

**REPORT OF THE JUDICIAL  
COUNCIL DEATH PENALTY  
ADVISORY COMMITTEE**

**(Approved by Judicial Council)**

January 29, 2004

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# **REPORT OF KANSAS JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE**

## **BACKGROUND**

The 1994 Kansas Legislature enacted HB 2578 “. . . creating the crime of capital murder and providing for a sentence of death therefore under certain circumstances. . .” Kansas had not had the death penalty since 1972 when the United States Supreme Court held in *Furman v. Georgia* that the death penalty, as then administered, violated the constitutional prohibition against cruel and unusual punishment.

Since July 1, 1994, which was the effective date of HB 2578, there have been over 80 potential capital cases in Kansas and seven persons have been sentenced to death. The actual costs of death penalty defense in Kansas from fiscal year 1995 (July 1, 1994) through fiscal year 2003 (June 30, 2003) have totaled approximately 10.8 million dollars. Expenditures for death penalty defense in fiscal year 2004 are expected to be two million dollars.

With lower State revenue and death penalty costs increasing, the 2003 Legislature requested that the Legislative Division of Post Audit and the Kansas Judicial Council each conduct studies relating to the costs of the death penalty.

At its June 20, 2003 meeting, the Judicial Council agreed to undertake the requested assignment. As is its usual manner of operation, the Council appointed an advisory committee made up of persons with experience and expertise in the area of law being considered and who represent a variety of points of view.

## **COMMITTEE MEMBERSHIP**

The Kansas Judicial Council appointed the following persons to serve on its Death Penalty Advisory Committee:

**Stephen E. Robison**, Chairman, Wichita, practicing lawyer in Wichita, Kansas and member of the Kansas Judicial Council.

**Ron Evans**, Topeka, Chief Defender, Kansas Death Penalty Defense Unit.

**Jeffrey D. Jackson**, Lawrence, consultant on death penalty issues to the Kansas Supreme Court.

**Michael Kaye**, Topeka, Professor at Washburn University School of Law.

**Stephen Morris**, Hugoton, State Senator from the 39th district and Chair of the Senate Ways and Means Committee.

**Donald R. Noland**, Pittsburg, District Court Judge in 11th Judicial District.

**Steven Obermeier**, Olathe, Assistant district attorney in Johnson County.

**Kim T. Parker**, Wichita, Assistant district attorney in Sedgwick County.

**Rick Rehorn**, Kansas City, practicing attorney in Wyandotte County and State Representative from the 32nd district.

**Fred N. Six**, Lawrence, retired Kansas Supreme Court Justice.

**Ron Wurtz**, Topeka, Deputy Federal Public Defender. Previously Chief Defender, Kansas Death Penalty Defense Unit.

In addition, the Committee wishes to acknowledge the assistance of Patricia Scalia, Executive Director of Kansas Board of Indigents' Defense Services, and Chris Clarke of the Legislative Division of Post Audit. Both Ms. Scalia and Ms. Clarke attended the meetings of the Committee and materially aided the Committee in its study.

### **SCOPE AND METHOD OF STUDY**

The request that the Judicial Council conduct the study was contained in Senate Substitute for House Bill 2444 and reads as follows:

“ . . . expenditures shall be made by the judicial council to study the issue of board of indigents defense services expenditures for death penalty defense cases. Such study shall make comparison with other states that have recently executed individuals and include information on the manner in which those states addressed associated indigent defense costs in death penalty cases.”

The Judicial Council Committee was aware that the Legislative Division of Post Audit received a similar, but broader, request to study costs in death penalty cases. The request to Post Audit asked that the following questions be addressed:

1. What are the total State and local costs of the case in which the death penalty was sought?
2. Are there steps Kansas could take to reduce overall costs in capital punishment cases?

3. Are alternative sentences to the death penalty less costly to governmental entities?

Because of Post Audit's experience in conducting studies of costs, its resources and access to information, the Council committee decided to defer to Post Audit as the primary source of cost information.

The Judicial Council Committee is made up of persons with extensive criminal law and death penalty experience in: defense, prosecution and judging at the trial level; preparation and argument of appeals for both defense and prosecution; hearing death penalty appeals and participating in appellate death penalty decisions; conducting research, teaching and consulting on death penalty issues and participating in the funding of death penalty defense in the legislative process. Because of the experience of the members, it was agreed that the approach of the Committee will be to analyze reports and studies in the area and utilize the members' experience, contacts and analytical abilities to study and report on the following issues:

1. Why death penalty cases cost more than other types of cases.
2. The cost of death penalty cases in Kansas.
3. What Kansas has done to contain costs in death penalty cases.
4. What death penalty cases cost in other jurisdictions.
5. What do other jurisdictions do to contain costs and are these strategies applicable to Kansas?

## **OBSERVATIONS OF PERSONS INVOLVED IN THE DEATH PENALTY PROCESS**

During discussions of death penalty issues by the Committee, it became apparent that the personal experiences of individual Committee Members who have participated in the death penalty process are of value to those informing themselves about the death penalty.

Retired Kansas Supreme Court Justice Fred N. Six, defense attorney Ron Evans, prosecuting attorney Steven Obermeier and district court judge Donald R. Noland agreed to put some of the observations they made about the death penalty process in written form for inclusion in the Committee's report. Their observations follow.

### **Observations of an Appellate Judge**

The angst that permeates judicial review of a capital murder or "death case" begins and ends with the thought that "death is different". A death case that is reviewed by the Supreme Court arises from a story that has shattered the lives of the victim's family. The telling of the story at the trial court level has also taken its stressful toll on the district judge, defense counsel, the prosecution, and the local community.

Anxiety charges the atmosphere surrounding a capital murder case. No member of the judicial system connected with a death case is immune. The responsibility of appellate review weighs heavily on a Supreme Court Justice because of the finality of the ultimate sanction that may be imposed. (The United States Supreme Court (USSC) remains available for *certiorari* review, however, in my opinion, the percent of state death cases accepted by the USSC is so small that in reality the final "death decision" rests with the state's highest court. State and Federal habeas corpus avenues remain, however a death defendant's success through these procedures is doubtful).

Whether or not Kansas has “Death” as punishment is a policy matter for the Kansas legislature. A Kansas Supreme Court Justice, in reviewing a death case seeks to apply the law established by the legislature. The Justice looks to the appropriate jurisprudential sources, (i.e.) Constitutions, Federal and State, State legislation and case law.

Always in the consciousness of that justice is the question, “do I have it right”? A wrong call is irreversible because “death is different”. The “do I have it right” question travels with you. You carry it with you during the workday, deliberations at case conference, your commute to and from work, before retiring at night, and on weekends. The question shadows you. However, normal shadows disappear at sundown, the “do I have it right” shadow does not. You also carry a brief case filled with death case materials home at night and on weekends. This brief case becomes your “constant companion” until the death case opinion is filed.

