among us--whether we kept the promise that our courts will guarantee the protection of the innocent. For ourselves and our children, let us do everything in our power to insure that the judgment of history will be that we passed this test and that, when we were called on to keep the promise, we did not fail.



LEAGUE OF WOMEN VOTERS®

My name is Ernestine Krehbiel and I am the president of the League of Women Voters of Kansas, which celebrates its 90th anniversary this year. We are a non-profit organization whose focus is promoting good governance practices as well as educating the public on governmental issues.

I would like to thank the Chair and Members of the Judiciary Committee for this opportunity to offer my remarks on the costs of the death penalty and its impact on good governance and responsible use of state funds.

There are many controversial aspects to the death penalty debate and the question of cost often gets overlooked. Fiscal considerations, however, are important because they have a critical impact on other issues such as innocence and the quality of legal representation, as well as expending dollars that could be used elsewhere during this financial crisis when many essential services are being cut.

A death penalty that attempts to be fair will also be costly. As you know, in Kansas that is \$508,000 per death penalty trial versus \$32,000 per non-death penalty trial¹.

From a public policy perspective, given the Kansas budget crisis, the League of Women Voters has to ask why state money is being expended on a process that does not make citizens any safer. You heard yesterday about the national survey of police chiefs who feel the money spent to preserve this failing system could be better spent if directed to effective programs that make society safer.²

Our judicial system is already being weakened as district courts across the state plan shutdown days and furloughs due to budget cuts.

Why is Kansas spending this money on a broken system when it is making cuts like the ones announced this week which cut dental care for seniors and eliminate monies that enable trained health workers to stay with seniors overnight when medically indicated?

The Senior Care Act—which uses state funds to provide homecare services to the elderly that have incomes just above Medicaid eligibility—now has a waiting list of 269. With these homecare service options reduced, more senior citizens will end up in nursing homes at a much higher cost to the state.

The social fabric of our state is already being torn by lack of funding for essential social services. Consider these examples of where the repeal of the death penalty could benefit our state:

- Reversing the 10% cut in Medicaid reimbursements so that providers can meet the needs of the sick, the poor, and the developmentally disabled. Of the 41,000 births in Kansas last year, 41% were funded by Medicaid. Approximately half of all nursing home clients are funded by Medicaid.
- Forestalling delays in school payments and some income-tax refunds.
- Restoring state funding for juvenile justice prevention programs. Not only is it more cost effective to prevent juvenile crime before youngsters become a part of the correctional system, but young lives are saved.
- Enabling SRS to fill the 17% personnel vacancy rate at area offices and the 30% personnel vacancy rate at the SRS central office.

- Preventing reductions in funding for the provision of 3.5 million meals to seniors

Given these urgent priorities, the League is left to ask: Why is Kansas spending money to execute people when public safety can be assured without it?

Given the expense of death penalty cases—half a million per trial—the League of Women Voters of the US and Kansas urge you to consider the ways that our limited state budget funds could be more effectively used.

Thank you.

Endnotes

1 *Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*. December 2003.

2 *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*. Report from the Death Penalty Information Center, 2009.



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Senate Judiciary Committee
Senate Bill 208 & 375
Deputy Solicitor General Kris Ailslieger
January 20, 2010

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony regarding SB 208 and SB 375. I am the Deputy Solicitor General responsible for appellate activity in the office of Attorney General Steve Six. The Attorney General opposes repealing the death penalty in Kansas.

The Attorney General believes the death penalty is the appropriate penalty for the small class of heinous murderers subject to it. It is a matter of justice, of seeking the appropriate penalty for the crime, it is not a matter of cost. Criminal justice does not lend itself to a simplistic "cost/benefit" analysis. As the Attorney General has made clear in previous debates about this issue, one cannot put a price on justice.

Today, I want to discuss two arguments that have been raised to support repeal: (1) that repealing the death penalty will save the state money, and (2) that the death penalty does not work (that it does not deter). Both are false.

Cost

- There are no hard figures that show it would save the State of Kansas money over the long term to repeal the death penalty.
- The 2003 Legislative Post Audit Report itself candidly admits that "**Actual cost figures for death penalty and non-penalty cases in Kansas don't exist.**" (2003 Legislative Post Audit Report, p. 10.)
- The 2003 Legislative Post Audit Report states very clearly that "**[i]t is not a study of whether it is more costly for Kansas to have the death penalty than not to have it.**" (LPA Report, p. 32, Appendix B – Methodology).
- The report also admits that its scope was not broad enough to determine whether it is more costly to have the death penalty than not, noting that a great many other factors would need to be considered. **Significantly, one of these other factors the report identifies is "possible cost**

savings from defendants pleading guilty to avoid a trial in which the death sentence could be imposed.” (LPA Report, p. 32.) The report does not take such cost savings into consideration.