The Legislature has instructed the Kansas Supreme Court on the public policy of judicial review in death cases by saying in KSA 21-4627 (b):

“The supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal **and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby**” (Emphasis added)

Let us take notice of the record in *State v. Kleypas*, 272 Kan. 894 (2001), the only death case submitted to the Supreme Court during my tenure. The opinion is 248 pages with 88 syllabi. (The longest Kansas appellate court decision that I am aware of).

The *Kleypas* appellate record consisted of eighty volumes and over 10,000 pages (my recollection). The brief submitted by counsel for *Kleypas* was 588 pages in length. The State’s

response brief contained 255 pages. *Kleypas* responded with a reply brief of 136 pages. Four amicus curiae (Friend of the Court) briefs were filed. The four totaled sixty-one pages. (The Supreme Court grants or denies motions to file amicus briefs. The court also grants or denies motions to exceed the number of pages permitted by court rule for death cases). See, Rule 10.02(f), (2003 Kan. Ct. R. Annot. 67, 68). 100 pages for the defendant, 100 pages for the State, and 30 pages for the reply brief.

When “death” is in issue usually extra pages are permitted if counsel for the defendant, in good faith, states that he or she cannot present the defendant’s case without more space. Extra pages are also granted to the State to respond.

In *Kleypas* each Supreme Court member was presented with 1040 pages of submitted briefs and over 10,000 pages of the record. *Kleypas* had 51 issues submitted for resolution on appeal. The parties, at the appellate level, filed thirty-three motions.

*State v. Marsh* (No. 81,135) was argued to the current Kansas Supreme Court in October 2003. The brief filed on behalf of *Marsh* consists of 200 pages; the State’s brief has 179 pages. A reply brief and two supplemental briefs from *Marsh* total an additional 68 pages. The *Marsh* record contains 8,447 pages in 92 volumes.

Each member of the Kansas Supreme Court has only one law clerk. (Appellate judges similarly situated in our neighboring states and I believe in all states, except Kansas, have two. Federal appellate judges have at their discretion, either three or four. **It should be noted that Kansas District judges do not even have one law clerk. “Death qualified” law clerks should be funded and provided for trial judges in death cases).**

In 1994, the year the death penalty was enacted the Kansas Supreme Court had no central staff. Routinely, each Supreme Court in a death penalty state has a law-trained staff assigned to work on death cases.

Over the years from 1994 to 2000 the Kansas Supreme Court developed a one, then two, then three, and finally four person central staff to assist the court in all civil and criminal matters. All of the central staff clerks were assigned to the *Kleypas* case in addition to their normal duties. The Supreme Court has recently created an attorney position to assist in death penalty appeals.

KSA 21-4627(a) requires that review of a death case “shall be expedited”. Perhaps this is the moment to relate that a “death case” does not exist in a vacuum. On the contrary it flows into the hearing schedule of the Supreme Court along with the other criminal and civil business of the court. The gargantuan dimensions of a death case, the voluminous trial court record, the great number of issues, and the length of the briefs, not only take over your professional life but also occupy “personal family time” during resolution of the issues on appeal.

The views expressed herein are mine. I do not speak for the Kansas Supreme Court.

### **Observations of Defense Counsel**

A death penalty case differs from other criminal cases in several ways. Each difference has an impact on the amount of resources a death penalty case requires.

As defense counsel on a burglary, or even a homicide in which death is not being sought as a punishment, I do not necessarily need to know my client's life history. In "death" cases it is essential that the defense team know all aspects of the accused's family history (maybe there is a history of substance abuse and/or mental illness), school records (learning disabilities maybe at the opposite end of the spectrum the accused was an excellent student), work history (past employers

give good anecdotal accounts of positive aspects of an accused's character), etc. Since anything could be considered "mitigating" by the sentencer I must investigate all aspects of the life the State of Kansas is seeking to take. Sometimes this leads us to people and records that are outside the state, or even the United States.

Since the law regulating the imposition of death is much more expansive it requires several dozen motions in each case. Each case is litigated, potentially, literally, to death. If we are taking a position on a point of law in a motion, we try to cite the court all salient authority, whether controlling or not. This simply takes more time for all parties concerned. More motion hearings are required and the hearings take longer than in a non-death case.

Death penalty cases require expert witnesses to explain aspects of the accused's character or mental state, or the nature of the offense. We try to find local experts but sometimes this is not possible. Expert witnesses are expensive and their involvement with the evidence or the defendant is often very time-consuming.

Potential jurors in death penalty cases must be more extensively questioned than in other criminal cases and this requires a much longer selection process. Jury selection in Kansas has taken as long as a month, although a week is more typical. It rarely takes more than a day to pick a jury in a non-death case.

Death is different, and the death penalty will always cost more in money and other resources. As a defender of individuals facing the ultimate penalty I have been honored to work in a system that, up to now, has respect for the resources proper representation requires.

## **The Prosecution Perspective – Observations**

The duty of the prosecution is to seek justice, not merely to convict.<sup>1</sup> This duty is one of the prosecution's motivations in deciding to endure the long, arduous process of a capital trial.

Prosecutors are servants of the law and a representative of the people. They represent a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>2</sup> Prosecutors have the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.<sup>3</sup>

In capital cases, prosecutors must have absolute certainty of the defendant's guilt. Prosecutors do not seek the death penalty in every case that technically qualifies as a death penalty case. They must also consider the existence of any mitigating factors in making the charging decision. They should also remember that the victims – for whom no economic analysis or cost comparison is considered – are often overlooked in capital cases. The victims will only be known to the jury as a name. The jury will know little else about the victims' lives.

The guilt phase of a capital trial is different in that voir dire lasts much longer. The prosecution generally has little evidence to present during the penalty phase, as the aggravating circumstances were usually proved during the guilt phase. The appeal phase of capital cases will take

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<sup>1</sup> ABA Standards for Criminal Justice Standard 3-1.2(c).

<sup>2</sup> State v. Pabst, 268 Kan. 501, Syl. ¶6, 996 P.2d 321 (2000).

<sup>3</sup> Comment to KRPC Rule 3.8 Special Responsibilities of a Prosecutor.

longer to address the numerous issues raised by the capital defendant. But this will begin to decrease as Kansas develops a body of case law in such cases.

### **Trial Court Perspective on Death Penalty Litigation**

It has been said that, in the context of capital case litigation, “death is different”. I agree. Perhaps my most vivid impression of death penalty cases in which I have participated is the inordinate amount of time and the consequent drain on judicial resources a capital case entails. It is certainly not unusual for over 100 motions to be filed in a typical capital case. For example, in the *Kleypas* case over 200 motions were filed by the defendant, which resulted in excess of 30 pre-trial hearing dates. Many, if not most, of capital case motions require significant research and court time. By way of illustration, I estimate that I devoted approximately six full months of my time to the *Kleypas* case until it was concluded. Seldom do the parties agree on pre-trial matters in a death penalty case, which of course necessitates frequent hearings.

The trial itself typically involves considerably more time due to the increased complexity of capital case litigation, our bifurcated trial process, and the requirement of “super due process”. I suspect that it would be very difficult to completely try any death penalty case from beginning to end in less than one month.

It also bears mention that the trial judge’s regular court docket needs continued attention during the litigation of a capital case. It is difficult to stay abreast of a regular docket because a death penalty case demands significant court time. During the *Kleypas* case, it became necessary to schedule hearings on weekends and during evening hours so that the regular docket was not neglected. This became a strain on our resources and on the clerks, court reporters, security, and

attorneys. Moreover, even though a capital case comprises a significant drain on time and resources, a corresponding increase in funding to assist the judiciary in handling these cases has not been forthcoming.

No mention of death penalty litigation from the trial court's perspective can be complete without a reference to other, more intangible dynamics typically at play in a capital case. Capital cases generally entail the "worst of the worst" and they can (and do) exact an emotional toll on many of the participants. Because the defendant's life literally hangs in the balance, tension in the courtroom is at times very palpable. Strain, tension, and raw emotion were very evident in many of the *Kleypas* trial participants. A capital case tends to become "personal" because the death penalty itself is so emotionally-charged and controversial. Accordingly, the trial itself is typically bitter with no quarter asked nor none given.

I believe a death penalty case can be particularly difficult on the jury. The trial will typically last for a month or more and during this time jurors are exposed to horrific testimony and photographs. During the *Kleypas* trial I saw jurors become nauseous and then emotional to the point of tears. I am always mindful of the efforts of the *Kleypas* jury as they were placed in an unwanted position and had to make a very difficult decision.

One additional issue should be briefly addressed from the trial court's perspective. A death sentence which is affirmed on appeal does not end matters for the trial court. A death sentence which is affirmed on appeal will typically initiate a new round of litigation pursuant to K.S.A. 60-1501 et. seq. This second round of litigation is generally filed pursuant to K.S.A. 60-1507 and will necessitate further hearings (often extensive) in the original trial court. These post-appeal matters

will no doubt be very time-consuming and will require additional resources from a judiciary already over-burdened.

In retrospect, I was naive and not prepared for the incredible amount of time a capital case entails. It is imperative that the judiciary be afforded adequate resources so that the trial bench can devote the time these cases demand.

### **THE EXPENSE OF THE DEATH PENALTY**

Death penalty laws impose substantial added costs on the state taxpayer's legal bill beyond the costs of a penal procedure that does not include the death penalty. Capital punishment laws lead to prosecuting capital cases that are very expensive due to high trial costs, and increased appeals costs, retrial costs, lost opportunity costs, and living costs. Many defendants charged with capital offenses end up living for years in prison, whether or not they are convicted of a capital crime. This also costs the taxpayers more money.

Kansas death penalty law contains many untested and unusual legal issues. The first recent death penalty case to be appealed was *State v. Kleypas*, 272 Kan.894 (2001). The sentence of death in that case was reversed and a new sentencing trial was ordered. The case led to very high court costs at the trial and appellate level, and it was extremely time consuming for judges, lawyers, and court personnel. There are six other death penalty cases on appeal at the present time. They are also complex cases.

The capital case also consumes more of trial courts' time than the non-capital case. The capital case demands more pre-trial time to prepare than does the non-capital murder case. The capital case often takes a year to come to trial. Even before the prosecutor has given notice that it

will seek the death penalty, experienced defense counsel have begun preparing a capital defense. This defense will be a defense in two eventual trials: a trial on guilt and a penalty trial which, upon conviction in the first trial, will follow immediately.

At the earliest stages of the criminal proceedings, competent defense counsel must engage the costly services of investigators, psychological evaluators, and the services of the mitigation specialist: a forensic researcher who will develop an exhaustive “social history” of the accused. This history will be of use to counsel in both the trial of guilt or innocence and in the penalty trial. Last term, the United States Supreme Court ruled in *Wiggins v. Smith*, 539 U.S. \_\_\_\_\_, 123 S. Ct. 2527(2003), that compiling a social history is a requirement of competent representation in death penalty mitigation proceedings, and that a capital defense lawyer who does not have such a report prepared must show that the report would not have aided in the case or the case may be reversed and a new trial on penalty ordered.

The capital case requires more lawyers (on both prosecution and defense sides), more experts on both sides, more pre-trial motions, longer jury selection time, and a longer trial. Researchers at Duke University found that a capital murder case is over three times longer to try than a non-capital murder case. See, Cook and Slawson, “The Cost of Prosecuting Murder Cases in North Carolina,” Duke University, Terry Sanford Institute of Public Policy, (1993). Some consider the capital trial the single most costly element of the capital punishment legal process that extends from arrest through trial to sentencing and possible execution.

The lack of certainty surrounding the imposition of the death penalty is frustrating for the families of victims and upsets those who demand prompt and certain punishment of those condemned to death. It may take ten to twelve years from conviction for an execution.

The post conviction process is a long process even with changes in federal law intended to streamline it. The process after trial includes appeal to the state supreme court and petition for review in the U.S. Supreme Court. Following denial of Supreme Court review, the inmate may seek state habeas corpus relief. The inmate may challenge his conviction on habeas corpus in order to preserve his right to review again in federal court. The inmate can then appeal a denial of state habeas relief to the state Supreme Court and to the U.S. Supreme Court. After losing again in the U.S. Supreme Court and upon issuance of a state death warrant, the inmate can again initiate federal habeas proceedings to avoid execution. A federal court may then delay state efforts to execute the inmate. If evidentiary hearings are required to decide the issues in the case, the case can be litigated for years. After losing the habeas case in federal district court, the inmate can appeal to the U.S. Circuit Court and to the U.S. Supreme Court. If the inmate loses there, the stay of execution is lifted. A new death warrant is obtained and lawyers again begin to seek to prevent execution in state and then in federal court. These new claims are appealed to the U.S. Circuit Court and eventually to the U.S. Supreme Court.

The post-conviction process includes difficult, and time consuming, legal and factual issues. There is also a nation-wide reversal rate of over two out of every three capital judgments due to serious error. See Leibman, et al. "A Broken System, Error Rates in Capital Cases 1973-1995" (Columbia University June 2000 research study). The Leibman study also found that when the cases were retried, over 80% of the defendants received a sentence less than death. See Leibman study cited in "Death Penalty Information Center, Testimony of Richard Dieter, Executive Director, Before the Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing", Assembly and Senate of Nevada, Las Vegas, Nevada April 18, 2002 on the internet at

[http:// www. Deathpenaltyinfo.org/article.php?scid=7&did=258](http://www.Deathpenaltyinfo.org/article.php?scid=7&did=258). And, the costs of the convicted defendant's possible lifetime incarceration must also be included in overall cost considerations.