- The 2009 Judicial Council Report’s discussion of cost is not based on a thorough analysis of actual costs, but rather on the same partial data as the 2003 report. It’s conclusion that the state would realize cost savings by repealing the death penalty is not backed up by complete, hard numbers.
- The facts and figures presented in Appendix E of the 2009 Judicial Council Report to support its conclusion regarding costs are misleading because they are incomplete and at least partially inaccurate.
- Over the long term, the state may actually realize cost savings from the death penalty:
 - The Criminal Justice Legal Foundation points out that “In states where the death penalty is the maximum punishment, a larger number of murder defendants are willing to plead guilty and receive a life sentence.” **Any greater costs associated with death penalty trials are “offset, at least in part, by the savings from avoiding trial altogether in cases where the defendant pleads guilty.”** (Criminal Justice Legal Foundation, Press Release, February 25, 2009.)
 - A study by the Criminal Justice Legal Foundation found that **in states with the death penalty, roughly 19% of murder convictions with sentences of over 20 years or more were obtained through plea bargaining, whereas in states without the death penalty, this number was 5%.** This translates into a significantly greater number of murder trials in non-death penalty states with all of the attendant trial costs, as well as appeal costs. (Criminal Justice Legal Foundation, *The Death Penalty and Plea Bargaining to Life Sentences*, February 2009).
 - Something else that was not factored in to either the 2003 Legislative Post Audit Report or the 2009 Judicial Council Report is the cost of geriatric health care for inmates serving sentences of life without parole. The rising cost of prison health care is already being felt, (see “Prisons Can’t Contain Rising Medical Costs,” *The Hutchinson News Online Edition*, September 21, 2009, <http://www.hutchnews.com/Todaystop/prisons2009-09-19T20-30-02>), and if one is going to reduce the death penalty debate to a pure cost analysis, this must also be taken into account.
 - Finally, one study of the deterrent effect of the death penalty found that by deterring additional homicides, “each execution results in society avoiding the loss of approximately \$70 million per year, all else equal.” Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, JOURNAL OF APPLIED ECONOMICS, Vol. III, No. 1, 163, 190 (May 2004).
- In sum, while no hard numbers exist, when one considers the long term, factoring in the cost savings of deterrence effected by the death penalty, guilty pleas as a result of the potential for capital punishment, and reduced incarceration and medical costs related to executions, it is not settled that the state will save money by repealing the death penalty, and in fact it is possible

that the state will actually realize a long term cost savings through effective implementation of capital punishment.

Deterrence

- It is a matter of logic and common understanding of human behavior that negative consequences deter behavior that would lead to those consequences.
- The argument that, because capital murderers exist in spite of the death penalty, the death penalty does not deter, extrapolated logically would lead to the conclusion that no criminal punishments deter crime. After all, prisons are full. Such a conclusion is clearly illogical.
- But, if one agrees that lesser punishments do, in fact, have some deterrent effect, then logically, more severe sanctions must also deter. Thus, if a term of imprisonment is a deterrent, then the death penalty is also a deterrent.
- Several studies have shown a deterrent effect correlated to the death penalty:
 - Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, JOURNAL OF APPLIED ECONOMICS, Vol. III, No. 1, 163, 190 (May 2004) (“... it is estimated that each state execution deters somewhere between 4 and 25 murders per year (14 being the average)).
 - Hashem Dezhbakhsh, Paul H. Rubin, Joanna M. Shepard, *Does Capital Punishment have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, AMERICAN LAW AND ECONOMIC REVIEW, 344, 373 (Fall, 2003) (“Our results suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide. . . . our most conservative estimate is that the execution of each offender seems to save, on average, the lives of eighteen potential victims. (This estimate has a margin of error of plus and minus ten).”
 - Charles N. W. Keckler, *Live v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J. LAW, ECONOMICS & POLICY, 101, 109 (2006) (“using data up to 1997, indicates that ‘an additional execution generates a reduction in homicide by five . . .’”)
 - Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397 (1975) (estimating each execution deters eight murders)
 - H. Naci Mocan and R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003) (finding each execution deters, on average, five murders).

- Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2006).
 - **“If the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death. States that choose life imprisonment, when they might choose capital punishment, are ensuring the deaths of a large number of innocent people.”** (p. 706).

- Further, there is anecdotal evidence of individual deterrence:
 - “One Iowa prisoner, who escaped from a transportation van, with a number of other prisoners, stated that he made sure that the overpowered guards were not harmed, because of his fear of the death penalty in Texas. The prisoners were being transported through Texas, on their way to New Mexico, when the escape occurred. Most compelling is that he was a twice convicted murderer from a non-death penalty state, Iowa. In addition, he was under the false impression that Texas had the death penalty for rape and, as a result, also protected the woman guard from assault.” Source: Dudley Sharp, citing “Langley says Texas death penalty affected his actions during escape,” Stephen Martin, *The Daily Democrat* (Ft. Madison, Iowa), 1/8/97, p. 1.
 - “New York Law School Professor Robert Blecker recorded his interview with a convicted murderer. The murderer robbed and killed drug dealers in Washington, DC., where he was conscious that there was no death penalty. He specifically did not murder a drug dealer in Virginia because, and only because, he envisioned himself strapped in the electric chair.” Source: Dudley Sharp, citing NYU Law Professor Robert Blecker.
 - Senator Dianne Feinstein related this story: “I remember well in the 1960s when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: ‘Why was your gun unloaded?’ She said to me: ‘So I would not panic, kill somebody, and get the death penalty.’ That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent.” Source: California District Attorney’s Association, *Prosecution Perspective on California’s Death Penalty*, March 2003, p. 44 (citing 141 Cong. Rec. 14,733 (1995)).

- The death penalty is only available for pre-meditated murders, meaning murders where the killer thought the matter over beforehand. Therefore, the potential to get caught and the possible penalty are matters that may very well enter into the head of potential capital murderers, and the possibility that even one might be deterred by the penalty he could face is worth the cost.

- Capital punishment may have very specific deterrent effects when considered in the context of “Jessica’s Law.” One of the criticisms raised against “Jessica’s Law,” is that the punishment (life in prison) is the same as if the perpetrator killed the victim, giving the perpetrator no reason to

not go ahead and kill his victim to eliminate the victim as a witness. However, as long as there is a death penalty, there will be a more severe punishment than life in prison and thus, perpetrators of sex crimes against children will have a strong deterrent to not kill their victims.

Ultimately this debate should not be about costs or statistics. It should be about insuring that the appropriate punishment is administered for the crime committed. It should be about insuring justice. The Attorney General strongly believes that there are some murderers whose crimes are so heinous, they are deserving of the ultimate punishment. Killers like Gary Kleypas, the Carr Brothers, John Robinson, and Justin Thurber, to name a few. While these individuals will be unaffected by the proposed legislation, there is no doubt that others like them will arise in the future and commit equally heinous crimes. There will be future serial killers and future mass murders. But if this legislation passes, the appropriate and just penalty to punish these future killers will no longer be available.

Appendix A – Critique of Appendix E of the 2009 Judicial Council Report

Included as Appendix E in the Judicial Council Report is a spreadsheet comparing costs of death penalty cases to selected non-death penalty cases in Kansas. This spreadsheet is somewhat inaccurate and can be misleading in that it suggests that death penalty cases have additional appellate costs and re-trial costs than non-death penalty cases. The problems with this spreadsheet are:

1. The spreadsheet shows costs for “Additional Appeals” for the Michael Marsh and Gavin Scott cases. However, both Michael Marsh and Gavin Scott had only a single direct appeal. Scott filed a federal habeas corpus petition that he appealed to the United States Court of Appeals for the Tenth Circuit, it is unclear if that is what is being referred to in the spreadsheet.
2. The portion showing the non-death penalty cases is more significantly flawed because it would lead one to believe that these non-death penalty cases did not require any re-trials, additional appeals, or federal habeas corpus actions, and only limited state habeas actions. However:
 - a. The Donesay case was reversed on appeal, was retried, and a second appeal followed. This is not reflected in the spreadsheet. See 270 Kan. 720 (2001).
 - b. Also not reflected in the spreadsheet is the fact that Jason Wakefield filed for federal habeas corpus relief in 2000 and was ultimately denied relief in 2003. USDC Case No. 00-3218-SAC.
 - c. Chester Jamison filed a state habeas action, appealed its denial, and won a reversal on appeal. The habeas case was remanded for an evidentiary hearing with appointed counsel, relief was denied again, he appealed again, lost on appeal, and the Kansas Supreme Court denied review in 2008 (the spreadsheet reflects a cost of only \$1,050 for all of this litigation which seems suspiciously low).
 - d. Romaine Douglas’ first trial ended in a mistrial, warranting a retrial (yet the spreadsheet shows no re-trial cost). He subsequently filed a state habeas petition (and the spreadsheet reflects only a \$1,072 cost for this), appealed its denial, and sought Kansas Supreme Court review (which was denied). He then filed a federal habeas petition (not reflected in the spreadsheet), was denied relief, appealed to the United States Court of Appeals for the Tenth Circuit, lost there, and sought United States Supreme Court review (which was denied). See USDC Case No. 06-3157-JTM; 10th Cir. Case No. 07-3244 (2008 WL 313185).