A death penalty process combining high costs of trial, investigation, and appeals with resulting life in prison is very expensive. When a case charged as a death penalty case ends without a death sentence or where, as in most cases, the death sentence is not carried out, the taxpayer pays for a costly criminal trial and for a life sentence, sometimes with years of confinement in maximum security (death row), with added health and medical costs.

The more fair and the more reliable the procedures that are used by the state to seek and to impose the death penalty, the higher the costs incurred. Higher legal standards for death penalty defense at trial and on appeal, and for post-conviction proceedings, higher pay for lawyers, more time spent by prosecutors to respond to the defense case, and more thorough review by the appellate courts add to the high cost.

Death penalty costs can easily spiral. State criminal justice systems are run economically. Salaries of those working in the criminal justice system are often modest. Jurors are paid a token sum for their service. Court facilities are usually not elaborate. The cost of the death penalty can weigh heavily on this system and weaken it as the recent inadequate BIDS budget for appointed counsel has shown. Courts at the trial and appellate level can become so busy with capital litigation matters, that other court business can suffer from potential neglect due to lack of time and personnel.

The ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Revised edition (February 2003) are recommended national standards of practice developed to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. The standards apply once a person is taken into

custody and extend to all stages of every case in which the state or federal government may seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post conviction review, clemency proceedings, and any connected litigation. In February 2003, these standards were revised upward. They now require membership on the defense team of “at least one mitigation specialist.”

The new Guidelines also require “high quality representation” in defense of death penalty cases. This is a more demanding standard than the former Guideline standard: “effective assistance”. The same standards apply whether the capital defense counsel is appointed or retained. The Guidelines seek to apply at “the moment the client is taken in to custody” in a death eligible case, and funding should begin at this time. At the outset of representation a team of two attorneys, and an investigator, and a mitigation specialist should be assembled. One member of the team should be qualified to screen for mental retardation and mental illness. If counsel is retained and lacks funds to hire such assistants, funds should be supplied by the court. All members of the team, including the non-lawyers, must receive death penalty specific training at least every other year.

So that clients get the necessary quality of representation, the Guidelines recommend that attorney and other team members should receive “full” funding. Public defenders must receive comparable salaries to the prosecutors’ salaries. For private practitioners, the hourly rate should be the market rate for retained lawyers doing similar work. The commentary to the Guidelines points out that in the criminal justice system, “you get what you pay for” and, therefore, discourages flat fees, caps, and other cost saving methods that could hinder quality representation. The commentary to the Guidelines encourages periodic payment to lawyers rather than requiring counsel to wait until the case is concluded.

The United States Supreme Court has reaffirmed recently in *Wiggins v. Smith*, 539 U.S. \_\_\_\_, 123 S. Ct. 2527 (2003), that its standard of effective assistance of counsel under the 6<sup>th</sup> Amendment in death penalty cases is influenced by local community standards and the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

Application this year of ABA Guideline standards to *Wiggins*, a case originally tried in 1989, led to a reversal of the death sentence. Two trial defense counsel had not commissioned a social history mitigation report, even though they had obtained social service records and a psychological evaluation. The Court found that information they had overlooked might have made a difference in the outcome of the death penalty phase of the trial.

State lawmakers must be aware of Supreme Court case law and the ABA standards when they enact capital legislation. Types of mitigation evidence: evidence relevant to leniency in sentencing, (which the defendant has an absolute right to present at the penalty hearing ) is very broad. See *Lockett v. Ohio*, 438 U.S. 86 (1978). Furthermore, recently, the Supreme Court announced that the mentally retarded are not subject to execution. That case, *Atkins v. Virginia*, 536 U.S. 304 (2002) has led states to modify their capital punishment laws to assure that adequate procedures are in place to determine who is mentally retarded. A new case on these issues, *Tennard v. Dretke*, 124 S.Ct. 383 (memorandum opinion granting certiorari review) is pending before the U.S. Supreme Court this term. The Court could expand exemption from execution beyond the mental retardation exemption to include other forms of mental disability.

## **WHAT THE DEATH PENALTY COSTS IN KANSAS**

The Committee agreed that the best information relating to what the death penalty costs in Kansas can be obtained by reading the Legislative Division of Post Audit Performance Audit Report entitled "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections", which is dated December, 2003. The report is available upon request from:

Legislative Division of Post Audit

800 SW Jackson, Suite 1200

Topeka, Kansas 66612-2212

(785) 296-4482.

The report is also available on the Post Audit website which is : <http://kslegislature.org/postaudit>.

The following is information taken from the Executive Summary of the Legislative Post Audit Report.

“Actual cost figures for death penalty and non-death penalty cases in Kansas don’t exist. Some information presented here is based on estimates because judges, attorneys, court staff, and local law enforcement officers don’t keep case-by-case time records and projections. Other costs had to be projected because most death penalty cases in Kansas are in the early stages of the process, and there’s no way to know how many appeals these cases will have.

**During this audit, we obtained and compared estimated cost information for 22 cases.**

**This included:**

- 7 cases where the death penalty was sought and given
- 7 cases where the death penalty was sought and not given
- 8 first degree murder cases where the death penalty was not sought

All 22 cases had gone to trial and resulted in a conviction.

**Cases in which the death penalty was sought and imposed could cost about 70% more than cases in which the death penalty wasn't sought.** The estimated median cost of a case in which the death sentence was given was \$1.2 million, compared to the same estimated casts for a non-death penalty case of about \$740,000.

The State will bear about 85% of the total estimated and projected costs for the 14 cases in which the death penalty was sought.

**Death penalty cases tend to have higher costs at the trial and appeal stages.** The median trial cost for cases in which the death penalty was imposed was more than \$500,000, compared to about \$33,000 for the median non-death penalty cases we reviewed. At just over \$400,000, the projected appeal-related costs for the death penalty cases in our sample was more than 20 times the projected cost for cases in which the death penalty wasn't sought. Numerous factors can make death penalty cases more expensive, such as lengthier proceedings, more experts, and more issues to litigate.”

The Judicial Council Death Penalty Advisory Committee reviewed numerous reports relating to costs in death penalty cases and considers the Post Audit Report to be excellent. The Post Audit Report has the additional advantages of being current and specific to Kansas. The Judicial Council Committee has no criticism of the Post Audit Report.

## **WHAT KANSAS HAS DONE TO CONTAIN COSTS**

This section examines the efforts made by the State of Kansas to contain death penalty costs. In examining these efforts, it is important to keep in mind that death penalty cost containment

involves two considerations: containing the costs of the death penalty trial and appellate process in the first instance; and avoiding errors which result in a costly retrial or possibly a civil suit. In some respects, these two interests are competing ones, in that the avoidance of errors will generally be expected to result in more up-front expense, but can also be expected to provide a greater cost savings in the long run in reduction of costly retrials or lawsuits. Conversely, cost containment at the initial proceeding provides more immediate benefits, but care must be taken to ensure that such savings do not lead to increased costs in the long run due to a higher risk of error.

With these two considerations in mind, a review of the Kansas death penalty system reveals several areas where attempts have been made to reduce the cost of the death penalty. These areas include: 1) reducing the costs incurred in presenting a defense for indigent defendants at both the trial and appellate level; 2) reducing the costs associated with the processing of appeals; and 3) systemic features which have the effect of containing the cost of the death penalty.

1. Reducing the Costs Incurred in Presenting a Defense for Indigent Defendants at Both the Trial and Appellate Level.

One of the significant costs involved in death penalty cases is the expense the State incurs in presenting a defense for indigent defendants. At the same time, failure to provide an adequate defense is a factor which results in reversals of convictions and expensive retrials.

For indigent defendants, representation in death penalty cases at the trial level is provided by the Board of Indigent Defense Services' Death Penalty Defense Unit. At the appellate level, representation is provided by the Capital Appellate Defense Office and the Capital Appellate Defense and Conflicts Office. These offices are staffed with attorneys who meet the criteria for experience and training established by the American Bar Association for death penalty cases. The

use of specialized trial and appellate staff reduces the possibility of errors in representation that would require an expensive retrial of the case.

The separate appellate conflicts office has been set up for use in those cases with multiple defendants. Funds have been requested for a similar conflicts office at the trial level. Absent such offices, representation in cases involving multiple defendants would have to be sent out to private counsel. Such private counsel is in most instances more expensive than representation by in-house counsel. The use of an in-house conflicts office reduces the need for the hiring of private counsel, with a resulting cost savings to the taxpayers.

The trial-level death penalty defense unit also includes a mitigation specialist among its professional staff. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provides that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). The United States Supreme Court has reversed cases in which defense counsel failed to provide adequate mitigation services. See *State v. Wiggins*, \_\_\_ U.S. \_\_\_, 156 L. Ed. 2d 471, 123 S.Ct. 2527 (2003). The use of an in-house mitigation specialist to perform mitigation services insures that such services will be provided in accordance with ABA standards, thus reducing the possibility that failure to provide adequate mitigation services will be the basis for an expensive retrial. Further, the use of an in-house mitigation specialist provides cost-savings over the alternative of retaining private mitigation specialists.

In addition, the Board of Indigent Defense Services applies other methods to reduce the cost to taxpayers in individual cases. In cases where it is necessary for courts to appoint private attorneys, the Board furnishes to the court a list of attorneys qualified and willing to accept death penalty defense cases for reduced fees. Where outside experts are necessary, the Board negotiates for reduced fees from the experts when possible.

## 2. Reducing the Costs Associated with Appeals

Although the bulk of costs in a death penalty case are incurred at the trial court level, there are also significant costs associated with appeals in death penalty proceedings. Under Kansas law, a sentence of death is automatically reviewed by the Kansas Supreme Court. Even if the sentence is affirmed on appeal, a defendant may file a state habeas proceeding alleging that his or her constitutional rights were violated. These appeals create a strain on the judicial resources of the Kansas Supreme Court.

Given the requirements imposed by the United States Supreme Court, there is very little that can be done to contain costs at the appellate level. Nevertheless, the Kansas Supreme Court is actively involved in attempting to find ways to improve its efficiency in handling such cases. One method employed has been the creation of an attorney position dedicated to death penalty appeals to advise the justices on the nuances associated with such cases. It is hopeful that this position will ultimately result in substantial cost savings in attorney-hours involved in death penalty cases.

## 3. Systemic Features of the Kansas Death Penalty Scheme

In addition to the above cost-containment measures, the makeup of the Kansas Death Penalty scheme has the effect of promoting some cost containment. First, the class of murders which are eligible for the death penalty is a narrow one. Pursuant to K.S.A. 21-3439, a defendant may only be

eligible for the death penalty if he or she is convicted of capital murder. That statute defines capital murder as: 1) the intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping with the intent of holding such person for ransom; 2) the intentional and premeditated killing of any person pursuant to contract or agreement; 3) the intentional and premeditated killing of any person by an inmate or prisoner; 4) the intentional and premeditated killing of the victim of rape, criminal sodomy, or aggravated criminal sodomy; 5) the intentional and premeditated killing of a law enforcement officer; 6) the intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or 7) the intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping or aggravated kidnapping where such crime was committed with the intent to commit a sexual offense upon or with the child or with intent that the child commit or submit to a sex offense. The effect of this narrow eligibility for the death penalty results in fewer death eligible cases than in those states which make all premeditated murders death eligible.

In addition, the Kansas death penalty scheme further narrows the class of defendant subject to the death penalty by requiring the State to establish at least one statutory aggravating factor contained in K.S.A. 21-4625 before the death sentence may be imposed. These statutory aggravating factors are: 1) the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another; 2) the defendant knowingly or purposely killed or created a great risk of death to more than one person; 3) the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value; 4) the defendant authorized or employed another person to commit

the crime; 5) the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution; 6) the defendant committed the crime in an especially heinous, atrocious or cruel manner; 7) the defendant committed the crime while serving a sentence of imprisonment on conviction of a felony; and 8) the victim was killed while engaging in or because of the victim's performance or prospective performance as a witness in a criminal proceeding. These aggravating factors are then weighed against evidence in mitigation in order to determine whether the death sentence will be imposed. K.S.A. 21-4624. The effect of this further narrowing of those defendants who are death eligible is to help insure that the death sentence will be reserved for those defendants to which it is most warranted. While this secondary narrowing does not serve to contain costs at the trial level, it narrows the persons subject to the death penalty and thus contains costs at the appellate level, as well as costs connected with state habeas corpus petitions.

### **DEATH PENALTY COSTS IN OTHER JURISDICTIONS**

News reports and scholarly studies from various states agree that a sentence to death is many times more expensive than a sentence to natural life in prison. The most comprehensive report, a 10-year-old study of the North Carolina death penalty, places the cost of each execution at \$4 million. A 1998 study of capital trials in federal courts was limited to the trial of capital cases (not the costs of appeals and the execution itself). The federal study found that capital case defense costs alone were nearly four times higher than in non-capital homicide cases. It also found that prosecution costs, on average, were even higher than defense costs.

Because of the variable quality of reports and different statutory schemes it is difficult to precisely determine the cost of death penalty cases anywhere. For example, the North Carolina

Study<sup>4</sup> is probably the most comprehensive study published in the past, but applying its findings wholesale to Kansas is not possible for several reasons. First, the North Carolina death penalty<sup>5</sup> results in many more cases than the more limited Kansas law. Second, at the time of the study, North Carolina's death penalty had been in force for 18 years. Therefore, much of the initial and more time-consuming litigation incurred by a new law was already settled at the time of this study. For these reasons this committee finds that a review of other states' procedures provides valuable background and benchmarks with which to evaluate Kansas' system, but there is no simple conclusion to be drawn from such a review.

Additionally, the reports of the various states do not lend themselves to precise comparison because each covers a different part of the legal process, *i.e.*, the Federal study considers only trial costs and does not address post-conviction or imprisonment costs. So too, some studies concentrate only on defense costs, finding the prosecution and court expenses too difficult to quantify. Thus one must be careful when generalizing regarding other states' experience.