- e. Ramon Juliano filed a state habeas petition in 2002 (not reflected in the spreadsheet) which was denied, and he appealed. The Kansas Court of Appeals denied relief and the Kansas Supreme Court denied review. Appellate Case No. 89,795. He then filed a federal habeas petition (not reflected in the spreadsheet), which was denied. He appealed to the United States Court of Appeals for the Tenth Circuit, which also denied relief. *See* USDC Case no. 04-3166-KHV; 10th Cir. Case No. 05-3107.

- f. Rodney Henry won a reversal on direct appeal and his case was remanded for re-trial. However, before retrial, he and the prosecution reached a plea agreement, obviating the need for any further litigation.



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Senate Judiciary Committee

Senate Bill 208 & 375

Deputy Attorney General Barry Disney

January 20, 2010

My name is Barry Disney. I am the Deputy Attorney General in charge of the criminal division for Attorney General Steve Six. I have been a prosecutor for over twenty years. I prosecute homicide cases; both capital and non-capital.

As, once again, a bill is introduced that would eliminate the death penalty, I am reminded of the words of a contemporary writer who noted that opposition to capital punishment "has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response." In the confines of a conference room, the murders that qualify for the death penalty seem distant. In such a civilized atmosphere, it is difficult to know or even imagine the absolute horror that lies behind these crimes.

However, for the police, prosecutors and survivors of these heinous crimes the images are all too real-- the bodies of four young people dead in a snowy field, their lives and futures ended by shots to the back of the head; the battered and bloody face of a lifeless young college girl who tried in vain to fight off the convicted murderer who broke into her home intent on killing his second woman; the remains of women stuffed into barrels and discarded like trash by a man who pretended to offer them help; the headless, ravaged body of a woman who had been raped with a knife; or the young child running alone down a county road after finding her parents murdered in their bed; there are more. More atrocious images left behind by each of the men sentenced to death in the 16 years since Kansas reenacted the death penalty. Images destined to be remembered by many forever.

The cost of the death penalty is a focus of the current debate. Opponents strive to show that the cost is high while proponents argue the cost is not exceedingly more significant than prosecuting a non-death penalty murder case. But it is unwise to decide the fate of the death penalty based upon the bottom line of a ledger sheet. Kansas has one of the most conservative death penalty laws in the nation. Each year only a few murders qualify for the death penalty. It

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Attachment 6

is a testament to these stringent standards that currently there are only 10 people under a sentence of death in the 16 years since Kansas reenacted the death penalty.

To repeal the death penalty fails to recognize that some crimes are so outrageous that the death penalty is the only adequate punishment. It is ironic that SB 375 exempts those who are currently under a sentence of death. Why is the death penalty warranted for these individuals but not those who commit similar crimes in the future? It is unreasonable to believe that murders such as these will not occur again.

A recently released report found that fewer people were sentenced to death this year than any other year since 1976. Opponents of the death penalty may urge this is a sign that society rejects the death penalty. I am reminded of the words of the United States Supreme Court that the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. This is the same Supreme Court that noted the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

The existing law reserves the death penalty for only those few crimes committed each year that are so horrible that anything but the death penalty is inadequate. To repeal the death penalty is a failure to recognize that fact. I invite anyone who is considering voting for this bill to contact me first to discuss the details of the limited number of murders that have thus far qualified for the death penalty. Only with an understanding of the horrors behind these crimes can the real costs be understood.

1/20/2010

Honorable Senators,

My name is Amy Scott, and I thank the Judiciary Committee for the time today to speak to you in person. I have emailed each of you and provided you letters last year, and I'm here again to state my reasons why I feel you should vote against SB 208.