The following summarizes conclusions in death penalty cost literature by state:

**California.** California's death penalty costs the state \$90 million more annually over ordinary costs of the justice system. \$78 million of that total is incurred at the trial level.<sup>6</sup> "Elimination of the death penalty would result in a net savings to the state of at least several tens of millions of dollars annually, and a net savings to local governments in the millions to tens of millions

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<sup>4</sup>P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).

<sup>5</sup>N.C.G.S.A. § 15A-2000.

<sup>6</sup>Sacramento Bee, March 18, 1988.

of dollars on a statewide basis.” quoting the Joint Legislative Budget Committee of the California Legislature, Sept. 9, 1999.<sup>7</sup>

**Connecticut.** Public defender services was the only agency which had arguably reliable cost data comparing capital and non-capital cases. Defense costs in cases receiving a sentence of life without parole costs ranged between \$85,540 and \$320,580 for an average of \$202,365. Of seven cases on death row, costs ranged between \$101,870 to \$1,073,922 for an average of \$380,000 per case. On average, costs of death case defense are 88% higher than cases with sentences of life without parole.<sup>8</sup>

**Florida.** In 1988 Von Drehle estimated that each execution cost the state \$3.2 million. In 2000 the Palm Beach Post estimated that Florida would save \$51 million each year by punishing all first-degree murderers with life in prison without parole. Based on the 44 executions Florida has carried out between 1976 and 2000, that equates to about \$24 million per execution. This finding takes into account the relatively few inmates who are actually executed, as well as the time and effort expended on capital defendants who are tried but convicted of a lesser murder charge, and those whose death sentences are overturned on appeal.<sup>9</sup>

**Georgia.** The Atlanta Journal-Constitution detailed some of the costs of a capital trial which resulted in a life sentence. Prosecutors’ salaries exceeded \$74,000 for the two months of trial and jury selection, and they spent approximately \$34,000 for equipment, court exhibits, and expert

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<sup>7</sup>The Catalyst, February 22, 2000.

<sup>8</sup>State Commission on the Death Penalty, *Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut*, submitted to the Connecticut General Assembly January 8, 2003.

<sup>9</sup>Palm Beach Post, January 4, 2000.

testimony. An additional \$43,000 was spent on overtime for investigators. Defense fees and expenses were expected to exceed \$364,000, and it cost more than \$87,000 to select and sequester the jury.<sup>10</sup>

**Indiana.** The death penalty costs 38% more than total cost of life without parole sentences. The study assumed that 20% of death sentences are overturned and resentenced to life.<sup>11</sup>

**Nebraska.** After a global study of Nebraska death penalty law and practice, including the costs of housing a prisoner for life without parole compared to a death-sentenced prisoner, the legislature's study concluded that, "... there is sound basis to conclude that the argument that the death penalty provides Quantifiable Benefits to the state in the form of taxpayer savings is incorrect. Adjudication of capital cases incurs additional costs that are significantly greater than the savings in incarceration costs realized from execution as opposed to life imprisonment."<sup>12</sup>

**New York.** New York passed a death penalty shortly after Kansas. The New York Law Journal reports that the defense team spent approximately \$1.7 million to mount the defense in one case, and the state's Capital Defender Office invested \$1.2 million into producing the team's 779-page brief. The budget for the New York Court of Appeals has increased by more than \$533,000 annually to enable each of the Court's seven judges to have an additional clerk for capital cases. The Brooklyn District Attorney's office was reimbursed \$707,259 to cover the personnel cost of one case, and the Queens District Attorney's Office estimates that seeking the death penalty

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<sup>10</sup>Atlanta Journal-Constitution, May 12, 2002.

<sup>11</sup>Indiana Criminal Law Study Commission, January 10, 2002.

<sup>12</sup>Judiciary Committee, Nebraska Legislature, *"An Interim Study to Gather Information As to Policy Considerations Relating to Legislation that would Repeal the Death Penalty,"* (1997)

translates into 300% to 500% more work than for a non-capital murder trial. Additionally the State Department of Correctional Services spent \$1.3 million to construct New York's death row for 12 inmates and it pays nearly \$300,000 per year to guard the unit.<sup>13</sup>

**North Carolina.** An execution costs \$2 million more than a non-death homicide, including costs of imprisonment for a presumed 20 years. A trial which goes through penalty phase (regardless of whether death is imposed) costs \$55,000 more than a non-capital murder trial. Appeals of death sentences cost \$7,000 more than the appeals of life sentences, and the average cost of death penalty post-conviction proceedings is \$255,000. Incarceration of a death-sentenced inmate who is executed 10 years after sentencing costs the state \$166,000 less than a prisoner paroled after 20 years. Combining all costs and savings, excluding non-attorney investigative costs, the costs of experts employed as government workers, or other assistance provided by law enforcement agencies, the death penalty costs North Carolina \$4 million per year.<sup>14</sup>

**Ohio.** The Columbus Dispatch estimated that the execution of a mentally ill man who wanted to be executed cost the state at least \$1.5 million. The attorney general reported that five to 15 prosecutors who worked on the case spent between five and ten percent of the capital crimes section's budget over the five years the case was litigated.

**Oklahoma.** The Associated Press reports that a legislative committee was told that the cost of an Oklahoma execution is \$1.2 million, or \$222,200 more than it would have cost to house the

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<sup>13</sup>New York Law Journal, April 30, 2002.

<sup>14</sup>Using a hypothetical case of execution after 10 years compared to non-death-sentenced convict released at 20 years, and adding in the extra costs of cases tried as capital but resulting in life sentences.

inmates in prison through 2003, and the cost was expected to climb when cost figures are received from prosecutors.<sup>15</sup>

**Texas.** A journalist has estimated that a death penalty case costs Texas taxpayers on average \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. The Wall Street Journal reports, “Just prosecuting a capital crime can cost an average of \$200,000 to \$300,000, according to a conservative estimate by the Texas Office of Court Administration.” This does not include defense costs of trial and appeal.<sup>16</sup>

**United States Courts.** A 1998 study by the Judicial Conference of the United States examined trial costs of federal death penalty cases and compared those costs to federal homicide cases in which the death penalty was not sought. The result was consistent with the state system studies except that the federal study did not include costs of appeals, post-conviction actions and incarceration. In the federal system the average cost of defense representation alone in cases where death was not authorized was \$55,772, while in cases where death was authorized the average cost per case was \$218,112. Average prosecution costs for both tried and non-tried death penalty cases was reported by the Department of Justice to be \$365,000 which did not include non-attorney investigative costs, the costs of experts employed as government workers, or other assistance provided by law enforcement agencies. The report indicates that the defense cost figure may be a bit low due to record-keeping anomalies. This report is notable, however, because it contains a number of recommendations for cost control in these expensive cases.

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<sup>15</sup>Ron Jenkins, Associated Press, October 16, 2003.

<sup>16</sup>The Wall Street Journal, January 9, 2002.

In summary, it is relatively difficult to precisely calculate the cost of the death penalty. The studies differ widely in the assumptions made and in sophistication, however they all conclude that the death penalty is more expensive than justice systems without capital punishment. When examining the various studies, the reader must always be mindful that many costs are not included in budget line items. Claims by government agencies (prosecutors, public defenders, courts) that no additional salaries are incurred whether they are working on a death penalty case or a burglary should be discounted simply because the extra hours spent on a death penalty case necessarily take time from other productive and necessary pursuits.

### Conclusions

The following conclusions may be gleaned from the study of other states' reported costs of operating a criminal justice system which imposes a death penalty.

- Trial in death penalty costs at least 30 to 50 percent more than a non-capital homicide trial.
- Only 11.3 % of those who were sentenced to death between 1973 and 2002 have been executed.<sup>1</sup>
- 68% of death penalty cases are overturned on appeal, so the additional costs of re-trial of either or both phases must be included in any survey of death penalty costs.
- The cost of the death penalty has risen as years have passed, and thus can be expected to continue to increase in the future.

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<sup>1</sup> Bureau of Justice Statistics, "Capital Punishment 2002," Appendix, Table 3 (Nov. 2003)

- The high costs of the initial trial are a function of trying to “get it right” the first time, and thereby reduce the number and expense of retrials.

## **WHAT OTHER STATES DO TO CONTAIN COSTS**

The focus of this portion of the report is on methods used by other states to contain costs in capital cases, as well as on features of the death penalty schemes of other states that act in a cost-containing manner. At the outset, it should be noted that, because the United States Supreme Court has mandated that certain safeguards exist in capital cases, cost containment is very difficult. Further, although the costs of capital punishment are clearly a burdensome problem, and many states are concerned with cost containment in capital cases, this focus is a relatively new one. As a result, most of the studies conducted by other states thus far have focused on the fairness of the procedures, with a secondary focus on accounting for the costs in death cases, rather than identifying any cost cutting measures.

With these caveats in mind, there are areas in which it is possible to realize savings or at least the containment of costs in capital cases, although it may not be desirable to do so:

### **A. Spending Caps for Defense of Death Penalty**

Several states have attempted to contain costs in capital cases by imposing caps on defense spending in such cases. For instance, in Oklahoma, fees for counsel contracted for indigent trial defense are capped at \$20,000 per case for a lead attorney and \$5,000 per case for co-counsel. Fees for appellate counsel are limited to \$15,000. See 22 Okla. Stat. § 1355.13. Missouri has also capped trial fees at \$12,000 per attorney for up to two attorneys, and limited appeals to \$72,000 per case for lead counsel and \$24,000 per case for co-counsel.

It is highly questionable whether these caps are desirable. First, there is a question as to their constitutionality. The American Bar Association has taken the position that "Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases." 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1(B)(1). While the ABA Guidelines are not binding law, they have been cited by the United States Supreme Court as instructive in considering the question of whether a defendant's attorney have met prevailing professional standards, and thereby provided effective assistance of counsel. See *Wiggins v. Smith*, \_\_\_ U.S. \_\_\_, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003). The imposition of such caps without a mechanism for allowing them to be exceeded when circumstances warrant is almost certainly unconstitutional. (Both Missouri and Oklahoma allow defense attorneys to request greater fees if warranted). Because there must be a mechanism to allow the caps to be exceeded, it is questionable whether they actually operate to contain cost. The dubious constitutionality of the caps combined with their limited utility appear to make caps of limited value in containing costs. It appears that the current cost-saving measures employed by the Board of Indigent Defense Services, including negotiating with private attorneys and experts for reduced fees where possible and employing an in-house mitigation specialist are more promising cost containment devices than caps on services.

B. Adding Life Without Parole as the Alternate Sentence for Capital Murder When the Death Penalty Is Not Imposed.

One option implemented by other states that could potentially save on death penalty costs is that of making the alternate sentence for capital-eligible crimes in which the death sentence is not imposed be life imprisonment without the possibility of parole, or at the very least presenting life

imprisonment without parole as a sentencing option. Of the 38 states which have capital punishment, 13 states have established life without parole as the sentence in capital cases where the death penalty is not imposed, and an additional 20 states include life without parole as a sentencing option. An additional state, Texas, considered a bill adding life without parole as a sentencing option in 2003. However, the bill failed to receive enough votes in the Texas Senate to allow it to come to the floor for a full debate. See "Texas Senate Rejects Life-Without-Parole Option", Houston Chronicle, April 22, 2003.

The imposition of life in prison without the possibility of parole as the sentence to be given if death is not imposed has the potential to contain death penalty costs associated with trials, in that prosecutors might be more unlikely to seek the death penalty where the default sentence is life without possibility of parole. This would eliminate the penalty phase in those capital murder trials, along with the associated costs of screening jurors for death eligibility. Further, even if prosecutors continued to seek the death penalty in such cases, there is at least some evidence that jurors are less likely to impose the death penalty where they know that life without parole is an option. See Alex Kotlowitz, "In the Face of Death", New York Times Magazine, July 6, 2003 (citing the increasing availability of life without parole as a factor in decreasing the number of death sentences imposed since 1996). This would not only ensure that the death penalty in Kansas is reserved only for the most deserving defendants, but also lower the costs associated with appeals and post-conviction proceedings.

Establishing life without parole as the alternate sentence is particularly suited to states such as Kansas which apply the death penalty to a narrow subsection of murders rather than all intentional murders in general. Because Kansas "narrows" the class of defendants eligible for the death penalty

by limiting it to those convicted of capital murder, imposing an alternate sentence of life without parole does not cause the problems that such a sentence would if it applied to all first degree murders. Currently, in Kansas, if a defendant is convicted of capital murder and the jury decides not to impose the death penalty, the defendant is sentenced by the judge to either life in prison with parole eligibility in 25 years ("life in prison") or to life in prison with parole eligibility in 50 years ("the hard-50"). In practice, every defendant in Kansas that has thus far been convicted of capital murder but spared the death penalty has been sentenced to the "hard-50" or its predecessor the "hard-40" (life with parole eligibility in 40 years). As a result, the default sentence is in practical effect already life without the possibility of parole. However, because even the "hard 50" sentence is not a "true" life sentence, and further is not automatically imposed, jurors are left with uncertainty as to when the defendant might become eligible for parole. Establishing life without parole as the alternative sentence will put an end to this uncertainty.

By establishing life without parole as the sentence for capital murder in cases in which the death sentence is not imposed, Kansas will not only be bringing its sentencing scheme in line with the actual practice, but also will realize substantial savings if prosecutors seek or jurors impose the death penalty less frequently as a result.