I had dated Brad Heyka for almost three years when he was murdered on Dec. 15th, 2000 along with three of our close friends – Jason, Heather, and Aaron. You can understand why this issue is very personal to me. I want you to know I am a Christian, I believe in God, and I know that God believes in consequences.

I don't think this issue is really about cost. Cost is an open door for the groups that do not represent the opinion of Kansas residents to try to re-visit this law.

The opinions of what Kansas wants are representative in the juries that convicted the men on death row today. In over 10 different instances, 12 strangers all came to the same consensus that the only possible punishment was death. This indicates several things:

- The crimes they committed were to mind-blowingly awful that it was an appropriate punishment. The two men who killed Brad and my friends committed around 40 felonies EACH in a three hour time frame. I don't know about you, but that's pretty difficult to do. For them, it was fun.

- The defendants were guilty beyond a reasonable doubt with witness testimony and DNA. No one in Kansas is going to be executed that's innocent.

- 12 strangers actually could all agree on the same controversial issue. TEN DIFFERENT TIMES with 12 different people each time.

I urge to consider these things before voting against 208:

- You need to do what Kansans want, not necessarily your beliefs.

- You need to provide your law enforcement and prosecutors as many tools as possible to do their jobs, which means keeping the death penalty. They protect you and I every day, the least we can do is give them the laws they need keep us safe.

- This bill WILL allow the cases currently on death row room to appeal. Even though its intent is to not affect those cases, in real life, it will influence and potentially change those outcomes.

- The people who commit these crimes do not think like you and I. They have nothing to lose, so if they are given life in prison what stops them from killing other inmates or guards?

- Someone you know may be the next me. Their life will be stopped in its tracks – suspended in time with pain that I can't even speak about today because it hurts too much. I can deal with life has dealt me, but what I can't take is watching his family go about with a large gapping hole in their world. All I want for future victims of crimes like this is the OPTION to bring the justice that the defendants deserved, and they deserve the sentence of capital punishment. Let the jury of their peers decide their fate. Don't let that decision happen in this room.

Amy Scott

Senate Judiciary

1-20-10
Attachment 7

Senate Judiciary Committee
January 19, 2010

Testimony of the Kansas Association of Criminal Defense Lawyers
in Support of SB 375

The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. Roughly 80 of our current members are public defenders (some of whom work exclusively as capital defenders), and many other members accept appointments to criminal cases under contract with BIDS.

Last year, KACDL submitted testimony in support of Senate Bill 208, the predecessor to Senate Bill 375.¹ KACDL's position has not changed. KACDL **supports** Senate Bill 375, insofar as it would prospectively abolish the death penalty in Kansas.

In the year since Senate Bill 208 was introduced, developments on both the state and national level have added to the many considerations in favor of abolition. The materials cited in the below footnotes (with the exception of footnote 11) have been submitted separately to Senator Owens.

Locally, yet another death sentence appears to be on the brink of reversal. The Shawnee County District Court is currently considering whether Phillip Cheatham—sentenced to death in 2005 for a double homicide—received constitutionally effective assistance of counsel at his capital trial and sentencing. The state has stipulated that Cheatham's lawyer wholly failed to prepare for sentencing and was constitutionally ineffective during that phase of Cheatham's trial.² All that remains is for the District Court to accept the stipulation and vacate Cheatham's sentence. KACDL is aware of no reason that the District Court would do otherwise. As KACDL pointed out last year, the Kansas courts have yet to confirm any death sentence on appeal. The vacation of Cheatham's sentence will continue Kansas's 100% reversal rate with respect to death sentences—putting

¹ See February 26, 2009, Testimony of the Kansas Association of Criminal Defense Lawyers in Support of SB 208, attached.

² See Steve Fry, *Resentencing would be complex*, TOPEKA CAP. JRNL. (Dec. 13, 2009).

Kansas's modern total at *six* death sentences vacated out of *six* death sentences challenged.³

In other local news, Gavin Scott's capital resentencing has been delayed for nearly a year by budget concerns.⁴ Scott's is a case that might have been resolved quickly, quietly, and with finality if the death penalty had not been on the table. Instead, here it is more than thirteen years after the charged killings, and the defendant stands, again, unsentenced.