### C. Unitary Appeals System

Another manner in which other states have sought to reduce or contain the cost of the death penalty is through a "unitary" appeals system. In such a system, a defendant, with very limited exceptions, is required to file his or her state petition for post-conviction relief at or near the same time as his or her direct appeal, or see any issues which could have been raised considered waived. Oklahoma has such a system, and Texas is considering its adoption. In contrast, Kansas allows for

the filing of petition for post-conviction relief with the district court subsequent to the direct appeal. If the petition is denied, then the denial may be appealed to the Kansas Court of Appeals.

From a state standpoint, there are some potential savings, in that many issues which Kansas now addresses would be considered waived, and Kansas courts would not have to address them. The practical effect of this unitary system is to abdicate the state's responsibility for providing meaningful post-conviction relief, and to instead shift the responsibility for addressing post-conviction issues to the federal courts.

This practice is questionable from a fairness standpoint and puts the trial court in a difficult position. In addition to causing a strain on federal-state relations, its utility as a cost savings or containment device may be marginal. While the federal courts appear to be willing, at this point, to allow states to abdicate any responsibility for post-conviction relief, it is quite possible that, as more states attempt to shift to this system, the federal courts will be more willing to send cases back to the states, thus negating any potential savings.

#### D. Trial Support and Education for District Court Judges

The greatest expense in a death penalty case occurs at the trial court level. Further, due to the complexity of the procedure as well as the high level of scrutiny applied in death penalty cases, the likelihood that appellate courts will find reversible trial error and require the trial to be done again is much higher than in a normal murder case. Thus, strategies to reduce the possibility of reversible error at trial have great cost-savings potential.

Arizona has sought to reduce the possibility of error at the trial level through the use of the Arizona Death Penalty Judicial Assistance Program, which began as a pilot project in 1996. This program establishes a staff of attorneys

who provide assistance to district court judges in death penalty cases. The attorneys provide case-specific research, advice and counsel at all stages of district court involvement in capital cases, including pretrial, trial, sentencing and post-conviction relief. In addition to this direct support in death penalty cases, these attorneys research, analyze, and educate the district court of Arizona concerning death penalty decisions of the United States Supreme Court and other State courts and their possible effect on Arizona's death penalty scheme. Further, the attorneys prepare and teach continuing legal education classes for judges to help keep them up to date on death penalty issues, and provide orientation for new judges. Finally, the attorneys publish a Capital Litigation Report on both local and national death penalty issues that is available to both judges and practitioners.

It has proven difficult for Arizona to objectively measure the effectiveness of this program. In 2002, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), which invalidated Arizona's judge-based death penalty sentencing scheme. This decision overruled the United States Supreme Court's earlier decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which found such a system to be constitutional. This decision resulted in the overruling of a great number of cases, thus making it difficult to determine whether the program itself reduced the number of cases reversed and sent back for new trial. However, the subjective view of judges in Arizona is that the program is very helpful and reduces the error rate at all stages of the litigation.

A program such as the one in Arizona could be implemented without difficulty in Kansas. Arizona has approximately 96-98 active death-eligible cases in a given year. The original staffing aspiration for the Arizona program was to allocate one attorney per 25 cases. Due to budget limitations, the actual staffing was three attorneys, with additional support staff. In April of 2003, budget cuts reduced this staff to two attorneys plus support staff.

In contrast, the average number of death eligible cases in Kansas averages less than 20 per year. As a result, it is estimated that one full-time, experienced attorney would be able to provide adequate research support.

E. Amendment of K.S.A. 21-4627 to Remove Language Regarding Unassigned Errors

K.S.A. 21-4627, regarding the Kansas Supreme Court's review of cases in which the death penalty is given, provides that:

"The supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby".

The practice of authorizing the Kansas Supreme Court to notice unassigned errors, which is also contained in the "hard 50" legislation, is in contrast to the Court's usual rule which requires errors on appeal to be raised by the appellant in order to be considered. Although the language used in K.S.A. 21-4627 is permissive rather than mandatory, the Kansas Supreme Court has taken the position that such language requires the justices to comprehensively search the entire record in order to make sure that it is free of significant trial error.

However, while it might be thought that amending K.S.A. 21-4627 to remove this language might be a potential cost-savings in appellate court resources, it is the opinion of the committee that this will probably not occur. Given the serious nature of the review of a capital case, it appears that appellate courts generally feel the obligation to conduct a comprehensive review of the record whether expressly mandated or permitted to do so by statute. As a result, any cost savings are likely to be illusory.

## Conclusion

Given the nature of the death penalty and the requirements imposed by the United States Supreme Court, there is really very little that states can do to contain or reduce death penalty costs. Of methods which other states have attempted, only two: the establishment of life without parole as the alternative sentence for capital murder; and the establishment of a staff attorney to assist district judges in death penalty cases, appear likely to generate any significant cost savings in Kansas.

## **RECOMMENDATIONS**

### **Life Without the Possibility of Parole Instead of the "Hard 50" for Persons Convicted of Capital Murder Who Do Not Receive the Death Penalty**

The Committee recommends that K.S.A. 21-4635 and 21-4638 be amended to provide that life without the possibility of parole instead of the "hard 50" be the sentence for persons who are convicted of capital murder but who do not receive the death penalty.

As part of its study the Committee agreed to make recommendations which it believes could result in cost savings. It is the opinion of the Committee that if life without the possibility of parole is an option that in some cases prosecutors may not seek the death penalty because a conviction will result in the convicted person never again being a threat to society. In addition it is the opinion of the Committee that if juries know that there is an alternative to the death penalty that guarantees the person convicted will not ever leave prison, they may be more willing to impose such a sentence. It is the opinion of the Committee that these amendments could save costs. The Committee noted that 46 of the 50 states have a life without parole sentence and of the 38 states that have the death penalty, 35 have a life without parole sentence.

**The Supreme Court establish a position which will provide an experienced death penalty clerk to district judges who are trying death penalty cases.**

The Committee reviewed an Arizona program that provides law clerks with death penalty experience to trial judges hearing death penalty cases. The Committee was also aware of the tremendous workload death penalty cases cause the trial court. Because such cases are often the only death penalty case a judge will hear in his or her career, the Committee is of the opinion that providing an experienced death penalty clerk to district judges trying death penalty cases could be a cost saving measure, if error is thereby avoided.

The Committee is of the opinion that the objectives of the Arizona program, which are to reduce the number of appeals and reversals from the Arizona Supreme Court, increase the fairness and efficiency in processing the cases and reduce findings of constitutional error upon federal habeas corpus review are applicable to Kansas.

### **Further Recommendations**

The Committee calls attention to the fact that the Judicial Council Criminal Law Advisory Committee recently concluded a study of the Atkins v. Virginia case, which holds that it is unconstitutional to execute developmentally disabled persons. The Judicial Council has approved introduction of a proposed amendment which, among other changes, will move the determination of whether a person suffers from a cognitive disability from after conviction to prior to the trial. If such cases arise, the statute could provide some cost savings and this Committee supports its passage.