National developments over the last year included:

- New Mexico's abolition of the death penalty.⁵
- The resignation of Washington's execution team in the midst of a court battle over lethal injection—a cautionary tale for a state like Kansas that has yet to endure the costs and chaos that accompany the actual execution process.⁶
- A former prosecutor's carefully considered public call for Montana to repeal its death penalty. John Connor—who served as Montana's chief special prosecutor for 21 years—reversed his previous position in favor of the penalty only after years of working with corrections officials taught him that life inmates are not the primary threat to prison officials; rather, “[p]rison safety depends on proper staffing, equipment, resources and training.” Connor concluded that “[c]ertainly the money spent on trying to put someone to death for over 20 years could find better use in addressing those practical needs of our correctional system.”⁷

³ This number includes Gary Kleypas; Michael Marsh; Gavin Scott (who has thus far twice been sentenced to death, and twice had that sentence vacated); Phillip Cheatham, and Stanley Elms (whose death sentence was vacated by agreement during his direct appeal).

⁴ See Jeannine Koranda, *Kansas trials delayed as public defender funds run low*, WICHITA EAGLE (Sept. 21, 2009).

⁵ See Trip Jennings, *Richardson abolishes N.M. death penalty*, NEW MEXICO INDEPENDENT (Mar. 18, 2009).

⁶ See Sara Jean Green, *State's execution team resigns, fearing identities would be revealed*, THE SEATTLE TIMES (April 2, 2009).

⁷ See John Connor, *Death penalty drains justice system resources*, BILLINGS GAZETTE (March 22, 2009).

- The release of a survey of leading criminologists demonstrating “an overwhelming consensus among these criminologists that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment.”⁸
- The United States Justice Department’s release of death penalty statistics from 2008. Notably, 119 inmates were “removed from under sentence of death” in 2008. Only 37 of those were actually executed; 82—more than two thirds—“were removed by other methods, including sentences or convictions overturned, commutations of sentence, and deaths by means other than execution.”⁹
- The Death Penalty Information Center’s release of its annual report, which notes a decline in death sentences, summarizes legislative abolition efforts across the nation, and observes that a number of prominent law-and-order spokespeople have recently begun to question the efficacy of the death penalty.¹⁰
- The American Law Institute’s withdrawal of any death-penalty statute from its Model Penal Code, in light of “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”¹¹

Respectfully submitted,

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 on behalf of KACDL

⁸ See Michael L. Radelet and Traci L. Lacoock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2009).

⁹ See CAPITAL PUNISHMENT, 2008—STATISTICAL TABLES (DOJ Dec. 2009).

¹⁰ See The Death Penalty in 2009: Year End Report (DPIC Dec. 2009).

¹¹ See MESSAGE FROM ALI DIRECTOR LANCE LIEBMAN (reporting October 23, 2003 vote), available at http://www.ali.org/_news/10232009.htm; REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (April 15, 2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

Senate Judiciary Committee
February 26, 2009

Testimony of the Kansas Association of Criminal Defense Lawyers
in Support of SB 208

The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. Roughly 84 of our current members are public defenders (some of whom work exclusively as capital defenders), and many other members accept appointments to criminal cases under contract with BIDS. For the reasons set forth below, KACDL **supports** Senate Bill 208, which would prospectively abolish the death penalty in Kansas.

1. **The Kansas public defender system is in crisis.** If money is to be spent on criminal justice, Kansas must shore up the core requirements of effective assistance of counsel to every person accused of crime before it invests in a costly capital system. Abolishing the death penalty is necessary so that Kansas may avoid the experience of Georgia, where a single capital case (the Brian Nichols courthouse shooting)—whose costs were driven up in large part by the prosecution—essentially bankrupted that state's public defender system. *See* Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, THE NY TIMES (Mar. 22, 2007), <http://www.nytimes.com/2007/03/22/us/22atlanta.html>.; Molly McDonough, *Prosecutors Drove Cost of Ga. Death Penalty Case*, ABA JOURNAL (Aug. 9, 2008), http://abajournal.com/news/annual_meeting_coverage_elsewhere/.
2. **The costs of maintaining the death penalty will increase exponentially over the next few decades.** In the fifteen years since Kansas brought back the death penalty, Kansans have had to bear the cost of various original capital trials and sentencing proceedings, a handful of completed direct capital appeals (Kleypas, Marsh, and Scott), one United States Supreme Court case argued on the merits (Marsh), and one completed re-sentencing proceeding (Kleypas). Over time, as more death sentences are either reversed or affirmed on direct appeal, Kansans will see costs increase exponentially as the state continues to charge and try new capital cases while *retrying* those cases in which convictions and/or death sentences have been reversed. Meanwhile, cases in which convictions and death sentences are affirmed on direct appeal will begin winding their way through the cumbersome but necessary state and federal postconviction process, with multiple visits to the United States Supreme Court a given in any capital case.

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While defendants in noncapital cases have the same rights to the state and federal postconviction process, noncapital cases rarely receive the same level of scrutiny beyond direct appeal that capital cases receive.

The American Bar Association has reported that in one study of the Florida capital postconviction process, it was concluded that “on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari through that state’s post-conviction proceedings.” ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>. And while *defense* costs may be federally funded in federal postconviction proceedings, the *state* (whether the AG office or the local prosecutor) must still expend a considerable amount of resources to appear in those proceedings.

3. **The high error rate in capital cases guarantees that the cycle of expensive capital litigation will continue in Kansas.** In 1991, the Chair of the U.S. Senate Committee on the Judiciary asked Columbia University School of Law Professor James Liebman to research the error rates in capital cases around the country. In 2000, Professor Liebman published nine years of “painstaking” research. He described the “capital error rate” as “the proportion of fully reviewed capital judgments that were overturned at one of the three stages [direct appeal, state postconviction, and federal postconviction] due to serious error.” He concluded that “[n]ationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.” James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

In Kansas, the error rate has so far been 100% on direct appeal. With such an inauspicious beginning, Kansas has a long way to go before it even approaches Liebman’s 68%, which is itself disheartening. Each time a capital case has to be retried, the costs of that case double, public faith in the justice system diminishes, and system resources are stretched that much thinner.

4. **Every Kansas death sentence reviewed to date has been deemed infected by constitutional error.** Some may be under the mis-impression that both Gary Kleypas’s and Michael Marsh’s death sentences were erroneously reversed because the weighing equation that a majority of the Kansas Supreme Court invalidated in those cases was later upheld by the United States Supreme Court. But the Kansas Supreme Court found

other constitutional errors in those cases, as well as in the more recent case of Gavin Scott. Specifically, the death sentences reviewed to date were infected by at least the following constitutional errors:

- In *State v. Kleypas*, 272 Kan. 894 (2001), the Kansas Supreme Court unanimously held that the prosecutor committed extensive misconduct during Gary Kleypas's sentencing phase by, among other things, making comments that "were clearly improper and reflect a complete lack of understanding of the concept of mitigating circumstances." 272 Kan. at 1103. The Court concluded that at least some of the prosecutor's misconduct was intentional, and probably resulted from the corruptive influence of the death penalty:

Many of the instances of prosecutorial misconduct appear to stem from a misunderstanding of the law regarding the imposition of the death penalty and cannot be characterized as intentional. Others, however, would be improper in any proceeding and can only be explained by the pressure put on the prosecutor to secure the death penalty in a high profile case.

Id. at 1123. While the Court reversed Kleypas's death sentence because of the weighing equation, it also held that "the net cumulative effect of the prosecutorial misconduct might very well have provided an additional basis for reversal." *Id.*

- In *State v. Marsh*, 278 Kan. 520 (2004), the Kansas Supreme Court reversed Michael Marsh's death sentence not just on grounds that the weighing equation was unconstitutional, but also because the Court unanimously concluded that Marsh's trial on capital murder was infected by judicial error, and thus his capital-murder conviction could not stand. Specifically, the Court held that when the trial judge excluded Marsh's evidence that somebody else committed the capital murder with which Marsh was charged, the judge thereby "violated Marsh's fundamental right to a fair trial." 278 Kan. at 533.
- In *State v. Scott*, 286 Kan. 54 (2008), the Kansas Supreme Court reversed Gavin Scott's death sentence after unanimously holding that the trial judge failed "to provide the jury with a proper standard for determining mitigating circumstances." 286 Kan. at 107. (The Court also found "numerous instances of improper comment" by the prosecutor during Scott's guilt phase, and observed that "reasonable minds may disagree as to whether the sheer number of such remarks demonstrate ill will

on the part of the prosecutor.” *Id.* at 84. The Court nonetheless upheld Scott’s conviction as supported by overwhelming evidence.).

- 5. Abolition will reduce costs to the Attorney General’s office.** The state budget division has submitted a fiscal note for HB 2351, reporting that the AG’s office “indicates no fiscal effect” as a result of abolishing the death penalty. This makes no sense. Just this week, the Saline County District Attorney explained that she asked the Kansas Attorney General’s office to assist with a capital prosecution in her jurisdiction because “[i]t will be very time consuming. We do not have enough staff to cover a death penalty case.” See Erin Matthews, *California Man Could Face Death Penalty*, SALINA JOURNAL (Feb. 21, 2009), <http://www.saljournal.com/rdnews/story/Capital022109>. Is the AG truly suggesting that there is no cost associated with staffing and resources when the AG’s office handles capital cases? Surely there was some cost to that office when it briefed and argued the constitutionality of the weighing equation before the United States Supreme Court. Surely there was some cost to that office when it handled the resentencing hearing of Gary Kleypas. Does the AG expect his office’s lawyers to volunteer their time to defend death sentences that are eventually challenged in state and federal postconviction proceedings? Would the AG approve if this body designated that no funds allotted to the AG’s criminal division be used toward capital litigation, or to pay the salaries of lawyers for their time spent prosecuting capital cases?

Capital cases require more person hours than noncapital cases for myriad reasons. For example, they require weeks of in-court hours conducting jury selection to probe potential jurors about issues that are not present in noncapital cases (specifically, whether potential jurors are capable of returning a death sentence); they require extensive preparation for sentencing trials that do not occur in noncapital cases; and they often involve detailed consultation with experts about sentencing issues not present in noncapital cases (for instance, the state relied on an expert neuro-radiologist to rebut certain brain-scan evidence offered as mitigation during sentencing in the Carr case). It may be that the county, and not the AG’s office, bears certain costs of litigation, such as expert fees. But presumably when the AG is handling a case, its lawyers spend significant hours working with their experts before putting them on the witness stand. And, of course, both expert fees and lawyer salaries are ultimately borne by Kansans no matter who signs the checks.

6. **The unavailability of the death penalty for BTK, Kansas's most notorious and feared serial killer, allowed for his speedy conviction, his certain incarceration, and the near-guarantee that he will be unable to challenge his conviction.** The contrasting cases of Dennis Rader and Justin Thurber provide just one illustration of the cost savings that abolishing the death penalty will accomplish. Justin Thurber, accused of murdering Jodi Sanderholm in January 2007, offered to plead guilty in exchange for a life sentence. His offer was rejected by a state eager to impose the ultimate punishment. Thurber's case dragged on for two years before he was convicted and sentenced to death, and Kansans now have decades of appellate and postconviction litigation to endure (and fund) while Thurber exercises his rights to challenge the fairness of the process that resulted in his death sentence. In contrast, Dennis Rader pled guilty and was given ten life sentences within six short months after his arrest for the murders he was charged with committed during his confessed reign of terror as Wichita's most notorious and feared serial killer. By pleading guilty, Rader waived any legal avenues for challenging his convictions and sentences. Kansans can thus rest assured that the man known as BTK now has no further legal options, and will simply die in prison. Had the state been able to pursue the death penalty in Rader's case, it would surely have done so, thereby ensuring Rader's longevity in the annals of Kansas capital litigation, and costing millions of Kansas dollars in the process.

7. **Arguments that prosecutors need the threat of death to force defendants into pleas resulting in life sentences do not reflect reality.** Prosecutors have argued that they need the death penalty on the books so that they can threaten defendants with death in order to force them to plead guilty. They claim that this "hammer" allows the state to save money by avoiding trial when defendants otherwise would not voluntarily plead guilty and accept a life sentence. But this argument does not reflect reality. Such a hammer was not necessary to induce Dennis Rader to plead guilty to multiple murders, even while knowing that his plea would result in multiple life sentences. And if the state were truly interested in avoiding the costs associated with capital litigation, it would have accepted the plea offers of Gary Kleypas, Justin Thurber, and others who were willing to waive their trial rights and accept life sentences (some of whom ultimately received life sentences anyway from juries unwilling to return death verdicts). Finally, the fact that the state does in some cases accept defendants' plea offers merely serves to illustrate the arbitrariness inherent in the system. For instance, it is difficult to square one prosecutor's refusal to accept Justin Thurber's plea with another prosecutor's acceptance of Edwin Hall's plea. Hall was, like Thurber, also accused of kidnapping, raping, and murdering a teenage girl (Kelsey Smith). Finally, the hammer of death can result in the high cost of inducing innocent people to plead guilty. The state of Nebraska recently learned this

lesson the hard way, with the exonerations of five defendants who confessed to a murder they did not commit and pleaded guilty “to escape the threat of the death penalty.” Paul Hammel, *Pardons Granted To Five In Murder They Didn't Commit*, OMAHA WORLD-HERALD (Jan. 27, 2009). The Nebraska legislature is now considering a bill that would award to the wrongfully convicted \$50,000 for each year spent in prison. *Id.*

Respectfully submitted,

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